No.

In the Supreme Court of the United States

FEDERAL BUREAU OF INVESTIGATION, ET AL.,
PETITIONERS

v.

YASSIR FAZAGA, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether dismissal of a claim after assertion of the state-secrets privilege requires a district court to adjudicate the merits of the claim using the privileged information where the privileged information is relevant to a defense.

PARTIES TO THE PROCEEDING

Petitioners are the United States of America, the Federal Bureau of Investigation (FBI); Kash Patel, in his official capacity as the Director of the FBI; and Akil Davis, in his official capacity as the Assistant Director of the FBI's Los Angeles Division, each of whom is a defendant in the district court.

Respondents are Yassir Fazaga, Ali Uddin Malik, and Yasser Abdelrahim, each of whom is a plaintiff in the district court; as well as Paul Allen, Kevin Armstrong, Pat Rose, J. Stephen Tidwell, and Barbara Walls, each of whom was a defendant in the district court sued in his or her individual capacity. Although Allen and Armstrong remain defendants, the district court dismissed Rose, Tidwell, and Walls as defendants on remand from the court of appeals. See 7/23/2025 D. Ct. Order.

RELATED PROCEEDINGS

United States District Court (C.D. Cal.):

Fazaga v. *FBI*, No. 8:11-cv-301 (Aug. 14, 2012)

United States Court of Appeals (9th Cir.):

Fazaga v. *FBI*, Nos. 12-56867, 12-56874, and 13-55107 (July 20, 2020) (initial decision)

Fazaga v. *FBI*, Nos. 12-56867, 12-56874, and 13-55107 (Dec. 20, 2024) (decision on remand)

United States Supreme Court:

FBI v. *Fazaga*, No. 20-828 (Apr. 5, 2022)

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the federal parties, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-46a) is reported at 124 F.4th 637. The prior amended panel opinion of the court of appeals (Pet. App. 50a-142a), the order denying rehearing en banc of that opinion (Pet. App. 49a), and opinions regarding the denial of rehearing en banc (Pet. App. 142a-178a) are reported at 965 F.3d 1015. The relevant opinion of the district court (Pet. App. 179a-222a) is reported at 884 F. Supp. 2d 1022.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 2024. A petition for rehearing was denied on May 14, 2025 (Pet. App. 223a-225a). On July 30, 2025,

Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including October 11, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

INTRODUCTION

This case presents a question of surpassing importance about the state-secrets privilege, which "prevent[s] disclosure of information [in litigation] when that disclosure would harm national security interests." *United States* v. *Zubaydah*, 595 U.S. 195, 204 (2022). Ordinarily, when courts determine that the government has properly invoked that privilege and that the privileged information would be central to further litigation, the rule is that the privileged information must be removed from the case and dismissal is required if the suit would risk disclosure of that information. See, *e.g.*, *General Dynamics Corp.* v. *United States*, 563 U.S. 478, 485-489 (2011); *Sakab Saudi Holding Co.* v. *Aljabri*, 58 F.4th 585, 596 (1st Cir 2023).

The Ninth Circuit properly determined that the government appropriately invoked the state-secrets privilege to protect classified information about counterterrorism investigations, and did not dispute that the plaintiffs' core allegations of religious discrimination could not be rebutted without recourse to that privileged material. Yet, rather than dismissing the case, the Ninth Circuit adopted improper and wholly novel procedural requirements that essentially negate the privilege in myriad cases. It held that district courts may dismiss claims that would require the evaluation of privileged state-secret information only if "the *privileged information* * * * establish[es] a legally and factually valid defense" requiring a "judgment against the plaintiff." Pet. App. 30a (emphasis added; citation omitted).

And the court held that the government must submit "specific" information "detailed enough to make 'clear' to the reviewing court that * * * the privileged information clearly shows the defendant's entitlement to judgment." *Id.* at 34a-35a.

That holding, if left undisturbed, risks vitiating the state-secrets privilege in the Ninth Circuit and contravenes the way this Court has long understood the privilege. The privilege exists to *prevent* the privileged information from being used in litigation. *Zubaydah*, 595 U.S. at 199. When a court has determined that the government has properly invoked the privilege, "[t]he privileged information is excluded" from the case for national-security reasons, *General Dynamics*, 563 U.S. at 485—not affirmatively used to adjudicate the merits.

The Ninth Circuit saw no problem with its contrary approach because it directed district courts to conduct merits adjudications with privileged information "*in camera* and *ex parte* to the extent the material is covered by the assertion of the state secrets privilege." Pet. App. 33a. But that process does not solve the problem. As this Court recognized in an earlier iteration of this very case, once a court has determined that the government has properly invoked the state-secrets privilege, the privilege "preclude[s] even *in camera*, *ex parte* review of the [privileged] evidence." *FBI* v. *Fazaga*, 595 U.S. 344, 358-359 (2022). "[C]ourt[s] 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." *United States* v. *Reynolds*, 345 U.S. 1, 10 (1953).

The inherent national-security risks stemming from such adjudications are so significant that this Court has already intervened once in this case to reject the Ninth

Circuit's attempt to require materially similar *in camera* review procedures of the same state-secrets-privileged information under the guise of inapplicable procedures in 50 U.S.C. 1806(f). See *Fazaga*, *supra*. After this Court unanimously reversed that theory, see *ibid.*, the Ninth Circuit on remand has again reached that same outcome, now by superimposing materially similar procedures onto the state-secrets doctrine itself.

