No. 25–430

IN THE
Supreme Court of the United States

FEDERAL BUREAU OF INVESTIGATION, ET AL.,
Petitioners,
v.
YASSIR FAZAGA, ET AL.,
Respondents.

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

BRIEF OF RESPONDENTS PAUL ALLEN AND KEVIN ARMSTRONG IN SUPPORT 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 her official capacity as the Assistant Director of the FBI's Los Angeles Division, each of whom is a defendant in the district court.

The Respondents filing this brief are Paul Allen and Kevin Armstrong, former FBI agents sued in their individual capacities in the district court. The other Respondents are Yassir Fazaga, Ali Uddin Malik, and Yasser Abdelrahim, each a plaintiff in the district court, and Pat Rose, J. Stephen Tidwell, and Barbara Walls, each a defendant in the district court sued in his or her individual capacity, and subsequently dismissed. See 7/23/2025 D. Ct. Order.

RELATED PROCEEDINGS

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

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

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

Fazaga v. *FBI*, No. 12-56867, 12-56874, and 13-55107 (July 20, 2020) (initial decision)

Fazaga v. *FBI*, No. 12-56867, 12-56874, and 13-55107 (Dec. 20, 2024) (decision on remand)

United States Supreme Court:

Fazaga v. *FBI*, No. 20-828 (March 4, 2022)

RULE 12.6 STATEMENT

Pursuant to Rule 12.6, counsel for all parties were timely notified of Respondents Paul Allen and Kevin Armstrong's intent to file this brief.

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INTRODUCTION

As the petition for certiorari explains, when the government properly invokes the state secrets privilege, the privileged information must be removed from the case. The U.S. Court of Appeals for the Ninth Circuit erred by disregarding this rule and instead requiring the district court to consider state secrets evidence *in camera* and *ex parte* to and adjudicate the case's merits. Respondents Paul Allen and Kevin Armstrong agree that the petition should be granted for the reasons urged by the government. They also join in the government's alternative request that the Court grant, vacate, and remand the case to the district court with specific instructions to assess material intervening factual developments.

Allen and Armstrong submit this brief under Rule 12.6 to underscore another reason for review by this Court. By requiring the district court to adjudicate liability in a secret trial on secret evidence, the judgment below threatens the jury trial and due process rights of all individual-capacity defendants in cases involving state secrets. Those consequences confirm the pressing importance of the grave error below.

STATEMENT

Allen and Armstrong join in the petition for certiorari's Statement and offer the following supplemental information concerning the jury and due process arguments raised below.

A. District court proceedings

Allen and Armstrong were FBI agents working on an investigation known as Operation Flex. Pet. App. 4a, 292a. Plaintiffs allege that the FBI placed

surveillance devices in a home, office, and car during that investigation. Pet App. 81a. Asserting that the alleged surveillance violated the Foreign Intelligence Surveillance Act of 1978 (FISA), 50 U.S.C. § 1801, *et seq*., plaintiffs sought monetary damages from Allen and Armstrong in their individual capacities under FISA section 1810.[1] Pet. App. 340a.

The government asserted that certain investigative methods used in Operation Flex, including the alleged placement of surveillance devices, are state secrets. Pet. App. 18a. Allen and Armstrong thus moved to dismiss the FISA claim, arguing that they could not defend themselves without the state secrets evidence. Pet. App. 181a. Although the district court dismissed other claims against Allen and Armstrong on state secrets grounds, it did not dismiss the FISA claim. Pet. App. 52a, 222a.

B. The Ninth Circuit's initial decision

The Ninth Circuit affirmed as to the FISA claim (and reversed as to others), holding that a different provision in FISA, 50 U.S.C. § 1806(f), "overrides . . . the state secrets evidentiary dismissal option." *Fazaga v. FBI*, 916 F.3d 1202, 1231–32 (9th Cir. 2019). Under that section, the court held, the district court must consider the privileged evidence *in camera* and *ex parte*, and on that basis adjudicate the merits of plaintiffs' claims against Allen and Armstrong. *Id*. at 1238.

In a footnote, the court brushed aside as "unpersuasive" Allen and Armstrong's argument that this

[1] Although plaintiffs asserted other claims against Allen and Armstrong, only the FISA claim remains pending. Pet. App. 7a–12a, 63a–82a, 79a–82a, 118a–131a.

procedure would raise grave Seventh Amendment and due process concerns. *Id.* at 1238 n.31. It held that "courts have upheld the constitutionality of the FISA *in camera* and *ex parte* procedures with regard to criminal defendants" and that Allen and Armstrong, as "defendants in a civil suit are not entitled to more stringent protections than criminal defendants." *Id.*

Allen and Armstrong joined the government in seeking rehearing en banc, arguing that using section 1806(f)'s *in camera* and *ex parte* procedures to adjudicate the claims against them would violate their constitutional rights, or at least raise serious constitutional questions about the court's interpretation of the statute. Brief for Respondents Rose, Allen, and Armstrong at 16–17, *FBI* v. *Fazaga*, No. 20-828 (2021). Allen and Armstrong also argued that the Ninth Circuit's cited authorities permit the *in camera* and *ex parte* resolution of evidentiary and discovery disputes, *not* questions of civil liability. *Id.* They thus shed no light on the Seventh Amendment and due process implications of adjudicating the *merits* of civil claims using such procedures. *Id.*

