

No. 20-828

In the Supreme Court of the United States

FEDERAL BUREAU OF INVESTIGATION, ET AL.,
PETITIONERS

v.

YASSIR FAZAGA, ET AL.

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

REPLY BRIEF FOR THE PETITIONERS

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The court of appeals seriously undermined the Executive Branch’s ability to protect the Nation’s secrets by holding that 50 U.S.C. 1806(f) displaces the state-secrets privilege—and by transforming Section 1806(f)’s narrow procedure for the government’s introduction of electronic-surveillance evidence into a broad new avenue for claims against the government. As the government’s opening brief explains, the court’s decision is inconsistent with the text, structure, and design of Section 1806(f) and with this Court’s articulation of the Executive’s constitutional authority and responsibility over the national security and foreign affairs.

Respondents’ lead argument, rather than defending the court of appeals’ decision, attacks it. In their view, the court did not go far enough in restricting the Executive’s ability to protect state secrets from disclosure in litigation—not just under the Foreign Intelligence Surveillance

Act of 1978 (FISA), 50 U.S.C. 1801 *et seq.*, but in any context outside of government-contract disputes. Respondents' new argument is outside the question presented, was not argued below, does not provide an alternative ground for affirmance, and is meritless. The Court should decline to address it.

When respondents finally turn to the question presented, their arguments do nothing to support the court of appeals' interpretation of Section 1806(f), which goes well beyond any natural reading of its text. As the Fourth Circuit recently held, Section 1806(f) is "relevant only when a litigant challenges the admissibility of the government's surveillance evidence" and does not "displace the state secrets privilege, even in actions pertaining to government-run electronic surveillance." *Wikimedia Found. v. NSA*, No. 20-1191, 2021 WL 4187840, at *14, *21 (Sept. 15, 2021). This Court should hold the same and reverse.

A. Section 1806(f)'s Procedures Do Not Provide A Means Of Litigating The Merits Of An Action

The court of appeals concluded that two of the three grounds for invoking Section 1806(f) were satisfied in this case and that Section 1806(f)'s *in camera* and *ex parte* procedures thus provide the exclusive mechanism for resolving the merits of this suit. The court's reasoning, endorsed by respondents, was wrong at every step. Gov't Br. 21-35.

1. The court of appeals first concluded that the government's assertion of the state-secrets privilege to *exclude* information from the case invoked Section 1806(f) by providing notice of the government's intent to affirmatively "enter into evidence or otherwise *use* or disclose" FISA-obtained or FISA-derived information "against an aggrieved person" "in [this] proceeding,"

50 U.S.C. 1806(c) (emphasis added). Pet. App. 57a-58a. Respondents repeat that contention and even assert (Br. 36) that the government’s motion to dismiss on state-secrets grounds “was itself a use of that [privileged] information.” Neither argument has merit.

As to the first contention, the government’s claim of privilege does the *opposite* of expressing an intent to “use or disclose in any trial, hearing, or other proceeding * * * information obtained or derived from an electronic surveillance.” 50 U.S.C. 1806(c). By asserting the privilege, the government sought to *prevent* the use or disclosure of the privileged information—only a subset of which pertains to alleged electronic surveillance or its fruits in any event—to avoid revealing state secrets. See J.A. 28-29. And when the district court upheld the claim of privilege, it precluded use of the privileged information by the plaintiffs, the government, or the individual-capacity respondents. See *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1079 (9th Cir. 2010) (“A successful assertion of privilege * * * remove[s] the privileged evidence from the litigation.”), cert. denied, 563 U.S. 1002 (2011).

The fact that the government (and the individual-capacity respondents) would “need to rely on secret information to defend themselves” against respondents’ claims of religious discrimination if the case proceeded, Resps. Br. 37, does not undermine that conclusion. Rather, as the government explained in its motion to dismiss, that need, combined with the government’s inability (and thus lack of intent) to use or disclose the information, supports dismissing this suit rather than forging ahead. See J.A. 161.