That decision, like its predecessor, threatens significant and recurring national-security harm that would ordinarily again warrant certiorari. However, this Court may alternatively wish to grant, vacate, and remand (GVR) this case and instruct the district court to assess material intervening factual developments. After the court of appeals issued its mandate, the sole source for respondents' core allegations—Craig Monteilh, the former FBI confidential informant who previously claimed to have performed surveillance activities by targeting Muslims solely based on their religion—recanted. He now represents that his declarations are materially false; that respondents' counsel knew the allegations were false; and that the FBI's counterterrorism investigations did "not 'target' the Muslim community" (as he claimed) but, instead, "lawfully followed specific evidence" to "investigat[e] some members." Pet. App. 483a; see *id.* at 452a, 461a-463a. The district court has nevertheless repeatedly declined the government's request to investigate Monteilh's recantation promptly, citing this Court's consideration of this petition. *Id.* at 438a-441a. Thus, the Court may wish to GVR with instructions to direct the district court to investigate that intervening development. Either way—whether because the Ninth Circuit's untenable legal ruling warrants review, or be-

cause it rests upon untenably flawed factual foundations —the decision below should not stand.

STATEMENT

A. Respondents' Complaint

Plaintiff-respondents (respondents) are three members of Muslim communities in Southern California who, in 2011, filed this putative class action against petitioners —the United States, the FBI, and two FBI officials in their official capacities—and five FBI agents (agent respondents) in their individual capacities. Pet. App. 183a-184a, 189a.[1] As respondents explain in the first sentence of their complaint, "[t]his case concerns an FBI-paid agent provocateur"—Craig Monteilh—who allegedly "infiltrated several mainstream mosques in Southern California, based on the FBI's [purported] instructions that he gather information on Muslims." *Id.* at 261a, 281a.

In 2009, during a federal prosecution, the FBI disclosed limited information about Monteilh's activities from 2006 to 2007 as an FBI confidential informant in "a group of counterterrorism investigations" named "Operation Flex." Pet. App. 248a-249a & n.3. Monteilh then "provided numerous statements to the media discussing his purported activities on behalf of the FBI." *Id.* at 250a. The FBI has neither confirmed nor denied his public allegations, *ibid.*, but "[Monteilh's] own statements" have been "reported widely," *id.* at 262a.

In 2010, Monteilh assisted in preparing respondents' case by executing a declaration (Pet. App. 354a-387a) that purports to describe orders and instructions that his FBI handlers gave him, information the agents told

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[1] The agent respondents are separately represented by private counsel at governmental expense.

him, and his activities during Operation Flex. See *id.* at 356a-385a. Later in 2010, Monteilh executed three additional declarations, each purporting to provide information specific to each respondent. See *id.* at 388a-392a (Fazaga), 393a-399a (Malik), 400a-405a (AbdelRahim).

The allegations in respondents' amended complaint (Pet. App. 261a-352a) track Monteilh's declarations. Respondents allege that the FBI in Operation Flex engaged in a "dragnet investigation" that, from 2006 to 2007, "used [Monteilh] to collect personal information on hundreds and perhaps thousands of innocent Muslim Americans" and to obtain "hundreds of hours of video recordings" of their activities and "thousands of hours of audio recording of [their] conversations." *Id.* at 262a; see *id.* at 292a; see also *id.* at 281a-283a, 306a-307a, 311a-312a. According to the complaint, "[t]he central feature of the FBI agents' instructions to Monteilh was their directive that he gather information on Muslims, without any further specification." *Id.* at 292a. Monteilh's FBI-agent handlers allegedly "repeatedly made clear that they were interested simply in Muslims" and "did not limit Monteilh to specific targets." *Ibid.*; see *id.* at 299a-302a. Those purported instructions allegedly "ensured that the surveillance tools [that the agents provided Monteilh] would target people solely due to their religion." *Id.* at 292a. The complaint emphasizes that "Monteilh himself confirms many of the [complaint's] details." *Id.* at 316a; see, *e.g.*, *id.* at 360a-362a, 370a (targeting allegations in Monteilh's first declaration).

Respondents allege 11 causes of action "fall[ing] into two categories: claims alleging [unlawful] searches ('search claims') and claims alleging unlawful discrimination on the basis of, or burdens on, or abridgement of the rights to, religion ('religion claims')." Pet. App. 59a.

The two "search claims" allege searches purportedly violating (1) the Fourth Amendment and (2) provisions in the Foreign Intelligence Surveillance Act of 1978 (FISA), 50 U.S.C. 1801 *et seq*. See Pet. App. 63a-65a, 340a. The nine "religion claims" allege constitutional and statutory violations, all predicated on respondents' "factual" "allegation that they were targeted for surveillance solely because of their religion." *Id*. at 117a & n.38; see *id*. at 334a-339a, 341a-342a.

B. District Court Proceedings

1. Then-Attorney General Holder submitted a declaration (Pet. App. 226a-233a) formally invoking the state-secrets privilege over information that could tend to: (1) confirm or deny whether a particular individual was the "subject" of "an FBI counterterrorism investigation, including in Operation Flex"; (2) reveal "the initial reasons (*i.e.*, predicate)" for, information obtained during, and the status and results of an FBI counterterrorism investigation of a particular person; and (3) reveal whether particular "sources and methods" were used in a counterterrorism investigation of a particular subject. *Id*. at 228a.

The government supported that privilege invocation with a public FBI declaration (Pet. App. 241a-260a) and "comprehensive and detailed" classified declarations (*id*. at 208a) explaining why disclosure of each category of information could reasonably be expected to cause significant harm to the national security. See *id*. at 227a-228a, 245a, 259a-260a.

