

No. 20–828

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

**REPLY BRIEF FOR RESPONDENTS PAUL
ALLEN, KEVIN ARMSTRONG, AND PAT ROSE**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	3
I. The possibility that Plaintiffs may prevail on summary judgment is irrelevant to FISA’s construction.	4
II. Plaintiffs’ analogous authorities support the government’s interpretation of FISA.	6
A. CIPA distinguishes between merits and procedural determinations.	7
B. The proffered lower court decisions lend Plaintiffs no support.	9
III. FISA’s “savings clause” does not authorize courts to rewrite the statute.	10
IV. Amici’s suggestion that the Seventh Amendment should “yield” only underscores the need for constitutional avoidance.	13
CONCLUSION	15

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Alderman v. United States</i> , 394 U.S. 165, 182 (1969)	12
<i>Clark v. Martinez</i> , 543 U.S. 371 (2005)	3, 5, 11, 14
<i>CRST Van Expedited, Inc. v. E.E.O.C.</i> , 578 U.S. 419 (2016)	11
<i>Curtis v. Loether</i> , 415 U.S. 189 (1974)	14
<i>Galloway v. United States</i> , 319 U.S. 372 (1943)	10
<i>Granfinanciera, S.A. v. Nordberg</i> , 492 U.S. 33 (1989)	14
<i>Halpern v. United States</i> , 258 F.2d 36 (2d Cir. 1958).....	10
<i>Jabara v. Webster</i> , 691 F.2d 272 (6th Cir. 1982)	9
<i>Jennings v. Rodriguez</i> , 138 S. Ct. 830 (2018)	12
<i>Lehman v. Nakshian</i> , 453 U.S. 156 (1981)	10

<i>Molerio v. F.B.I.</i> , 749 F.2d 815 (D.C. Cir. 1984)	9
<i>Parklane Hosiery Co. v. Shore</i> , 439 U.S. 322 (1979)	9
<i>United States v. Oakland Cannabis Buyers' Co-op.</i> , 532 U.S. 483 (2001)	12
<i>United States v. Palomar-Santiago</i> , 141 S. Ct. 1615 (2021)	4, 11
<i>Waters v. Churchill</i> , 511 U.S. 661 (1994)	9
<i>Wikimedia Found. v. Nat'l Sec. Agency/Cent. Sec. Serv.</i> , 14 F.4th 276, 2021 WL 4187840 (4th Cir. Sept. 15, 2021).....	3
Statutes	
18 U.S.C. Appendix III § 6	7, 8
18 U.S.C. Appendix III § 9	8
50 U.S.C. § 1806(g)	10
Other Authorities	
A POCKET GUIDE FOR JUDGES ON THE STATE-SECRETS PRIVILEGE, THE CLASSIFIED INFORMATION PROCEDURES ACT, AND COURT SECURITY OFFICERS, 2007 WL 5012057 (2007)	8

*Revised Security Procedures Established
Pursuant To Pub. L. 96-456, 94 Stat.
2025, By The Chief Justice Of The
United States For The Protection Of
Classified Information* 8

S. Rep. No. 95-604 (1977) 12

S. Rep. No. 95-701 (1978) 12

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INTRODUCTION

The government’s brief offers reason enough to reverse the Ninth Circuit’s interpretation of FISA Section 1806(f), and the Respondent Agents join in those arguments. But the decision below should be reversed for another reason: the Ninth Circuit’s interpretation requires the district court to adjudicate the Respondent Agents’ *Bivens* liability in a secret trial, on secret evidence, outside the presence of the jury—an inter-

pretation that raises doubts about the statute's constitutionality under the Seventh Amendment.

Plaintiffs do not dispute that the Ninth Circuit's interpretation of FISA raises grave Seventh Amendment concerns. They instead ask the Court to ignore those concerns because a jury trial might prove unnecessary if they prevail on summary judgment. But that bare possibility is no reason to adopt an interpretation that raises serious doubt about the statute's constitutionality.

Plaintiffs next try to scare up some legal support for depriving the Respondent Agents of their jury right. They do so first by drawing an analogy to the Classified Information Protection Act ("CIPA"), but the analogy favors the Respondent Agents here. Although CIPA permits *in camera* hearings, it limits those hearings to evidentiary issues. When it comes time to adjudicate the merits, *juries* hear CIPA cases, not judges sitting *in camera*. Plaintiffs also cite lower court cases that employed secret proceedings to consider the merits of civil claims. But those cases involved summary judgment or claims asserted directly against the United States—contexts where no jury right would attach in the first place. The authorities are thus beside the point.

