

IN THE
Supreme Court of the United States

FEDERAL BUREAU OF INVESTIGATION, ET AL.,
Petitioners,

v.

YASSIR FAZAGA, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**UNOPPOSED JOINT MOTION OF RESPONDENTS TIDWELL, WALLS,
ALLEN, ARMSTRONG, AND ROSE FOR DIVIDED ARGUMENT
AND FOR ENLARGEMENT OF TIME FOR ARGUMENT**

Pursuant to this Court’s Rules 21, 28.3, and 28.4, respondents Tidwell, Walls, Allen, Armstrong, and Rose (the “Agent Respondents”) jointly and respectfully move that the time allotted for oral argument in this case be enlarged to 80 minutes and that the Agent Respondents be allowed 10 minutes of argument time. Petitioners take no position on this motion. Respondents Yassir Fazaga, Ali Uddin Malik, and Yasser Abdelrahim (“Plaintiff Respondents”) take no position on this motion.

1. Plaintiff Respondents brought this action against petitioners the United States, the Federal Bureau of Investigation (“FBI”), and two official-capacity defendants. Plaintiff Respondents also asserted claims against the Agent Respondents, who are FBI agents sued in their individual capacities. The complaint alleges that,

during a counterterrorism investigation in Southern California, petitioners and the Agent Respondents targeted Plaintiff Respondents for electronic surveillance because of their religion. The complaint asserts, among other claims, that by doing so, petitioners and the Agent Respondents violated Plaintiff Respondents' rights under the Establishment and Free Exercise Clauses of the First Amendment and the Equal Protection Clause of the Fifth Amendment. The complaint seeks compensatory and punitive damages against the Agent Respondents in their personal capacities.

2. The government invoked the state-secrets privilege over information concerning whether any particular individual was the subject of an FBI counterterrorism investigation, the reasons for any such investigation, and sources and methods used. The district court dismissed the First Amendment and Equal Protection claims, holding that those claims could not be litigated without risking the disclosure of state secrets and that the government's assertion of the privilege precluded the defendants from defending themselves fully and effectively. Pet. App. 172a-178a, 180a.

3. The U.S. Court of Appeals for the Ninth Circuit reversed the state-secrets dismissal determination. The court concluded that, where they apply, the in camera, ex parte procedures set forth in the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. § 1806(f), provide the "exclusive procedure for evaluating evidence that threatens national security in the context of electronic surveillance-related determinations" and "override[] ... the state secrets evidentiary dismissal option." Pet. App. 50a. The court of appeals determined that FISA "speak[s] ... directly to the question otherwise answered by the dismissal remedy sometimes required by" the state-secrets privilege, because it supplies an "alternative mechanism for the

consideration of electronic state secrets evidence” that eliminates the need for dismissal. Pet. App. 49a, 51a. The court further concluded that FISA’s procedures apply in this case because the government seeks to use evidence allegedly derived from electronic surveillance as a basis to dismiss the action. Pet. App. 57a-58a. The court of appeals accordingly directed that the district court “should, using § 1806(f)’s *ex parte* and *in camera* procedures, review any materials relating to the surveillance as may be necessary, including the evidence over which the Attorney General asserted the state secrets privilege, to determine whether the electronic surveillance was lawfully authorized and conducted”—that is, whether the surveillance “violated any of the constitutional and statutory provisions asserted by Plaintiffs in their complaint,” including the First Amendment and the Equal Protection Clause. Pet. App. 92a-93a (quotation marks and citation omitted).

4. Petitioners sought this Court’s review of whether FISA “displaces the state-secrets privilege and authorizes a district court to resolve, *in camera* and *ex parte*, the merits of a lawsuit challenging the lawfulness of government surveillance by considering the privileged evidence.” Pet. i. Although the Agent Respondents are respondents by operation of this Court’s Rule 12.6, they are aligned with petitioners and filed briefs in support of the petition for certiorari. This Court granted certiorari, and the case is set for argument on November 8, 2021.