Respondents’ new contention (Br. 36) that even the government’s motion to dismiss “was itself a use” of privileged information under Section 1806(c) that could

trigger Section 1806(f) is also unavailing. A dismissal on state-secrets grounds is the “effect of a successful interposition of the state secrets privilege”—it is a result that sometimes occurs *after* information has been excluded. *El-Masri v. United States*, 479 F.3d 296, 306 (4th Cir.), cert. denied, 552 U.S. 947 (2007). And a motion to dismiss on those grounds is predicated on the parties’ inability to use or disclose the excluded information and the harm that would follow such use or disclosure—not on any parties’ use of the information itself. Regardless of how “capaciously” one defines “use” or “disclos[ure],” Resps. Br. 36, the government’s submission that this case cannot proceed without risking the intentional or unintentional disclosure of state secrets is not itself the use or disclosure of those secrets.

In any event, Section 1806(c) speaks of the government’s “intend[ed]” use and requires the government to provide notice of such intention “*prior* to an effort to so disclose or so use the information.” 50 U.S.C. 1806(c) (emphasis added). It is thus notice of intended future use of FISA-obtained or FISA-derived evidence, not the use itself, that triggers Section 1806(f) under that provision. To be sure, if FISA-obtained or FISA-derived evidence is actually “introduced or otherwise used or disclosed in a[] trial, hearing, or other proceeding” against an aggrieved person without advance notice, the statute permits that person to “move to suppress the evidence” as unlawfully acquired. 50 U.S.C. 1806(e). That motion to suppress may then serve as a predicate for the government’s invocation of Section 1806(f)’s procedures. But respondents never filed a motion to suppress in this case, presumably because no such evidence was, in fact, “introduced or otherwise used or disclosed.” *Ibid.*

2. The court of appeals alternatively concluded that Section 1806(f)'s procedures were triggered at the very outset of this case by the filing of respondents' complaint. See Pet. App. 58a. The court determined that respondents had "requested" to "obtain" FISA-obtained information, within the meaning of Section 1806(f), by including a prayer for injunctive relief ordering the government to destroy or return information gathered through unlawful surveillance. *Ibid.* But Section 1806(f)'s reference to a "motion or request * * * to discover, obtain, or suppress" information does not encompass a prayer for ultimate relief on the merits in a complaint. Gov't Br. 28-31.

Respondents argue (Br. 39) that their prayer for relief "is, literally, a 'request' to 'obtain' information—even if a half-hearted one here, see Resps. Br. 38 n.10. But "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Sturgeon v. Frost*, 577 U.S. 424, 438 (2016) (citation omitted). In context, a "request" to "obtain" evidence plainly refers to the same sort of procedural motion concerning evidentiary matters in the course of litigation that Section 1806, as a whole, concerns. Section 1806 repeatedly uses the word "motion" to refer to both "motions" and "requests," indicating that the terms are near equivalents. See 50 U.S.C. 1806(f) (directing that a "motion or request" triggering Section 1806(f) be resolved by the district court where it is made "or, where the *motion* is made before another authority," by the district court in the same district) (emphasis added); 50 U.S.C. 1806(g) (referring only to the granting or denying of the "motion"). And the word "obtain," when grouped with "suppress" and "discover," connotes "procedural, evidentiary actions having nothing to do with substantive claims or injunctive relief." Pet. App.

132a (Bumatay, J., dissenting from denial of rehearing en banc); see, *e.g.*, Fed. R. Civ. P. 26(b)(1) (granting the right to “obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense”).

FISA’s legislative history is not to the contrary. Respondents rely on a snippet from the House Report justifying the immediate appealability of Section 1806(f) orders on the ground that an order to disclose confidential information “might force the Government to dismiss the case (or concede the case, if it were a civil suit against it) to avoid disclosure,” H.R. Rep. No. 1283, 95th Cong., 2d Sess. Pt. 1, at 94 (1978). In respondents’ view (Br. 48), that “confirms that Section 1806(f) applies where civil plaintiffs challenge unlawful surveillance and seek secret information in furtherance of their claims.” But whatever one might infer about the House bill from the parenthetical, the “conference substitute essentially adopt[ed] the Senate provisions.” H.R. Conf. Rep. No. 1720, 95th Cong., 2d Sess. 32 (1978); see *ibid.* (describing minor modifications). As the Senate Judiciary Report explains, those provisions were intended to establish a procedure to “determine whether the surveillance” violated the “right[s] of the person *against whom the evidence is sought to be introduced.*” S. Rep. No. 604, 95th Cong., 1st Sess. 57 (1977) (Senate Judiciary Committee Report) (emphasis added).