Finally, Plaintiffs contend that FISA contains a savings clause that would kick in to prevent any violation of the Respondent Agents' Seventh Amendment rights, should the case proceed to trial. But the clause would apply only if the Ninth Circuit's interpretation of FISA raises grave constitutional concerns—otherwise there would be nothing to "save." And if the Ninth Circuit's interpretation raises such

concerns, the wiser course is to reject it in favor of the government’s interpretation, which raises no such concerns.

ARGUMENT

The decision below held that Section 1806(f) requires the district court to rule on the merits of Plaintiffs’ *Bivens* claims in an *ex parte* and *in camera* proceeding. Pet. App. 92a. The government advances a contrary interpretation: the statute provides procedures for determining the admissibility or disclosure of electronic-surveillance evidence, but not the merits of a civil rights lawsuit brought against federal officers accused of violating the Constitution. Government Br. 21-22; *see also Wikimedia Found. v. Nat’l Sec. Agency/Cent. Sec. Serv.*, 14 F.4th 276, 2021 WL 4187840, at *17-18 (4th Cir. Sept. 15, 2021) (finding that Section 1806(f) “is confined to procedural requests related to a circumscribed body of evidence” but does not “permit the district court” to “conduct an entire trial in camera and grant final judgment on the merits of the underlying claim”). The Respondent Agents support the government’s interpretation. Respondent Agents’ Br. 9.

Assuming both interpretations are plausible, the canon of constitutional avoidance provides a tool for choosing between them.¹ *Clark v. Martinez*, 543 U.S.

¹ As noted in their opening brief, the Respondent Agents contend that the Ninth Circuit’s construction of FISA is not plausible, and that the Court should reverse on that basis without reaching constitutional avoidance. Respondent Agents’ Br. 9. If the statute is susceptible to more than one plausible interpretation, however, the canon applies.

371, 380–81 (2005). It counsels that courts should interpret a statute “to avoid not only the conclusion that [it is] unconstitutional, but also grave doubts upon that score.” *United States v. Palomar-Santiago*, 141 S. Ct. 1615, 1622 (2021) (quote omitted).

The canon’s application is straightforward here. Under the Court’s precedents, the Seventh Amendment would normally give the Respondent Agents a right to have the claims against them tried to a jury. *See* Respondent Agents’ Br. 9-13. Plaintiffs do not dispute this. To the contrary, Plaintiffs requested a jury trial in their complaint, and they argued below that a jury should hear their claims. (Case 8:11-cv-00301, Docket No. 1 at 1; Case 12-56874, Dkt. 79-2 at 21.)

Yet the decision below does away with this constitutional right, instead requiring the district court to adjudicate Plaintiffs’ claims *in camera*, *ex parte* and without a jury. That interpretation raises grave constitutional concerns under the Seventh Amendment. In contrast, the government advances an interpretation of Section 1806(f) that raises no such concerns. Thus, the canon requires the Court to embrace the government’s construction and reverse the decision below.

I. The possibility that Plaintiffs may prevail on summary judgment is irrelevant to FISA’s construction.

Plaintiffs argue that the Respondent Agents’ Seventh Amendment concerns are “speculative” and “premature” because Plaintiffs *might* prevail on summary judgment and make trial unnecessary. Plaintiffs’ Br. 63. But the bare possibility that Plain-

tiffs might prevail on an early dispositive motion contributes nothing to the task currently before the Court: the construction of a statute. A litigant's belief that she has a good case, no matter how well founded, is irrelevant to *any* mode of statutory interpretation, as that belief provides no insight into the meaning of the words used in the statute or the congressional intent behind them.

Plaintiffs' optimism is particularly misplaced in the context of constitutional avoidance. That canon requires courts to consider "the necessary consequences" of its statutory construction and to reject a construction, like the one reached below, that raises constitutional problems, "whether or not those constitutional problems pertain to the particular litigant before the Court." *Clark*, 543 U.S. 380–81. Even assuming Plaintiffs could dodge the Seventh Amendment by securing summary judgment, the decision below still raises constitutional concerns for the next case that requires an adjudication of disputed facts. There is "little to recommend the novel interpretive approach advocated by the [Plaintiffs], which would render every statute a chameleon, its meaning subject to change depending on the presence or absence of constitutional concerns in each individual case." *Id.* at 382. The canon thus requires reversal of the decision below, despite Plaintiffs' confidence in their ability to secure summary judgment.