The FBI's public declaration states that the "group of counterterrorism investigations" named "Operation Flex" was "directed at detecting and preventing possible terrorist attacks." Pet. App. 249a. The declaration disputes that indiscriminate dragnet surveillance oc-

curred, stating that Operation Flex "focused on fewer than 25 individuals" with the goal of determining whether "particular individuals" were involved in "recruit[ing] and training" others for "terrorist activity." *Ibid.* The declaration explains that each counterterrorism investigation could be initiated only based on information indicating a "threat to the national security" and, if initiated, "the grounds for the investigation" had to be reported to FBI Headquarters, which had to report the investigation to the Department of Justice (DOJ). *Id.* at 253a-254a & n.5. The declaration states that every investigation of "Operation Flex subjects" was "opened with supervisory authority" and was "subject to internal FBI and DOJ oversight." *Id.* at 255a.

The FBI declaration, like the Attorney General's (Pet. App. 228a-232a), explains that national-security considerations preclude disclosure of more specific information about the actual subjects of, reasons for, or sources or methods used in Operation Flex or other FBI counterterrorism investigations. *Id.* at 250a-259a.

2. The government moved to dismiss respondents' religion claims—but not their search claims—under the state-secrets doctrine. D. Ct. Doc. 55, at 3, 21-23, 54-69 (Nov. 4, 2011). It argued that the religion claims should be dismissed because they turn on "one issue"—whether FBI counterterrorism investigations were "based solely on [respondents'] religion"—and "litigating [respondents'] allegations of an indiscriminate investigation based solely on religion would risk or require the disclosure of properly privileged information." *Id.* at 22.

Respondents opposed, arguing that they "need[ed] no discovery" to "establish a *prima facie* case that Defendants surveilled them because of their religion." D. Ct. Doc. 64, at 34 (Dec. 23, 2011). Respondents cited

only one source supporting that assertion: Monteilh's declarations. *Ibid.* The district court observed that "the heart and soul of [respondents'] allegations are Mr. Monteilh," who was "saying some pretty outrageous things" about "what the FBI did and what his handlers were telling him to do." 8/14/2012 Hr'g Tr. 56.

3. After "careful[ly] review[ing]" the government's public and classified submissions (Pet. App. 208a, 221a), the district court dismissed all of respondents' claims except the claim against the agent respondents alleging searches that violated FISA. *Id.* at 179a-222a (state secrets); 885 F. Supp. 2d 978, 982-987 (2012) (FISA claim).[2]

The district court upheld the state-secrets privilege invocation because disclosure of the identified information "would significantly compromise national security." Pet. App. 208a; see *id.* at 208a-213a. The court further determined that the privilege required dismissal of respondents' religion and Fourth Amendment search claims. *Id.* at 201a; see *id.* at 213a-220a. It concluded that "dismissal at this stage of the proceeding" was necessary because "litigation of this action would certainly require or, at the very least, greatly risk disclosure of secret information." *Id.* at 208a. It explained that "the Government will inevitably need the privileged information to defend against [respondents'] core allegation" of "an indiscriminate 'dragnet' investigation" "based on their religion" and that the information would be "essential" to a "full and effective *defense* against [respondents'] claims—namely, showing that"

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[2] The court of appeals later affirmed or directed the dismissal of all claims against the agent respondents on other grounds, Pet. App. 7a-12a, 63a-82a, 118a-131a, except for the FISA search claim against Agents Allen and Armstrong, *id.* at 79a-82a, which remains pending.

the FBI's investigations "were properly predicated and focused." *Id.* at 208a-209a, 216a.

C. This Court's Reversal Of The Initial Ninth Circuit Decision

The Ninth Circuit reversed in relevant part and remanded. Pet. App. 50a-142a. As relevant here, the court reversed the dismissal of respondents' religion claims, *id.* at 91a-111a, reasoning that the procedures in a FISA provision—50 U.S.C. 1806(f)—displace a state-secrets dismissal remedy as to alleged electronic surveillance governed by FISA. Pet. App. 92a; see *id.* at 91a-100a. The court determined that Section 1806(f) requires a district court to "decide the lawfulness of [such] surveillance" by conducting an "*in camera* and *ex parte* review" to adjudicate its legality using the "evidence that threatens national security." *Id.* at 95a-96a; see *id.* at 136a-137a. The court accordingly directed the district court to "review [under Section 1806(f)] 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." *Id.* at 136a-137a (internal citation omitted).[3]

This Court unanimously reversed and remanded, holding that "§ 1806(f) does not displace the state secrets privilege." *FBI* v. *Fazaga*, 595 U.S. 344, 355 (2022).

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[3] The court of appeals reversed the dismissal of respondents' Fourth Amendment search claim because the government had not sought dismissal of that claim on state-secrets grounds. Pet. App. 87a-91a. It did not disturb the dismissal of the FISA search claim against petitioners, *id.* at 61a, and affirmed the dismissal of one religion claim against petitioners (a Privacy Act claim) on alternative grounds, *id.* at 131a-133a. Cf. *id.* at 118a, 131a, 133a-136a.

D. The Ninth Circuit's Remand Decision

On remand, the Ninth Circuit again reversed in relevant part and remanded, Pet. App. 1a-46a, directing the district court to address the religion claims by using privileged state-secrets evidence to adjudicate whether the privileged evidence shows that petitioners have a "valid defense" on which they are entitled to judgment. *Id.* at 25a-38a.

The court of appeals affirmed the district court's determination that the government properly invoked the state-secrets privilege. Pet. App. 3a-4a, 15a-18a. It recognized that "[t]he national security concerns in this case are serious." *Id.* at 45a. It concluded that, while some privileged information potentially "need [not] remain secret today" due to the passage of time, "the disclosure of at least some information within the three identified categories would seriously harm legitimate national interests and so is privileged." *Id.* at 18a, 44a.[4] And the Ninth Circuit observed that a claim should be dismissed if a "'plaintiff cannot prove the *prima facie* elements of her claim with nonprivileged evidence.'" *Id.* at 19a n.8 (citation omitted).