3. The court of appeals also erred in determining that where Section 1806(f) is properly invoked, it provides the exclusive mechanism for litigating the merits of an action. For nearly the entire history of the statute, no court held that it served such a novel function, and there is no sound basis for finding it to do so. Gov’t Br. 32-35.

Respondents suggest (Br. 45-46) that the government overstates the consequence of the court of appeals' decision. In their view, Section 1806(f) "simply requires that the [district] court determine whether the [alleged] surveillance was lawful, and then grant any relief 'in accordance with the requirements of law,' as the context of the particular case demands." Resps. Br. 46. But the lawfulness of alleged surveillance and related investigation is the merits of respondents' suit. And if respondents' complaint is a "request" that triggers Section 1806(f)'s procedures, it is difficult to see how the relief they seek is not effectively an award of judgment.

Contrary to respondents' assertion, the government did not agree that Section 1806(f) was intended to serve that function in *ACLU Foundation v. Barr*, 952 F.2d 457 (D.C. Cir. 1991). In *ACLU*, the Attorney General had previously asked a district court to determine, under Section 1806(f), the lawfulness of electronic surveillance after a group of noncitizens moved to discover and suppress any fruits of the surveillance in administrative deportation proceedings. *Id.* at 462-463. Dissatisfied with the result of the Section 1806(f) proceeding, the noncitizens filed a separate, standalone suit, arguing that past and ongoing surveillance of their communications violated FISA and the Constitution. *Id.* at 460.

Respondents suggest (Br. 46-47) that the government argued that the district court in the standalone suit should use Section 1806(f)'s procedures to resolve the lawfulness of any surveillance—quoting the government's statement that Section 1806(f) applies when an aggrieved person "moves or requests before any authority of the United States to discover or obtain materials relating to electronic surveillance." Resps. Br. 47 (quoting Gov't Br. at 38, *ACLU*, *supra* (No. 90-5261)).

That statement, however, referred not to any motion or request in the standalone suit, but to the noncitizens' request to discover or suppress any FISA-obtained or FISA-derived evidence that the government intended to introduce in the underlying deportation proceedings. See Gov't Br. at 38-39, *ACLU*, *supra* (No. 90-5261). In the standalone suit, the government argued that the plaintiffs should not be "allowed to relitigate immediately the issue of the legality of the surveillance" and that they had "no right under the FISA to require the Government to confirm or deny surveillance." *Id.* at 37, 48. That argument is entirely consistent with the government's position here.

Finally, respondents echo (Br. 48) the court of appeals' reasoning that the cause of action in 50 U.S.C. 1810 to recover damages for a criminal violation of FISA requires a broader reading of Section 1806(f). In fact, Section 1810 undermines respondents' position. Had Congress intended Section 1806(f) to be the mechanism for litigating Section 1810 claims, one would have expected it to say so—or at least to include some textual link between the two provisions. But Congress did neither. To the contrary, the relief authorized by Section 1810—"damages," "attorney's fees," and "costs"—*excludes* the relief that respondents contend triggers Section 1806(f) (an injunction ordering the return of the fruits of the surveillance). *Ibid.*

According to respondents (Br. 48-49), unless Section 1806(f) can be used "to resolve" Section 1810 claims, Section 1810's civil damages remedy would be "eviscerate[d]" "by permitting the Government to win dismissal of virtually all such suits by invoking state secrets." But those concerns are misplaced. Although "FISA surveillance *by definition* occurs for national security pur-

poses,” Resps. Br. 51, the government does not invariably invoke the state-secrets privilege in any suit concerning events in which FISA surveillance may have been involved, including those asserting claims under Section 1810. See, e.g., *Attkisson v. Holder*, 925 F.3d 606 (4th Cir. 2019); *Valdez v. NSA*, 228 F. Supp. 3d 1271 (D. Utah 2017). The government does not “lightly invoke” the privilege, which requires personal consideration by the head of the relevant department. *United States v. Reynolds*, 345 U.S. 1, 7 (1953). Since 2009, even when another department head wishes to invoke the privilege in litigation, DOJ policy has also required personal approval of the Attorney General. See Gov’t Br. 4. And, even then, the district court must determine that “the circumstances are appropriate for the claim of privilege.” *Reynolds*, 345 U.S. at 8. Those procedures cast substantial doubt on respondents’ assertion that the privilege necessarily forecloses Section 1810 claims.