Plaintiffs also speculate that the government may declassify the state-secrets evidence while their case remains pending. Plaintiffs' Br. 65. But Plaintiffs offer no reason to expect a sudden reversal on this point. Nor can they when the government has stood by its state-secrets assertion for nearly ten years. The

argument also proves too much. If the government were to declassify the critical evidence required to litigate this case, then Plaintiffs would have no reason to invoke Section 1806(f) at all. The possibility of future declassification thus offers no useful insight into the statute's meaning.

II. Plaintiffs' analogous authorities support the government's interpretation of FISA.

In a footnote, the Ninth Circuit cited five lower court decisions purporting to uphold "the constitutionality of FISA's *in camera* and *ex parte* procedures with regard to criminal defendants." Pet. App. 65a-66a n. 31. The court then concluded that "[i]ndividual defendants in a civil suit are not entitled to more stringent protections than [the] criminal defendants" in the cited cases. *Id.* Plaintiffs echoed the argument at the certiorari stage, citing some of the same cases. Cert. Opp. 33-34.

In their opening brief, the Respondent Agents pointed out that none of these cases approve of Section 1806(f)'s application to determine the *merits* of a lawsuit. Respondent Agents' Br. at 16-17. Instead, each endorsed the use of *in camera* and *ex parte* procedures to resolve evidentiary and discovery disputes. *Id.* In other words, the decisions support the government's proffered interpretation of the statute, not the decision below.

In their merits brief, Plaintiffs abandon their reliance on these cases. They instead proffer a new raft of authorities that supposedly support the Ninth Circuit's interpretation of FISA. But the new authorities fare no better than the old.

A. CIPA distinguishes between merits and procedural determinations.

Plaintiffs seek to shore up the decision below by reference to the Classified Information Protection Act (“CIPA”), contending that the statute presents an “analogous” context. Plaintiffs’ Br. 65. The analogy arises, according to Plaintiffs, because CIPA allows courts to try cases with classified information using “unclassified substitutions to provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information.” *Id.* (citing 18 U.S.C. Appendix III § 6(c)(1)). But the decision below has nothing to do with “substitution procedures.” Rather, the Ninth Circuit held that Section 1806(f) requires the district court to adjudicate Plaintiffs’ claims in an *in camera* and *ex parte* trial. Substitution procedures are neither mentioned nor implied.

In any event, CIPA supports the interpretation of Section 1806(f) advanced by the government, not the decision below. As noted above, the government and the Respondent Agents argue that the *ex parte* and *in camera* procedures authorized by Section 1806(f) apply to evidentiary and procedural issues but cannot be used to adjudicate the merits of a civil claim. Government Br. 21-22, Respondent Agents’ Br. 9. CIPA draws the same distinction. It authorizes *in camera* proceedings for hearings to “make all determinations concerning the use, relevance, or admissibility of classified information that would otherwise be made during the trial or pretrial proceeding.” 18 U.S.C. Appendix III § 6(a). The statute also authorizes the use of *ex parte* and *in camera* applications by the government to make evidentiary substitutions. *Id.* § 4.

But nothing in CIPA permits an *ex parte* and *in camera* trial of the merits.

CIPA also requires the Chief Justice of the United States to consult with the Attorney General and other officials to “prescribe rules establishing procedures for the protection against unauthorized disclosure of any classified information” in criminal cases. *Id.* § 9. Those procedures echo CIPA’s text by limiting *in camera* proceedings to “the use, relevance, or admissibility of classified information.” *See Revised Security Procedures Established Pursuant To Pub. L. 96-456, 94 Stat. 2025, By The Chief Justice Of The United States For The Protection Of Classified Information* § 3.²

The Chief Justice’s procedures also contemplate the use of *juries* to try criminal cases involving classified information. For example, they state that CIPA should not “interfere with the functions of a jury, including access to classified information introduced as evidence in the trial of a case.” *Id.* They also instruct district courts to consider government requests for cautionary instructions about classified information “regarding the release or disclosure of any classified information provided to the jury.” *Id.*

² The current procedures, issued in 2011, are reprinted at the end of 18 U.S.C. Appendix III § 9. The original procedures, issued in 1981, are substantially the same and are available as Appendix B to KEEPING GOVERNMENT SECRETS: A POCKET GUIDE FOR JUDGES ON THE STATE-SECRETS PRIVILEGE, THE CLASSIFIED INFORMATION PROCEDURES ACT, AND COURT SECURITY OFFICERS, 2007 WL 5012057 (2007).