Nonetheless, the Ninth Circuit held, such a dismissal "is not at issue in this case," Pet. App. 19a n.8 (citation omitted), by reasoning that evidence supplied by Mon-

[4] In 2022, the government informed the Ninth Circuit that it had determined, consistent with an updated DOJ state-secrets-privilege policy, that its privilege invocation and dismissal of the religion claims remained necessary to protect the national security. Pet. App. 16a n.6. The government has reviewed this case in connection with this petition under that policy and has again determined that the privilege assertion and dismissal of the religion claims remain appropriate and necessary to protect the national security.

teilh would likely be sufficient to establish a prima facie case. *Id.* at 5a, 36a-37a, 41a-42a.

The Ninth Circuit then considered and rejected the notion that other circumstances "requir[ed] dismissal" under the state-secrets doctrine. Pet. App. 19a; see *id.* at 18a-44a. The court acknowledged that dismissal is warranted when the privilege deprives the defendant of a valid defense, *id.* at 19a, which the court defined as "one that 'is meritorious and not merely plausible and would *require* judgment for the defendant." *Id.* at 25a-27a (quoting *id.* at 140a). The court stated that the rationale for a valid-defense dismissal is to "protect[] against the unfairness that would result" from forcing abandonment of a defense where privileged evidence is "factually and legally sufficient to establish" that the defense is "actually meritorious." *Id.* at 30a.

The court of appeals thus concluded that, to justify dismissal, "the government must be prepared to disclose to the court the specific information that establishes its defense" in submissions "detailed enough to make 'clear'" that dismissal is required "because the privileged information clearly shows the defendant's entitlement to judgment." Pet. App. 34a-35a (citation omitted). And the district court must "make 'factual judgments' and consider potentially disputed issues of material fact" by "review[ing] the defendant's evidence" —"*in camera* and *ex parte* to the extent the material is covered by the assertion of the state secrets privilege" —and weighing it against a plaintiff's evidence. *Id.* at 32a-34a (citations omitted). The court then remanded because the district court had not "conducted the detailed and fact-intensive inquiry" required by the court of appeals' "unorthodox" procedure, *id.* at 35a, 37a.

E. Post-Mandate Events

1. After the Ninth Circuit issued its mandate on May 22, 2025, Monteilh emailed a series of statements to petitioners' and respondents' counsel in which he recanted his representations on which respondents built their case. See Pet. App. 442a-443a, 467a. Monteilh authenticated under oath his first three statements (*id.* at 445a-453a, 455a-459a, 461a-465a) when he appeared unexpectedly during a district court hearing, *id.* at 420a, 426a, 429a-431a. Monteilh then used his same email address (*id.* at 466a) to send counsel three additional statements (*id.* at 469a-484a).

Monteilh now represents that he "orchestrated" this lawsuit and "worked together" with respondents' counsel to extract his "revenge against the FBI" for allowing his arrest and incarceration shortly after his activity in Operation Flex ended. Pet. App. 445a-447a, 464a-465a. Monteilh considers this case "a victory for [him]"; touts his role as the "architect of a lawsuit that has reached the *United States Supreme Court*"; disclaims "car[ing] about the wasted time of the District Court, the 9th Circuit," and this Court; and observes that the "government is faced with * * * petitioning [this Court]" yet again. *Id.* at 448a, 453a.

Monteilh now states that he and respondents' counsel "made up" "[m]ost of the information" in his declarations; that the information is "50-60% lies" or "half truths"; and that counsel "knowingly assisted in the submission of false declarations." Pet. App. 452a, 462a-463a. He adds that the government in 2012 correctly described his declarations in district court when arguing that it would "not [be] possible" to untangle "'the truths, half truths and falsehoods' in Monteilh's statements * * * without wading into sensitive, privileged in-

formation." *Id.* at 461a-462; see 8/14/2012 Hr'g Tr. 56. He further states that respondents' portrayal of "Operation Flex as an illegal and unconstitutional operation that trampled on the civil rights of Muslim Americans" is "the furthest from the truth," Pet. App. 476a. He represents that "Operation Flex did not 'target' the Muslim community" but instead "lawfully followed specific evidence" to "investigat[e] some members." *Id.* at 483a. Monteilh "would willingly cooperate with a prompt investigation into [his] contentions." *Id.* at 453a, 462a.

2. In light of Monteilh's post-mandate recantation, the government asked to initiate a "prompt investigation of Mr. Monteilh's contentions" in district court by moving to strike his declarations supporting respondents' claims. D. Ct. Doc. 193, at 4-6 (July 10, 2025). The district court, however, granted respondents' request to stay the proceedings "pending the government's decision to seek Supreme Court review of the Ninth Circuit's decision." Pet. App. 438a. It reasoned that waiting would be more "efficient" because the case "may be taken up by the Supreme Court and drastically changed," *id.* at 437a; see *id.* at 416a. The government renewed its request, explaining that Monteilh's "now-recanted statements are the *sole* evidence supporting certain key facets of [respondents'] prima facie case"; "serious national security and constitutional issues have [already] been adjudicated on the basis of statements Mr. Monteilh now disclaims"; and the "[Supreme] Court should not be required to potentially take on consideration of [such] weighty" issues "if it turns out that the foundation for [respondents'] case was intentionally fabricated." D. Ct. Doc. 203, at 5, 7-8 (Aug. 14, 2025). The court maintained its stay. Pet. App. 440a.