In any event, the fact that Section 1810 claims would be easier to pursue if Section 1806(f) provided a means to litigate them *in camera* and *ex parte*, while also displacing the state-secrets privilege, is not a basis for concluding that Congress in fact enacted such a regime—much less that it did so for *any* claim challenging alleged electronic surveillance. Respondents emphasize Congress’s purpose to ensure that surveillance under FISA “conforms to the fundamental principles of the [F]ourth [A]mendment.” Resps. Br. 5 (citation omitted). But even assuming respondents’ interpretation of Section 1806(f) would further that purpose, “no legislation pursues its purposes at all costs.” *CTS Corp. v. Waldburger*, 573 U.S. 1, 12 (2014) (citation omitted). The state-secrets privilege is an essential tool for safeguarding the national security. It is not surprising that

it may hinder certain suits directly targeting the government’s foreign-intelligence operations. See *Wikimedia*, 2021 WL 4187840, at *20 (Diaz, J.) (“Every state secrets case presents the possibility that a plaintiff will be denied—in the interests of national security—a remedy available by law.”).

B. Section 1806(f)’s Procedures Do Not Silently Displace The State-Secrets Privilege

1. Even if Section 1806(f) provided a mechanism for resolving the merits of a case, the court of appeals further erred by holding that it silently displaced the government’s authority to invoke the state-secrets privilege. Gov’t Br. 35-42.

Respondents contend (Br. 53) that the absence of even a single mention of the state-secrets privilege in FISA is “immaterial” because the term “state secrets privilege” was not well established in 1978. But the term was far from novel. Greenleaf had described a privilege covering “*secrets of State*” at least as early as 1852. ¹ Simon Greenleaf, *A Treatise on the Law of Evidence* § 250, at 323-324 (6th ed. 1852). Wigmore’s influential treatise had devoted an entire chapter to privileges over “State Secrets and Official Documents.” ⁸ John Henry Wigmore, *Evidence in Trials at Common Law* ch. 85 (John T. McNaughton rev. ed., 1961). And a 1971 draft of the Federal Rules of Evidence had proposed to codify, among the well-settled privileges, the privilege over “military and state secrets.” *Revised Draft of Proposed Rules of Evidence*, 51 F.R.D. 315, 375 (Mar. 1971) (capitalization omitted). Notably, the 1971 proposal engendered “a vigorous debate in Congress” over such codification. Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*,

75 Geo. Wash. L. Rev. 1249, 1292 (2007). “Though Congress ultimately chose not to codify any privileges at all—leaving the status quo, including *Reynolds*, in place—the debate inevitably increased awareness of the state secrets privilege” just years before Congress enacted FISA. *Ibid.* (footnote omitted).

Citing a handful of decisions, respondents claim (Br. 54 & n.19) that pre-FISA court opinions used related terms like “national security” or “military secrets.” But others used “state secrets” to refer to the privilege. See, e.g., *Halkin v. Helms*, 598 F.2d 1, 3 (D.C. Cir. 1978); *Ethyl Corp. v. EPA*, 478 F.2d 47, 51 (4th Cir. 1973); *J.H. Rutter Rex Mfg. Co. v. NLRB*, 473 F.2d 223, 233 n.11 (5th Cir.), cert. denied, 414 U.S. 822 (1973); *General Eng’g, Inc. v. NLRB*, 341 F.2d 367, 375 (9th Cir. 1965). And regardless of the label employed, respondents do not dispute that the state-secrets privilege was broadly recognized or that, since 1952, *Reynolds* has been the canonical case defining its scope. It is improbable that Congress eliminated the government’s ability to invoke that privilege—by whatever label—without at least using the word “privilege” or acknowledging the procedures described by this Court in *Reynolds* that it intended to displace.

Respondents acknowledge (Br. 56) that federal courts employed *in camera* and *ex parte* review of foreign-intelligence surveillance before FISA in cases where the government did not invoke the state-secrets privilege but sought to introduce the fruits of such surveillance. See, e.g., *United States v. Ajlouny*, 629 F.2d 830, 837-839 & n.12 (2d Cir. 1980), cert. denied, 449 U.S. 1111 (1981); *United States v. Butenko*, 494 F.2d 593, 607 (3d Cir.) (en banc), cert. denied, 419 U.S. 881 (1974); *United States v. Brown*, 484 F.2d 418, 425-426 (5th Cir. 1973), cert. denied, 415 U.S. 960 (1974). They argue (Br.