The court of appeals issued an amended opinion that again rejected these concerns. Pet. App. 50a. In an expanded footnote, the decision below reiterated that other courts had approved *in camera* and *ex parte* procedures in criminal cases, without acknowledging that those cases involved evidentiary and discovery disputes, not questions of civil liability. Pet. App. 110a n. 31. The court also revised its treatment of the Seventh Amendment argument, deeming it "premature," because any "hypothetical interference with a jury trial would arise only if a series of contingencies occurred on remand." *Id.* For example, the "district court

might determine that there was no unlawful surveillance after reviewing the evidence under the *in camera*, *ex parte* procedures, or [Allen and Armstrong] may prevail on summary judgment" or on "a strictly legal decision." *Id*. The court held that the Seventh Amendment arguments could be raised on remand if plaintiffs' claims survived those contingencies. *Id*.

C. This Court's reversal and the Ninth Circuit's remand decision

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). This Court did not reach Allen and Armstrong's Seventh Amendment and due process arguments. *Id.* at 351 n. 4 ("we need not discuss those claims or those parties (who are also respondents in this Court and who filed briefs supporting the Government) in order to resolve the question presented").

On remand, the Ninth Circuit again instructed the district court to consider the state secrets evidence *in camera* and *ex parte* to determine whether Allen and Armstrong have a "valid defense." Pet. App. 25a–38a. The court explained that requiring district court judges to take on this "expanded, nontransparent fact-finding role" is "unorthodox," but necessary to prevent "closing the courthouse door to potentially meritorious lawsuits" that turn on state secrets evidence. Pet. App. 35a.

The Ninth Circuit's instruction focused on claims that the government sought to dismiss on state secrets grounds. To be clear, the government did *not* seek dismissal of the FISA claim against Allen and Armstrong. But the government *did* assert that the use of

surveillance devices in Operation Flex is a state secret, and Allen and Armstrong moved to dismiss on that basis. Thus, under the "unorthodox" rule announced below, Allen and Armstrong's FISA liability must be adjudicated by the district court judge hearing the state secret evidence *in camera* and *ex parte*.

REASONS FOR GRANTING THE PETITION

Allen and Armstrong agree that the government's Petition should be granted for the reasons stated. They also join in the government's alternative request that this Court grant, vacate, and remand the case, with instructions that the district court assess material intervening factual developments for the reasons stated.

Yet the decision below suffers from additional constitutional infirmities not addressed by the government. By requiring the district court to determine individual capacity defendants' liability in a secret trial, on secret evidence, the decision below would deprive those defendants of their jury and due process rights whenever the government invokes the state secrets privilege. Because these rights are necessary to "vindicate the Constitution's promise of a 'fair trial in a fair tribunal,'" they should not be so easily discarded. *SEC* v. *Jarkesy*, 603 U.S. 109, 147 (2024) (Gorsuch, J., concurring) (quoting *In re Murchison*, 349 U. S. 133, 136 (1955)).

I. The decision below deprives individual capacity defendants of their Seventh Amendment right to a trial by jury

The Seventh Amendment preserves "the right of trial by jury" in all "[s]uits at common law, where the value in controversy shall exceed twenty dollars." U.S.

Const. amend. VII. The Amendment embeds the jury "right in the Constitution, securing it 'against the passing demands of expediency or convenience.'" *Jarkesy*, 603 U.S. at 122 (quoting *Reid* v. *Covert*, 354 U. S. 1, 10, (1957)).

"The Seventh Amendment extends to a particular statutory claim," like the FISA claim at issue here, "if the claim is 'legal in nature.'" *Id.* (quoting *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 53 (1989)). To "determine whether a suit is legal in nature, [courts must] consider the cause of action and the remedy it provides," with the remedy being "the 'more important' consideration." *Id.* at 122–23 (quoting *Tull* v. *United States*, 481 U.S. 412, 421 (1987)).

The "remedy is all but dispositive" here, because plaintiffs seek only monetary damages from Allen and Armstrong for their supposed involvement in the alleged unlawful surveillance. *Id.* at 123; see also Pet. App. 340a, 343a. At the time of the alleged violations, FISA provided for "actual damages, but not less than equitable damages equal to the greater of … $1,000 or $100 per day for each day of violation." 50 U.S.C. § 1810 (1978).[2] The statute also provided for punitive damages. *Id.* These damages are plainly legal in nature: they are intended to compensate a plaintiff and to "punish or deter the [alleged] wrongdoer." *Jarkesy*, 603 U.S. at 123. Because FISA ties damages to the perceived need to punish the defendant rather than to restore property to the victim, it provides for a legal remedy. That alone requires the FISA claim to be decided by a jury. But if left standing, the decision below would

[2] In 2024, Congress increased the damages to $10,000 or $1,000 per day. 50 U.S.C. § 1810 (2024).

impermissibly deny that right to Allen, Armstrong, and other individual defendants in state secret cases.