REASONS FOR GRANTING THE PETITION

This case presents exceptionally important questions meriting review. The Ninth Circuit's decision directing merits adjudications using sensitive evidence about matters of national security that the state-secrets privilege protects from use in litigation is fundamentally wrong and risks substantial, recurring national-security harms. This Court may alternatively wish to grant, vacate, and remand, because Monteilh's post-mandate recantation is a significant intervening event that fundamentally changes the factual landscape. The government twice attempted to address Monteilh's recantation promptly in district court, but the court declined to do so, concluding that this Court should first determine whether to grant review. If this Court were to grant certiorari, vacate the judgment of the court of appeals, and remand, it should require that the district court conduct further proceedings regarding the recantation and then revisit the state-secrets issues.

I. THE COURT OF APPEALS' DECISION IS FUNDAMENTALLY ERRONEOUS AND WARRANTS REVIEW

A. The Ninth Circuit's Decision Is Seriously Flawed

Under the state-secrets doctrine, privileged information is entirely removed from the case because its use in litigation would risk harm to the national security. The removal of that information and the need to ensure that further litigation does not jeopardize the secrecy that the privilege is meant to protect will sometimes require that a claim implicating state secrets must be dismissed because it cannot be fairly adjudicated in a manner consistent with national-security interests. The Ninth Circuit's decision cannot be squared with those fundamental principles underlying the privilege.

1. "[P]rotecting our national security sometimes requires keeping information about our military, intelligence, and diplomatic efforts secret." *General Dynamics Corp.* v. *United States*, 563 U.S. 478, 484 (2011). The state-secrets privilege thus "allow[s] the Government to bar the disclosure [in litigation] of information that, were it revealed, would harm national security." *United States* v. *Zubaydah*, 595 U.S. 195, 199 (2022). That privilege is both "well established in the law of evidence" and rooted in our "constitutional system." See *United States* v. *Reynolds*, 345 U.S. 1, 6-7 & n.9 (1953). The privilege respects the President's "Art[icle] II duties" to protect the national security and conduct foreign affairs, which include the duty to safeguard national-security "secrets." *United States* v. *Nixon*, 418 U.S. 683, 710-711 (1974); accord *Zubaydah*, 595 U.S. at 229 (Thomas, J., concurring in part and concurring in the judgment); Pet. App. 152a-154a, 157a-163a (Bumatay, J., dissenting from the 2020 denial of rehearing en banc).

The contours of the process for invoking the privilege are well-established. "[T]he Government must submit to the court a 'formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer.'" *Zubaydah*, 595 U.S. at 205 (quoting *Reynolds*, 345 U.S. at 7-8). Further, "the Government bears the burden of showing that the privilege should apply" by "adequately establish[ing] 'that there is a reasonable danger that compulsion of the evidence [at issue] will expose . . . matters which, in the interest of national security, should not be divulged.'" *Id.* at 209 (quoting *Reynolds*, 345 U.S. at 10) (brackets in original). The government need not provide "a complete disclosure to the judge before the claim of privilege will be accepted"; it must

simply "satisfy the court, from all the circumstances of the case," that supplying the information in litigation would pose a reasonable risk of exposing sensitive national-security information. *Reynolds*, 345 U.S. at 10.

Where—as here (Pet. App. 18a, 208a)—the government has "satisf[ied] the court" that a "reasonable danger" to the national security justifies its privilege invocation, this Court has emphasized that "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." *Reynolds*, 345 U.S. at 10. Instead, "once the court determines that the requested information falls within the state secrets privilege," "[t]he privilege is absolute": "'[E]ven the most compelling necessity' cannot overcome the privilege." *Zubaydah*, 595 U.S. at 233 (Kavanaugh, J., concurring in part) (quoting *Reynolds*, 345 U.S. at 11); see *id.* at 205 (majority opinion). The privilege "completely excis[es] the privileged material from the case." *Sakab Saudi Holding Co.* v. *Aljabri*, 58 F.4th 585, 596 (1st Cir. 2023) (*Aljabri*).

Because of that excision, the state-secrets privilege also "sometimes authorizes district courts to dismiss claims on the pleadings." *FBI* v. *Fazaga*, 595 U.S. 344, 357 (2022); see *Reynolds*, 345 U.S. at 11 n.26. That is because "[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." *Tenet* v. *Doe*, 544 U.S. 1, 8 (2005) (quoting *Totten* v. *United States*, 92 U.S. 105, 107 (1876)). "[I]f a proceeding involving state secrets can be fairly litigated without resort to the privileged information, it may continue." *Aljabri*, 58 F.4th at 596 (citation omitted). But if not, "dismissal is not only ap-

propriate, but necessary." *Ibid.* (citation omitted); see *Zubaydah*, 595 U.S. at 230 n.5 (Thomas, J., concurring in part and concurring in the judgment) ("[D]ismissal of the action is required whenever the case cannot be fairly litigated without the disclosure of state secrets."). "The standard is that dismissal is required when any attempt to proceed would risk or require disclosure of privileged information," and the court's task is therefore to "examine the nature of the privileged information and its centrality to the anticipated litigation as a whole, then weigh the risk of disclosure if that litigation proceeds." *Aljabri*, 58 F.4th at 601 n.13. For instance, dismissal is warranted where (1) "a plaintiff cannot prove the prima facie elements of a claim without the use of privileged evidence"; (2) even if the plaintiff could establish a prima facie case, "'the defendants could not properly defend themselves without using privileged evidence'"; and (3) "any 'further litigation would present an unjustifiable risk of disclosure.'" *Id.* at 596 (citation omitted); see, *e.g.*, *Abilt* v. *CIA*, 848 F.3d 305, 313-314 (4th Cir. 2017).