In short, Plaintiffs are correct that CIPA presents an analogous context, but they draw the wrong lesson from the analogy. CIPA distinguishes between merits trials, which require juries, and evidentiary hearings, which courts may hear *in camera*. The Court should interpret FISA the same way and reverse the decision below.

B. The proffered lower court decisions lend Plaintiffs no support.

Plaintiffs also rely on a smattering of lower court decisions that supposedly support the use of *ex parte* and *in camera* proceedings to adjudicate the merits of civil claims. But these cases lend no support to the decision below.

Plaintiffs first rely on *Molerio v. F.B.I.*, 749 F.2d 815, 822 (D.C. Cir. 1984), which they claim considered state secrets “evidence relevant to liability *ex parte* and *in camera*” without “render[ing] the proceedings unconstitutional” and *Jabara v. Webster*, 691 F.2d 272, 274 (6th Cir. 1982), a case supposedly using *in camera* review to determine the lawfulness of electronic surveillance. Plaintiffs’ Br. 31, 65. But no party raised a constitutional challenge in either case, and thus these “cases cannot be read as foreclosing an argument that they never dealt with.” *Waters v. Churchill*, 511 U.S. 661, 678 (1994). And the courts decided both cases on summary judgment, a context in which the Seventh Amendment does not apply in any event. *Molerio*, 749 F.2d at 822 (examining “each of Molerio’s claims to see if summary judgment should have been granted”); *Jabara*, 691 F.2d at 274 (appeal from grant of summary judgment); *see also Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 336

(1979) (summary judgment compatible with Seventh Amendment).

Plaintiffs also cite *Halpern v. United States*, 258 F.2d 36, 43–44 (2d Cir. 1958), but that case too says nothing about the Seventh Amendment or any other constitutional limit on *ex parte* and *in camera* proceedings. Nor is *Halpern's* silence on these issues surprising, as the case concerned a claim brought against the United States, and it “has long been settled that the Seventh Amendment right to trial by jury does not apply in actions against the Federal Government.” *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981) (citing *Galloway v. United States*, 319 U.S. 372, 388 (1943)). In short, *Molerio*, *Jabara*, and *Halpern* shed no light on the Seventh Amendment’s applicability here.

III. FISA’s “savings clause” does not authorize courts to rewrite the statute.

Finally, Plaintiffs argue that FISA has a “savings clause” in Section 1806(g) that would prevent any violation of the Respondent Agents’ constitutional rights. Plaintiffs’ Br. 24, 43, 58, 64. That section provides that when a court “determines that the surveillance was not lawfully authorized or conducted, it shall, in accordance with the requirements of law” suppress the evidence or otherwise grant the aggrieved person’s motion. 50 U.S.C. § 1806(g). Plaintiffs contend that because Section 1806(g) “requires the district court to act ‘in accordance with the requirements of law’ when granting any relief, the statute prohibits relief that violates the Constitution.” Plaintiffs’ Br. at 64.

The Ninth Circuit had no chance to consider this argument below, because Plaintiffs failed to raise it—reason enough to reject it. *CRST Van Expedited, Inc. v. E.E.O.C.*, 578 U.S. 419, 435 (2016) (it “is not the Court’s usual practice to adjudicate either legal or predicate factual questions in the first instance”) (quote omitted).

Forfeiture aside, this purported “savings clause” has no application unless the Ninth Circuit’s interpretation of FISA *does* raise grave concerns under the Seventh Amendment. After all, there would be nothing to “save” unless the decision below imperiled the Respondent Agents’ constitutional rights. And if the decision below does raise such concerns, then the Court should reverse under the canon of constitutional avoidance. *See, e.g., Palomar-Santiago*, 141 S. Ct. at 1622.

Plaintiffs instead suggest a different path: that the Court embrace the Ninth Circuit’s interpretation of FISA, and then employ the “savings clause” to rewrite the statute to address the constitutional infirmities caused by that interpretation. This would be an anomalous approach to statutory construction, to say the least.