The error below will extend beyond FISA cases, because litigants often invoke other statutes allowing monetary damages against federal officers in state secrets cases. For example, in this very case, plaintiffs sought monetary damages from Allen and Armstrong under the Religious Freedom Restoration Act (RFRA), alleging that Operation Flex was religiously motivated. Pet. App. 126a–131a, 337a; *Tanzin* v. *Tanvir,* 592 U.S. 43, 47 (2020) (RFRA authorizes damages suits against federal officers). Under the Ninth Circuit's rule, any such claims that survive a pleading challenge must be adjudicated by the district court after reviewing the state secrets evidence *in camera* and *ex parte*.[3] The decision below thus jeopardizes federal officers' right to a jury in *any* suit in which the government invokes the state secrets privilege.

The erroneous holding below will also extend beyond suits against federal officers, because private individuals and entities can also be defendants in state secret cases seeking monetary damages. See, *e.g., Sakab Saudi Holding Co.* v. *Aljabri*, 58 F.4th 585, 589 (1st Cir. 2023); *Mohamed* v. *Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1091 (9th Cir. 2010); *Zuckerbraun* v. *Gen. Dynamics Corp.*, 935 F.2d 544, 545 (2d Cir. 1991). If allowed to stand, the rule announced below would require district court judges to adjudicate the merits of those claims too, and thus deprive these private defendants of their right to a jury.

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[3] The Ninth Circuit dismissed the RFRA claims against Allen and Armstrong on qualified immunity grounds. Pet. App. 126a–131a.

This Court has also held that questions raising "predominantly factual issues are in most cases allocated to the jury." *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 720 (1999). Allen and Armstrong's liability here will depend on factual issues, including whether listening devices were placed; if they were, who placed them or knew of them, when they were placed, and where they were placed. Indeed, state secrets cases invariably turn on similarly contested factual issues. See, *e.g.*, Pet. App. 126a–131a (outlining factual issues to be determined by "the trier of fact" on the RFRA claim asserted below); *Sakab Saudi Holding Co.*, 58 F.4th at 598 (identifying fact questions "critical to [the] litigation and adjudication"); *Mohamed*, 614 F.3d at 1073 (listing facts that plaintiff must prove to prevail); *Zuckerbraun*, 935 F.2d at 547 (same). Under the Seventh Amendment, a jury, not a judge, must make these factual findings.

The Ninth Circuit acknowledged that its decision created "an expanded, nontransparent factfinding role for judges," but justified its "unorthodox" requirement as the price federal officers must pay to avoid "closing the courthouse door to potentially meritorious lawsuits." Pet. App. 35a, 37a. But no matter how laudable that policy goal may be, the Seventh Amendment does not permit such horse-trading. The Seventh Amendment secures the jury right "against the passing demands of expediency or convenience." *Jarkesy*, 603 U.S. at 122 (quote omitted). Policy arguments like those advanced below "are insufficient to overcome the clear command of the Seventh Amendment," yet another reason this case cries out for review. *Granfinanciera,* 492 U.S. at 63 (1989) (quote omitted).

II. The decision below deprives individual capacity defendants of their due process rights

The Fifth Amendment's Due Process Clause provides that no person may be "deprived of life, liberty or property without due process of law." U.S. Const. amend. V. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965)). This Court has defined "a hearing in its very essence, [to] demand [] that he who is entitled to it [] have the right to support his allegations by argument however brief, and, if need be, by proof, however informal." *Memphis Light, Gas, & Water Div.* v. *Craft*, 436 U.S. 1, 16 n.17 (1978) (quoting *Londoner* v. *Denver*, 210 U.S. 373, 386 (1908)).

Yet the court of appeals would require a district court judge to decide *in camera* and *ex parte* whether a listening device was placed in a plaintiff's house, car, or phone by the FBI, and if so, whether Allen and Armstrong knew about that placement or were otherwise involved in its placement (and to what degree), and whether damages should be awarded. The district court must make this determination based on evidence that Allen and Armstrong and their attorneys cannot see and thus cannot rebut, according to the decision below.

The Due Process Clause prohibits "punishing an individual without first providing that individual with 'an opportunity to present *every* available defense.'" *Philip Morris USA* v. *Williams*, 549 U.S. 346, 354 (2007) (quoting *Lindsey* v. *Normet*, 405 U.S. 56, 66

(1972)). In this case Allen and Armstrong will have no opportunity to confront the states-secret evidence or present *any* available defense, let alone *every* available defense. This deprivation of Allen and Armstrong's due process rights, and of the due process rights of future federal officers and private defendants named in suits involving state secrets, necessitates this Court's review.

CONCLUSION

For all the above reasons, this Court's review is warranted, and the government's Petition For A Writ Of Certiorari should be granted.

Respectfully submitted.

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