2. The Ninth Circuit's ruling upends those basic tenets of the state-secrets doctrine. The court below held that a court may dismiss a claim on the ground that a defense to the claim would rely on privileged state-secret information only if "the *privileged information* * * * establish[es] a legally and factually valid defense" requiring "judgment against the plaintiff." Pet. App. 30a (emphasis added). The court then held that the government must submit "specific information" "detailed enough to make 'clear' to the reviewing court that * * * the *privileged information* clearly shows the defendant's entitlement to judgment." *Id.* at 34a-35a (emphasis added; citation omitted). The Ninth Circuit thus instructed that the district court "review the privileged

information *in camera* and consider, based on the submissions from each party, whether the privileged information establishes a valid defense and so requires dismissing [respondents'] claims." *Id.* at 38a. That holding destroys the very purpose of the privilege: to prevent the privileged information from being used in litigation.

The state-secrets privilege is designed to "allow[] the Government to *bar* the disclosure of information that, were it revealed, would harm national security." *Zubaydah*, 595 U.S. at 199 (emphasis added). That is why "[t]he privileged information is excluded" from the case, *General Dynamics*, 563 U.S. at 485, not affirmatively used to conduct merits adjudications. See p. 17, *supra*. Excising privileged information is essential to guard against the risk that "compulsion of the evidence [as issue] will expose . . . matters which, in the interest of national security, should not be divulged." *Zubaydah*, 595 U.S. at 209 (quoting *Reynolds*, 345 U.S. at 10) (brackets in original).

The Ninth Circuit apparently thought that its process of adjudicating the merits—under which district courts must weigh a defendant's evidence against a plaintiff's and then resolve "any disputes or inconsistencies" to reach "'factual judgments'" on "disputed issues of material fact"—was appropriate because courts must "review[] the defendant's evidence[] *in camera* and *ex parte* to the extent the material is covered by the assertion of the state secrets privilege." Pet. App. 32a-34a (citation omitted). But as this Court made clear in this very case, once a court upholds the government's privilege invocation on "'national security'" grounds, the privilege "preclude[s] even *in camera*, *ex parte* review of the relevant evidence." *Fazaga*, 595 U.S. at 358-

359 (quoting *Reynolds*, 345 U.S. at 10); see *Zubaydah*, 595 U.S. at 233 (Kavanaugh, J., concurring in part).

Indeed, this Court has long made clear that if a court is satisfied "from all the circumstances of the case" that evidence is protected by the privilege, "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." *Reynolds*, 345 U.S. at 10. Such review "poses a very real national security threat." *Zubaydah*, 595 U.S. at 223 (Thomas, J., concurring in part and concurring in the judgment). Courts of appeals have thus long understood that "[i]t is not to slight judges" or anyone else to recognize that "any such [*ex parte*, *in camera*] disclosure carries with it serious risk that highly sensitive information may be compromised." *Ellsberg* v. *Mitchell*, 709 F.2d 51, 57 n.31 (D.C. Cir. 1983) (citations omitted), cert. denied, 465 U.S. 1038 (1984); see *Sterling* v. *Tenet*, 416 F.3d 338, 344 (4th Cir. 2005) ("Courts are not required to play with fire and chance further disclosure—inadvertent, mistaken, or even intentional—that would defeat the very purpose for which the privilege exists."), cert. denied, 546 U.S. 1093 (2006).

The Ninth Circuit required the adjudication of a defense using privileged information because it viewed the "rationale[] for the 'valid defense' ground for dismissal" as "not linked to the generalized risk that privileged information might be disclosed if the litigation moves forward." Pet. App. 30a. That conclusion borders on the absurd. As this Court explained in this case, "the central question" when the state-secrets privilege is invoked is whether the disclosure of "the evidence in question * * * would harm national-security interests." *Fazaga*, 595 U.S. at 357-358. And as discussed, it is well

settled that *after* a court has been satisfied that the government has properly invoked the privilege, "the court should not jeopardize *the security which the privilege is meant to protect* by insisting upon an examination of the evidence." *Reynolds*, 345 U.S. at 10 (emphasis added). The obvious need to focus on the national-security risks posed by disclosing privileged information in litigation does not change when the information may be described as relevant to a defense. The privilege and the national-security interests it protects are independent of the issues, claims, or defenses presented in a particular case, or indeed whether the government is a party to the underlying dispute at all.

3. a. The Court's decision *General Dynamics* illustrates these points. There, the Court addressed a suit by defense contractors challenging the military's decision to terminate a stealth-aircraft-development contract for default and to demand repayment of certain progress payments. 563 U.S. at 481. The contractors asserted as their defense that any default was excused by the government's failure to share its superior knowledge about stealth aircraft, and the government asserted the state-secrets privilege to protect various classified aspects of stealth technology. *Id.* at 481-482. The Court first determined that "[t]he privileged information is excluded" from the case. *Id.* at 485. As a result, the Court concluded that the superior-knowledge defense was "nonjusticiable" because the necessity of keeping the privileged information out of the case prevented a "full litigation of that defense" and because adjudicating it would intolerably "risk the 'potential injustice' of [courts] misjudging the superior-knowledge issue based on a distorted evidentiary record." *Id.* at 486, 488-489 (internal citation omitted). The Court then further held that the

lower courts could not properly adjudicate the claim that the contractors had defaulted, explaining that "[i]t is claims and defenses *together* that establish the justification, or lack of justification, for judicial relief." *Id.* at 487. In such circumstances, the case was "nonjusticiable" because "too many of the relevant facts remain[ed] obscured by the state-secrets privilege to enable a reliable judgment." *Id.* at 489, 492.