5. The Agent Respondents, who face the prospect of damages and liability in their personal capacities, have been represented by separate counsel from petitioners throughout this litigation and continue to be separately represented. Counsel for the Agent Respondents have filed briefs and participated in oral argument throughout the

proceedings in the district court and court of appeals and have filed separate briefs on the merits in this Court.¹

6. The Agent Respondents have a substantial interest in the question presented that is distinct from petitioners' interests in multiple respects, and they have offered distinct arguments in their briefs to this Court. First, the Agent Respondents have argued that an assertion of the state-secrets privilege and the availability of the state-secrets dismissal remedy have unique implications for private defendants sued alongside the government. *Tidwell & Walls Br. 12, 14-17*. While the Agent Respondents agree with petitioners that a dismissal remedy should be available in certain cases where the government has asserted the privilege, the Agent Respondents assert a distinct basis for that view. In particular, the Agent Respondents rely on their private status as individual-capacity defendants who have no control over the government's decisions whether to assert the privilege and whether to make relevant information available, but may be deprived as a result of those decisions of their ability to access and introduce evidence and information relevant to their defense. The Agent Respondents have thus emphasized a distinctive interest in dismissal that stems from the unfairness that results if the government chooses to assert the privilege in a manner that precludes a private defendant—who faces the prospect of personal liability and damages—from fully and fairly defending him or herself. *See, e.g., General Dynamics Corp. v. United States*, 563 U.S. 478, 486-487 (2011).

¹ Although Agent Respondents *Tidwell* and *Walls* are represented separately from Agent Respondents *Allen*, *Armstrong*, and *Rose*, they bring this motion jointly for leave to allow one attorney to participate in oral argument on behalf of all the Agent Respondents.

7. Second, petitioners and the Agent Respondents have asserted distinct constitutional arguments against the court of appeals' interpretation of FISA. Whereas petitioners have argued that the court of appeals' interpretation trenches on the constitutional prerogatives of the Executive to prevent the disclosure of information that would jeopardize national security, Pet. Br. 42-47, the Agent Respondents—reflecting their distinct perspective as individual-capacity defendants—have argued that an interpretation of FISA that would permit or require adjudication of their personal liability through in camera, ex parte proceedings would raise grave constitutional questions under the Seventh Amendment and Due Process Clause that counsel against the court of appeals' interpretation. *See* Tidwell & Walls Br. 21-32; Allen, Armstrong, Rose Br. 9-17. Given these distinct arguments and perspectives, the Agent Respondents' participation in oral argument could materially assist the Court in its consideration of this case.

8. This Court has regularly granted motions for divided argument when parties with different interests appear on the same side of a case, particularly when those parties represent the distinct perspectives of government officials and private parties. *See, e.g., Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 1263 (2021) (mem.); *Trump v. New York*, 141 S. Ct. 870 (2020) (mem.); *Fulton v. City of Philadelphia*, 141 S. Ct. 230 (2020) (mem.); *Department of Com. v. New York*, 139 S. Ct. 1543 (2019) (mem.); *American Legion v. American Humanist Ass'n*, 139 S. Ct. 951 (2019) (mem.); *Janus v. American Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 974 (2018) (mem.); *Masterpiece Cakeshop, Ltd., v. Colorado Civil Rights Comm'n*, 138 S. Ct. 466 (2017) (mem.).

9. An enlargement of time for oral argument to a total of 80 minutes is warranted to accommodate 10 minutes of time for the Agent Respondents and a corresponding increase of time for Plaintiff Respondents, while ensuring that the Court receives a full presentation of the important issues raised in this case. Plaintiff Respondents were previously granted leave to file a brief on the merits in excess of the word limit.

For the foregoing reasons, the Agent Respondents jointly and respectfully request that that the time allotted for oral argument in this case be enlarged to 80 minutes and that the Agent Respondents be allowed 10 minutes of argument time.

Respectfully submitted.



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SEPTEMBER 2021

CERTIFICATE OF SERVICE

I, Catherine M.A. Carroll, a member of the bar of this Court, certify that on this 28th day of September, 2021, I caused all parties requiring service in this matter to be served with a copy of the foregoing by email and third-party commercial carrier to the addresses below:

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