56), however, that another line of cases required *in camera* and *ex parte* review in civil cases where the government asserted the state-secrets privilege to exclude privileged information. They assert (*ibid.*) that it was this latter practice that Congress intended to codify in FISA. That assertion is implausible.

Respondents cite (Br. 56-57) two cases to support their assertion: *Jabara v. Webster*, 691 F.2d 272 (6th Cir. 1982), cert. denied, 464 U.S. 863 (1983), and *Halpern v. United States*, 258 F.2d 36 (2d Cir. 1958). Neither does. When FISA was enacted in 1978, the *Jabara* case was still in discovery. See *Jabara v. Kelley*, 476 F. Supp. 561, 564 (E.D. Mich. 1979). The district court had reviewed classified material *in camera*, in accordance with *Reynolds*, “solely” for purposes of evaluating the claim of privilege, not “for the purpose of making any *ex parte* determination on the merits.” *Jabara v. Kelley*, 75 F.R.D. 475, 489 (E.D. Mich. 1977). When the court resolved the merits (after FISA’s enactment), it relied on some *in camera* submissions, but it declined to rely on materials over which it had upheld a claim of state-secrets privilege. See *Jabara*, 476 F. Supp. at 564, 578.

In *Halpern*, the court of appeals determined that the Invention Secrecy Act of 1951 had “waive[d]” the state-secrets privilege over information concerning certain military inventions when it expressly authorized federal courts to adjudicate takings claims by persons whose inventions were protected from public disclosure—and therefore precluded from the issuance of a patent—by a secrecy order under the Patent Act. 258 F.2d at 43. The court held that the inventor’s takings claim could be adjudicated in an adversarial, *in camera* proceeding “if, in the judgment of the district court, such a trial can

be carried out without substantial risk that secret information will be publicly divulged.” *Id.* at 44.

Regardless of whether *Halpern* was correctly decided, it provides respondents scant support. Unlike the Invention Secrecy Act, FISA does not expressly authorize district courts to adjudicate the merits of the claims at issue here. Nor do respondents already possess the state secrets this litigation implicates, such that an adversarial proceeding would be feasible. See *Clift v. United States*, 597 F.2d 826, 829 (2d Cir. 1979) (Friendly, J.) (upholding claim of state-secrets privilege in proceeding under the Invention Secrecy Act where privileged information could not be shared with inventor). And the district court here has already concluded that an adversarial hearing, “even with the protective procedures available to the Court,” would “present[] an unjustifiable risk of disclosing state secrets.” Pet. App. 177a.

2. If there were any doubt about whether Section 1806(f) displaced the state-secrets privilege, constitutional-avoidance principles would strongly support retaining it. Gov’t Br. 35-47. This Court has repeatedly recognized the Executive’s constitutional “authority to classify and control access to information bearing on national security,” flowing from the President’s role as Commander in Chief and his Article II authority to conduct the Nation’s foreign affairs. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). And although the Court in *Reynolds* had no need to articulate the constitutional foundation of the state-secrets privilege—given the privilege’s well-established common-law roots—the Court has since acknowledged that the privilege is constitutionally based. See *United States v. Nixon*, 418 U.S. 683, 706 (1974).

Respondents attempt to distinguish on their facts (Br. 59-60 & n.20) this Court’s decisions describing the

Executive Branch's authority, but they fail to grapple with the Court's reasoning. In *Nixon*, the Court held that the President could not assert an absolute, unqualified privilege over his confidential communications *because* he did not assert the need to protect any "military, diplomatic, or sensitive national security secrets." 418 U.S. at 706; see *id.* at 706-707, 710-711. In *Egan*, the Court held that the Merits Systems Protection Board lacked authority to review the revocation of a federal employee's security clearance *because* "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." 484 U.S. at 529-530. The same reasoning demands a far clearer showing of congressional intent to displace the state-secrets privilege than the one respondents have mustered here.