When two plausible interpretations of a statute present themselves, the Court typically avoids the interpretation that raises constitutional concerns. *Clark*, 543 U.S. at 381. This practice rests “on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts.” *Id.* The canon of constitutional avoidance is thus a “means of giving effect to congressional intent.” *Id.* at 382. Plaintiffs’ invocation of FISA’s sav-

ings clause inverts this congressional deference, by requiring the Court to embrace a constitutionally perilous interpretation of a statute over the alternative interpretation that raises no such concerns.

Plaintiffs would also have the Court rewrite Section 1806(f) to save the statute from this self-inflicted constitutional infirmity. But this is not “how the canon of constitutional avoidance works. Spotting a constitutional issue does not give a court the authority to rewrite a statute as it pleases.” *Jennings v. Rodriguez*, 138 S. Ct. 830, 843 (2018). Rather, the Court’s role is to interpret, not rewrite, federal statutes. *United States v. Oakland Cannabis Buyers’ Co-op.*, 532 U.S. 483, 495 (2001) (“federal courts interpret, rather than author [federal statutes and are] not at liberty to rewrite [them]”). The Court should thus reject Plaintiffs’ suggestion that FISA’s so-called savings clause is a freestanding license for courts to rewrite any problematic passages in the statute.³

³ Although their brief teems with citations to legislative history, Plaintiffs identify none supporting their suggestion that Congress intended Section 1806(g) to authorize judicial revision of FISA to “save” it from constitutional infirmity. To the contrary, the legislative history reveals that Congress selected the quoted language—“in accordance with the requirements of law”—out of deference to the Court’s decision in *Alderman v. United States*, 394 U.S. 165, 182 (1969). See S. Rep. No. 95-604, at n. 68 (1977); see also S. Rep. No. 95-701, at 65 (1978). *Alderman* concerned a criminal defendant’s right to access surveillance records, after the surveillance had been determined illegal, to facilitate a motion to suppress the fruits of that unlawful surveillance. The case had nothing to do with the Seventh Amendment or a defendant’s right to a jury trial.

In short, Plaintiffs’ eleventh-hour invocation of FISA’s supposed savings clause turns statutory construction on its ear. It requires the Court to embrace a constitutionally perilous interpretation of the statute when the canon of constitutional avoidance counsels exactly the opposite. And it requires the Court to rewrite the law to mitigate the consequences of that interpretation, a task more suited to Congress. Rather than embark on this convoluted process, the Court would better fulfill Congress’s intent by adopting a statutory construction that avoids constitutional doubt in the first instance.

IV. Amici’s suggestion that the Seventh Amendment should “yield” only underscores the need for constitutional avoidance.

Only two amici, the Project for Privacy & Surveillance Accountability (PPSA) and the Constitutional Law Professors, address the Seventh Amendment. Although these amici acknowledge that the decision below raises grave Seventh Amendment concerns, they posit that the “Seventh Amendment right to a jury trial must yield when a jury would be unable to hear evidence bearing on the national security.” PPSA Amicus Br. 13; Professors’ Amicus Br. 17 n. 5.⁴

In support of this argument, amici quote isolated and out-of-context phrases from the Court’s decisions

⁴ Amici professors also suggest that “the government should bear” any deprivation of rights as the “regrettable” consequence of its state-secrets invocation. *Id.* at 17. The argument overlooks that the decision below jeopardizes the *individual defendants’* Seventh Amendment rights, not those of the government.

that supposedly suggest that courts may craft exceptions to the Seventh Amendment as policy needs dictate. But no decision by the Court has required the Constitution’s jury guarantee to “yield” to some other policy concern. To the contrary, the Court has rejected “policy arguments” offered to limit the jury right, because such “considerations are insufficient to overcome the clear command of the Seventh Amendment.” *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 63 (1989) (quoting *Curtis v. Loether*, 415 U.S. 189, 198 (1974)).

Even if amici could find a case carving a national-security exception out of the Seventh Amendment, that would only reinforce the applicability of constitutional avoidance here. The canon’s primary function is to *avoid*—not embrace—statutory interpretations that collide with the Constitution. *Clark*, 543 U.S. at 381. Amicus thus has it exactly backwards when it suggests that the canon “strongly favors as broad a reading of [FISA] as possible.” PPSA Amicus Br. 16. The canon instead favors a narrow interpretation of FISA that obviates the need for judicially crafted exceptions to the Seventh Amendment. The Court should not pick a fight with the Bill of Rights by aggressively construing FISA when an alternative construction is available.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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