Applying similar reasoning, the Sixth Circuit held that religious-discrimination claims materially analogous to those here had to be dismissed. In *Tenenbaum* v. *Simonini*, Tenenbaum alleged that the government had "conducted a criminal espionage investigation of [him] solely because he is Jewish." 372 F.3d 776, 777 (6th Cir.), cert. denied, 543 U.S. 1000 (2004). The Sixth Circuit determined that the district court had "properly dismissed the [religion] claims," citing this Court's instruction that "[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." *Id.* at 777 (quoting *Totten*, 92 U.S. at 107). The court reasoned that dismissal was required because the defendants could not "defend their conduct with respect to Tenenbaum without revealing the privileged information," *ibid.*, without suggesting that the defense, if litigated, would require judgment for the defendants.

b. Under those principles, the Ninth Circuit should have affirmed the dismissal of respondents' religion claims, which rest on their "core allegation" that "they were targeted for surveillance solely because of their religion," Pet. App. 39a, 117a & n.38. That core question cannot be fully and fairly adjudicated without information that the Ninth Circuit agreed was privileged:

the government's actual reasons for, and the scope of, the investigations, including who was investigated, why, and how.

The government has already explained in the FBI's public declaration that governing policies prohibited counterterrorism investigations—including those in Operation Flex—from being based solely on religion, and that the initiation of every investigation in Operation Flex was subject to internal oversight. Pet. App. 244a-245a, 253a-255a. Moreover, whereas respondents allege indiscriminate dragnet surveillance targeting Muslims generally, the declaration explains that Operation Flex "focused on fewer than 25 individuals" in order to determine whether "*particular individuals*" were "involved in the recruitment and training" of others for "terrorist activity." *Id.* at 249a (emphasis added); see pp. 7-8, *supra*. But because the state-secrets privilege properly protects additional details—such as the identity of the actual subjects of those investigations or the FBI's reasons for its counterterrorism investigations—the government cannot fully and fairly defend against the core factual allegation for respondents' religion claims. Dismissal should have followed.

B. The Ninth Circuit's Decision Warrants Further Review

The Ninth Circuit's deeply flawed decision significantly curtails the Executive Branch's authority to safeguard the national security and raises exceptionally important questions warranting this Court's review.

The decision poses a serious risk of depriving the government of a vital tool to prevent the disclosure of state secrets by demanding that the government affirmatively use privileged information to adjudicate the merits of claims to which the information pertains. And despite declaring that the "[t]he 'valid defense' ground

for dismissal" protects the "public interest in safeguarding [national-security] information" by ensuring that the government is not forced "to choose between waiving the state secrets privilege to assert a defense [with the privileged information] and keeping the privileged information private by abandoning [its] defense," Pet. App. 28a-29a (emphasis omitted), its decision effectively does exactly that by requiring that the privileged evidence be used to adjudicate the merits of the defense or the case will proceed notwithstanding that defense. Perversely, it is the government's own invocation of the privilege to protect the national-security information relevant to a claim that forces the government either to endanger the national security by participating in the Ninth Circuit's required process for merits adjudication or to forego its defense to what may be a wholly meritless claim. That situation is intolerable. And it would improvidently expose the government to "graymail"—paying settlements from the public fisc to resolve meritless claims just to safeguard the national security. Cf. *Tenet*, 544 U.S. at 11.

The court of appeals' decision is in some respects even more important than its prior interlocutory decision in this case, which prompted the Court to grant review and unanimously reverse. See *Fazaga*, 595 U.S. at 346. The prior decision demanded the use of evidence protected by the state-secrets privilege to adjudicate the lawfulness of purported surveillance only in the subset of national-security cases implicating "electronic surveillance" governed by FISA. See p. 10, *supra*. Yet after this Court unanimously reversed that decision, the Ninth Circuit has again determined (this time without any arguable statutory support) that a merits adjudication—again using the privileged evidence—is

required in *any state-secrets case* in which privileged information supports a defense in order to dismiss on the ground that the privilege prevents the assertion of that defense. That shuffling of doctrinal deck chairs to justify the court's continuing requirement that the government litigate the merits of cases with state secrets does nothing to diminish that procedure's fundamental and dangerous deficiencies.

The possibility that the government might be able to secure dismissal of claims when a plaintiff cannot establish their prima facie elements without recourse to privileged evidence does not eliminate the dangers inherent in the Ninth Circuit's approach. Even when all parties litigate in good faith, the plaintiffs in some suits will be able to marshal evidence to establish a sufficient circumstantial case for their claims. And as this case illustrates, the possibility that false and deliberately misleading evidentiary submissions supporting such claims will force a merits litigation using state-secrets evidence to mount a defense puts the government and the Nation's security in an untenable position. Cf. pp. 13-14, *supra* (discussing Monteilh's recantation).

II. THE COURT SHOULD ALTERNATIVELY GRANT, VACATE, AND REMAND DUE TO INTERVENING EVENTS

Ordinarily, given the stakes involved in the proper application of the state-secrets privilege, the proper course would be to grant certiorari to review the Ninth Circuit's decision. But after the court of appeals issued its mandate, the source for respondents' key allegations —Craig Monteilh—recanted his prior assertions of religion-based targeting. See pp. 13-14, *supra*. Given that significant intervening event, this Court may alternatively wish to grant certiorari, vacate the court of appeals' judgment, and remand with specific instructions

that the court of appeals remand to the district court to reconsider the state-secrets issues in light of Monteilh's recantation.