Respondents cite (Br. 60-61) disclosure and reporting requirements in the Freedom of Information Act (FOIA), 5 U.S.C. 552, and FISA itself, 50 U.S.C. 1802(a)(3), as well as FISA's provision for judicial review of warrant applications, 50 U.S.C. 1803, as examples of provisions that do not intrude on the Executive's constitutional prerogatives. But while each of those statutes provides for *in camera* review of classified information, none purports to deprive the Executive of its ability to prevent disclosure in ordinary civil litigation by invoking the state-secrets privilege. Indeed, FOIA expressly exempts from disclosure documents that "would not be available by law to a party * * * in litigation with the agency," 5 U.S.C. 552(b)(5)—*i.e.*, privileged information. See *Baker & Hostetler LLP v. United States Dep't of Commerce*, 473 F.3d 312, 321 (D.C. Cir. 2006).

Respondents observe (Br. 59-60) that *in camera, ex parte* review is available under *Reynolds* to evaluate a claim of state-secrets privilege. That review, however, is permitted only if and to the extent it is necessary for the court to satisfy itself that “there is a reasonable danger that compulsion of the evidence” would expose state secrets. *Reynolds*, 345 U.S. at 10. “When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.” *Ibid.* The government has not disputed that such limited review is permissible if necessary to determine whether the privilege is properly invoked. But that is a far cry from (1) displacing the privilege; (2) requiring resolution of the merits on the basis of “any ‘materials relating to the surveillance as may be necessary,’ including the evidence over which the Attorney General asserted the state secrets privilege”; and (3) authorizing the district court to “‘disclose to [respondents] * * * portions of the application, order, or other materials relating to the surveillance’” if “‘necessary to make an accurate determination of the legality of the surveillance.’” Pet. App. 93a (quoting 50 U.S.C. 1806(f)).¹

¹ Respondents embrace (Br. 38 n.10) the suggestion from the joint concurrence in the denial of rehearing en banc that, notwithstanding that language, Pet. App. 93a, if the district court were to determine that disclosure to respondents were necessary, the government may re-assert the privilege and “the state secrets privilege’s dismissal remedy as a backstop at that juncture.” Pet. App. 100a n.1. If this Court were to affirm the decision below, the government would accept respondents’ concession. But respondents provide no more basis in the text of the statute for this partial-displacement theory, nor any better justification.

Finally, the individual-capacity respondents' concerns about the consistency of the scheme envisioned by the court of appeals with the demands of due process and the Seventh Amendment provide additional reasons to reverse the decision below. See Allen Br. 9-17; Tidwell Br. 21-32. In their brief rejoinder, respondents cite (Br. 64) Section 1806(g)'s requirement that any relief be awarded "in accordance with the requirements of law." That provision, however, is designed to address "what procedures are to be followed" to determine which evidence must be suppressed in cases where the court determines that surveillance was "unlawfully authorized or conducted"—*i.e.*, the "question of taint." Senate Judiciary Committee Report 59 n.61. Congress sought to avoid codifying this Court's holding in *Alderman v. United States*, 394 U.S. 165 (1969), requiring in the domestic context that, after a finding of illegality, all "surveillance records as to which any petitioner has standing to object should be turned over to him without being screened *in camera* by the trial judge," *id.* at 182. The provision was not intended to serve as an all-encompassing "savings clause" to ensure that the court's determination of lawfulness complies with other requirements of law. Resps. Br. 58. If it were, respondents provide no reason why it would preserve any requirements of the Due Process Clause and the Seventh Amendment, but not of the constitutionally based state-secrets privilege. Rather than strain to reach that result, the better course is to avoid those constitutional concerns by construing Section 1806 consistently with the natural import of its text and structure.

C. There Is No Occasion For The Court To Address The Scope Of The State-Secrets Dismissal Remedy

The court of appeals erred in holding that Section 1806(f) displaces the state-secrets privilege and authorizes the district court to resolve the merits of this suit by considering the privileged information. That is all the Court needs to decide to answer the question presented and resolve this case. Nevertheless, respondents devote much of their brief to a wholly different argument. They contend (Br. 24-33) that, even when the state-secrets privilege is properly invoked and a court determines that further litigation would threaten disclosing those state secrets, the court may not dismiss claims that do not concern the scope or existence of a government contract. The Court should decline to consider that argument for several reasons.

1. At the threshold, respondents' new argument that state-secrets dismissals are never appropriate outside the government-contract context is not fairly encompassed by the question presented: "Whether Section 1806(f) 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. Respondents observe (Br. 33 n.9) that the question does not "define the 'state-secrets privilege.'" But respondents' new argument does concern the definition of the privilege; instead, it seeks to challenge an accepted understanding—shared by both the question presented and the decision below—about the potential consequences of the privilege's successful invocation.

The argument that a district court may never dismiss a non-contract claim on state-secrets grounds was

also not pressed or passed upon below. Although respondents argued that dismissal was inappropriate in this case, they generally accepted that “[a]ssertion of the *Reynolds* privilege * * * may lead to dismissal of a lawsuit” where “the privilege deprives the defendant of information that would otherwise give the defendant a valid defense to the claim . . . [or it is] impossible to proceed with the litigation because . . . litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets.” Resps. C.A. Br. 17-18 (quoting *Mohamed*, 614 F.3d at 1083). The court of appeals’ decision contemplates that the government might re-assert the state-secrets privilege in this case and indicates that, if it does, the district court “should consider anew * * * whether dismissal is required” on the same grounds. Pet. App. 95a-96a (citations omitted). As this Court frequently observes, it is “a court of review, not of first view.” *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Respondents provide no sound reason for departing from that approach here.

Moreover, respondents’ new argument also does not provide an alternative ground to affirm. As the government’s opening brief explains (at 46-47), despite the panel’s claim that its decision only deprived the government of the state-secrets dismissal remedy (which respondents now insist does not exist), the panel’s decision went further. It directed the district court to decide the merits of this suit based on privileged information. As respondents concede, that interpretation of Section 1806(f) would deprive the government not only of the dismissal remedy, but of the *exclusion* remedy as well. See Resps. Br. 53 (arguing that, “[i]nstead of exclusion or dismissal, Congress provided for ex parte, in camera review of the disputed surveillance to assess its

lawfulness”). But respondents acknowledge (Br. 24-25) that, outside the context of Section 1806(f), a successful invocation of the state-secrets privilege must at least result in the exclusion of the privileged information.

2. In any event, respondents’ argument against the availability of dismissal is wrong. The constitutional authority to protect state secrets finds its most frequent application in disputes over whether particular information may be entered into evidence. But, as this Court has long recognized, adequately protecting state secrets may also require dismissal of a claim in limited circumstances where continued litigation would threaten to disclose those secrets. See *Totten v. United States*, 92 U.S. 105, 107 (1876) (explaining that “the maintenance of any suit in a court of justice” is forbidden where continued litigation “would inevitably lead to the disclosure of” state secrets); see also *General Dynamics Corp. v. United States*, 563 U.S. 478, 486 (2011); *Tenet v. Doe*, 544 U.S. 1, 11 (2005); *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139, 146-147 (1981); *Reynolds*, 345 U.S. at 11 n.26.

For well over 40 years, the courts of appeals have uniformly recognized that the principles articulated in those decisions are not restricted to government contracts.² While the occasions to dismiss claims on state-

² See, e.g., *Wikimedia*, 2021 WL 4187840, at *22-*23 (Diaz, J.); *id.* at *29 (Rushing, J., concurring in part and in the judgment); *Mohamed*, 614 F.3d at 1081; *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1196-1202, 1204-1205 (9th Cir. 2007); *ACLU v. NSA*, 493 F.3d 644, 655 (6th Cir. 2007) (Batchelder, J.), cert. denied, 552 U.S. 1179 (2008); *id.* at 692-693 (Gibbons, J., concurring); *In re Sealed Case*, 494 F.3d 139, 145-154 (D.C. Cir. 2007); *El-Masri*, 479 F.3d at 306-308; *Sterling v. Tenet*, 416 F.3d 338, 347-348 (4th Cir. 2005), cert. denied, 546 U.S. 1093 (2006); *Tenenbaum v. Simonini*, 372 F.3d 776, 777 (6th Cir.), cert. denied, 543 U.S. 1000

secrets grounds have been relatively infrequent, those courts have understood, as one court explained, that any “proceeding in which the state secrets privilege is successfully interposed must be dismissed if the circumstances make clear that privileged information will be so central to the litigation that any attempt to proceed will threaten that information’s disclosure.” *Abilt v. CIA*, 848 F.3d 305, 313 (4th Cir. 2017) (citation omitted). Circumstances in which dismissal is required include cases where “the plaintiff cannot prove the prima facie elements of his or her claim without privileged evidence,” cases where “the defendants could not properly defend themselves without using privileged evidence,” and cases “where further litigation would present an unjustifiable risk of disclosure.” *Id.* at 313-314 (citation omitted).