A. Monteilh is "[c]entral to [respondents'] case," Pet. App. 5a, and, as the district court recognized, the "heart and soul of [respondents'] allegations are Mr. Monteilh," 8/14/2012 Hr'g Tr. 56. See pp. 5-7, 8-9, *supra*. With respect to respondents' "core allegation" for their religion claims—*i.e.*, that respondents "were targeted for surveillance solely because of their religion," Pet. App. 39a, 117a & n.38—Monteilh is the *only* person (besides the agent respondents) with personal knowledge about what his FBI-agent handlers told him to do. Without Monteilh's now-recanted testimony, respondents cannot plausibly substantiate their contention that the FBI targeted them through Monteilh "solely because of their religion." *Id.* at 117a.

Monteilh now represents that he "orchestrated" this lawsuit to exact "revenge" on the FBI for allowing him to be arrested and imprisoned after his role in Operation Flex had ended. Pet. App. 446a, 464a-465a. He also states that "the time has come to end this charade." *Id.* at 452a. He avers that his declarations providing the basis for respondents' core allegations were "50-60% lies" or "half truths." *Id.* at 452a, 462a. He declares that respondents' factual contention that the FBI engaged in "a pattern of unlawful surveillance" targeting Muslims is untrue. *Id.* at 482a-483a; see *id.* 476a. And he represents that "the surveillance of Operation Flex did not 'target' the Muslim community" but instead "lawfully followed specific evidence" (*i.e.*, "establish[ed] a predicate") to "investigat[e] some members." *Id.* at 483a. That recantation fatally undermines respondents' religion claims.

B. If the Court does not grant certiorari outright, it should grant, vacate, and remand (GVR) with instructions to remand to the district court to reconsider its rulings in light of these developments. Monteilh's recantation has fundamentally changed the factual posture of this case. The Court has "broad power" to vacate "'any judgment, decree, or order'" of a lower court brought before it for review and to remand for proceedings "'as may be just under the circumstances.'" *Lawrence* v. *Chater*, 516 U.S. 163, 166 (1996) (per curiam) (quoting 28 U.S.C. 2106). The Court has accordingly "GVR'd in light of a wide range of developments," including "changed factual circumstances." *Id.* at 166-167. A GVR is appropriate when (1) supported by "the equities of the case" in circumstances in which (2) "intervening developments" reveal "a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration" and (3) "such a redetermination may determine the ultimate outcome of the litigation." *Id.* at 167-168; accord *Lords Landing Vill. Condo. Council of Unit Owners* v. *Continental Ins. Co.*, 520 U.S. 893, 896 (1997) (per curiam). All three criteria are satisfied here.

First, the equities clearly warrant a GVR. Monteilh's recantation indicates that this case—which has already required this Court's intervention once and again warrants the Court's review—has been litigated since 2011 based on falsehoods, or at a minimum based on allegations from a source that cannot possibly be credited. Rather than devote further resources to resolving significant questions surrounding the state-secrets privilege on the current record—which appears to rest on materially significant misrepresentations—

this Court may wish to return the case to district court. The Court could instruct the district court to redevelop the record in light of Monteilh's recantation and then reconsider the state-secrets issues afresh.

The government twice attempted to investigate Monteilh's recantation promptly below, but the district court —at respondents' prompting—concluded that it would be more efficient to wait to see whether and how this Court will resolve the case on the existing record. See p. 14, *supra*. That course is exactly backwards. It is this Court that should not be asked to resolve the weighty questions here before having the lower courts investigate whether the vehicle presenting those questions has been fabricated though lies.

Second, Monteilh's recantation may well fundamentally alter the Ninth Circuit's legal reasoning. That court concluded that respondents' religion claims could proceed because dismissal was unavailable on the more common ground that their unprivileged evidence would be insufficient to establish the elements of those claims on a prima facie basis. Pet. App. 19a n.8, 37a; see pp. 11-12, *supra*. The court indicated that Monteilh's evidence would likely support respondents' core allegation of religion-based targeting, Pet. App. 5a, 36a-37a, and specifically observed that respondents would likely offer "evidence from Monteilh, a percipient witness, *regarding the government's surveillance instructions*" to him. *Id.* at 37a (emphasis added). It also considered an "early dismissal" unwarranted in the "unusual circumstances of this case" because the government admitted Monteilh's prior "role as a confidential informant" in Operation Flex and "Monteilh ha[d] provided extensive nonclassified declarations" about the investigations. *Id.* at 41a.

Monteilh's recantation severely undercuts that reasoning and would seemingly foreclose respondents' ability to establish a prima facie case for their religion claims through Monteilh. Without the information in Monteilh's now-disclaimed declarations, this case would likely require only a straightforward application of the rule that dismissal is warranted where a plaintiff cannot make a prima facie showing for a claim's key factual allegation—here, respondents' allegation that they were "targeted for surveillance solely because of their religion," Pet. App. 117a & n.38. Cf. *Kiyemba* v. *Obama*, 559 U.S. 131, 131 (2010) (per curiam) (vacating and remanding because a "change in the underlying facts may affect the legal issues presented" and "[n]o court ha[d] yet ruled in th[e] case in light of the new facts").

Third, a redetermination by the courts below may obviate the need to consider the question presented at all. Monteilh's recantation has irreparably undermined his declarations. Striking those declarations would eliminate the evidentiary source that respondents need to support their religion claims and would necessitate dismissal. The Court may thus wish to consider returning this case to district court with instructions to further investigate Monteilh's recantation and to reconsider the relevant state-secrets issues on a record cleaned of misrepresentations attributable to Monteilh.

CONCLUSION

The petition for a writ of certiorari should be granted. At a minimum, the petition should be granted, the judgment of the court of appeals vacated, and the case remanded with instructions to direct the district court to vacate its judgment for petitioners and to conduct fur-

ther proceedings on the state-secrets issues in light of the intervening events discussed in this petition.

Respectfully submitted.

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