(2004); *DTM Research, L.L.C. v. AT&T Corp.*, 245 F.3d 327, 334 (4th Cir. 2001); *Kasza v. Browner*, 133 F.3d 1159, 1166-1167, 1170 (9th Cir.), cert. denied, 525 U.S. 967 (1998); *Black v. United States*, 62 F.3d 1115, 1119 (8th Cir. 1995), cert. denied, 517 U.S. 1154 (1996); *Bareford v. General Dynamics Corp.*, 973 F.2d 1138, 1140 (5th Cir. 1992), cert. denied, 507 U.S. 1029 (1993); *Bowles v. United States*, 950 F.2d 154, 156 (4th Cir. 1991) (per curiam); *In re Under Seal*, 945 F.2d 1285, 1288-1290 (4th Cir. 1991); *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 547-548 (2d Cir. 1991); *In re United States*, 872 F.2d 472, 476-477 (D.C. Cir.), cert. dismissed, 493 U.S. 960 (1989); *Guong v. United States*, 860 F.2d 1063, 1066-1067 (Fed. Cir. 1988), cert. denied, 490 U.S. 1023 (1989); *Fitzgerald v. Penthouse Int’l, Ltd.*, 776 F.2d 1236, 1241-1244 (4th Cir. 1985); *Molerio v. FBI*, 749 F.2d 815, 825 (D.C. Cir. 1984); *Ellsberg v. Mitchell*, 709 F.2d 51, 64-65 (D.C. Cir. 1983), cert. denied, 465 U.S. 1038 (1984); *Halkin v. Helms*, 690 F.2d 977, 997-1001 (D.C. Cir. 1982); *Salisbury v. United States*, 690 F.2d 966, 977 (D.C. Cir. 1982); *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 281 (4th Cir. 1980) (en banc) (per curiam); *Halkin*, 598 F.2d at 10-11.

Totten's "core concern" is preventing state secrets "from being revealed" by continued litigation. *Tenet*, 544 U.S. at 10. In *Weinberger*, the same concern meant that a claim under the National Environmental Policy Act of 1969 (NEPA) was "beyond judicial scrutiny" where determining whether NEPA was complied with would depend on whether the Navy proposed to store nuclear weapons in a particular location. 454 U.S. at 146-147. And in *Tenet*, the same principles justified dismissal to protect a state secret—an alleged clandestine relationship with the CIA—where the plaintiff did not seek to recover on a contract in the federal suit but instead pressed a constitutional due process claim and the existence of a secret relationship was at the heart of the claim. See 544 U.S. at 8 (holding that *Totten* is not "merely a contract rule").

The Court's holdings in those cases did not rest on the conclusion that the plaintiffs "assumed the risk" that the government would fail to comply with NEPA or the requirements of due process. Resps. Br. 26. Rather, the "use of *in camera* judicial proceedings simply c[ould not] provide the absolute protection [the Court] found necessary." *Tenet*, 544 U.S. at 11. "The possibility that a suit may proceed" and state secrets "may be revealed" was "unacceptable"; as was "[f]orcing the Government to * * * settle a case * * * out of fear that any effort to litigate the action would reveal classified information that may undermine ongoing covert operations." *Ibid.*; see *Weinberger*, 454 U.S. at 146-147 ("[P]ublic policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated.") (quoting *Totten*, 92 U.S. at 107; citing *Reynolds*, *supra*).

Contrary to respondents' contention (Br. 30), the Court's decision in *General Dynamics* did not retroactively limit those decisions to articulating a common-law contracting rule. To be sure, *General Dynamics* was a government-contract case, and, accordingly, the Court grounded its decision on its "common-law authority to fashion contractual remedies," looking to *Totten* and *Tenet* to inform its decision. *General Dynamics*, 563 U.S. at 485. "But that in no way signaled [the Court's] retreat from [the] broader holding[s]," *Tenet*, 544 U.S. at 9, that the Court articulated in *Totten*, *Weinberger*, and *Tenet*. Nor did it call into question directly or indirectly the courts of appeals' longstanding recognition that those principles also apply in suits that cannot be distinguished from the circumstances presented here.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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