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 IN OPPOSITION


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## QUESTIONS PRESENTED

This case challenges an FBI program that targeted Americans in Southern California for surveillance in their homes, offices, and places of worship, because of their religion. The government filed a motion to dismiss Respondents' religious discrimination claims on the pleadings based on the state secrets privilege, even though Respondents do not rely on or seek discovery of any privileged material. The government seeks dismissal based on its asserted need for secret evidence to defend itself. The district court granted dismissal, but the court of appeals reversed. It held the government was not entitled to dismissal before Respondents even had an opportunity to present their prima facie case based on non-privileged evidence. It also held that if the government seeks dismissal on the ground that it has a valid defense based on privileged material, it must show the defense is meritorious. And the court of appeals held the district court should consider various protective alternatives for reviewing such a defense, including but not limited to an ex parte, in camera examination of privileged evidence.

The questions presented are:

Is the government entitled to dismissal on the pleadings under the state secrets privilege based on its assertion that privileged information will be relevant to its defense?

Did the court of appeals err in suggesting that the district court could, among other possible protective measures, evaluate the proffered defense through in camera, ex parte review of the privileged evidence?

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## INTRODUCTION

Respondents brought this litigation to challenge a federal government operation that targeted them for surveillance because of their religion, including through surreptitious recording of their most private conversations in their homes, offices, and places of worship. Fourteen years later, and after this Court reversed and remanded on another preliminary state secrets issue, Respondents' case is still at the motion-to-dismiss stage.

The government's new petition does not concern the traditional state secrets privilege, which "permits the 'Government to prevent disclosure of information when that disclosure would harm national security interests." *United States v. Zubaydah*, 595 U.S. 195, 204 (2022) (citing *United States v. Reynolds*, 345 U.S. 1, 10-11 (1953)). Respondents do not seek to discover or rely on any state-secrets privileged material; indeed, the government officially acknowledged the existence of the surveillance activity here in open court many years ago, and it has consistently stated that there is ample non-privileged information about the surveillance program that would be available in this litigation, including even more than was available when the district court dismissed it more than a decade ago. Pet.App. 37a n.16, 41a n.20. Respondents have no objection to the government taking all steps needed to prevent disclosure of secret evidence as this case proceeds. And this is not a case where "the very subject matter of the action . . . [is] a matter of state secret." *Reynolds*, 345 U.S. at 11 n.26 (citing *Totten v. United States*, 92 U.S. 105 (1875)). Respondents do not seek to enforce a secret contract with the government.

Nonetheless, the government asserts the complaint should be dismissed on the pleadings because it needs to use privileged information in mounting its defense. It contends the court of appeals erred in holding that the government may obtain dismissal on that basis only by showing its defense is meritorious after the district court conducts some form of evidentiary review, whether through ex parte, in camera proceedings or other measures that would permit some assessment of the strength of the defense.

1. The question presented by the government does not warrant certiorari. The Ninth Circuit's holding breaks no new ground. It involves a narrow issue arising from a rarely litigated aspect of the state secrets doctrine: the conditions under which the government can use secret evidence to obtain dismissal of a suit not because the plaintiffs seek secret evidence to make their case, but rather because it would aid the government's defense. On that issue, the decision below followed the D.C. Circuit, which has held since at least 2007 that to win dismissal based on its need to present a valid defense, the government must show its defense is "meritorious and not merely plausible" and "would require judgment for the defendant." *See In re Sealed Case*, 494 F.3d 139, 149 (D.C. Cir. 2007); *see also Molerio v. FBI*, 749 F.2d 815, 825 (D.C. Cir. 1984) (Scalia, J.)).

This valid-defense standard does not conflict with any decision of this Court. No circuit has ever rejected it. And the government has not shown any harm from this rule in the last two decades. Indeed, it told this Court *not* to address the issue when the Ninth Circuit

first adopted the D.C. Circuit's rule in this case in 2020.

The decision below also creates no risk that secret information will be disclosed without an opportunity for the government to object and appeal. It does not require the government to disclose anything, even to the district court. The rule adopted by the decision below does not alter the traditional state secrets privilege, which applies "[w]hen the government seeks only to exclude privileged information." Pet.App. 34a. The government retains authority to designate evidence as secret under the privilege and substantiate the assertion without disclosing actual evidence, after which "[t]he privileged information is excluded and the trial goes on without it." *Gen. Dynamics Corp. v. United States*, 563 U.S. 478, 485 (2011). The ruling below also permits courts to dismiss cases where privileged material is "impossible to isolate" from non-privileged material, and it permits the government to reassert that ground for dismissal on remand. Pet.App. 39a.

The court of appeals did recognize a procedure that would permit the government to disclose secret evidence to the court in camera and ex parte, but only as one protective measure to consider if the government wishes to use that secret evidence to establish a valid defense. And even then, the court of appeals did not *order* such disclosure—it merely required the district court to consider it along with other options that would permit some assessment of the government's evidence without any disclosure. Moreover, the court of appeals expressly permitted the government to object should the district court

conclude that disclosure to the court is the only option that would allow it to assess the government's defense. Pet.App. 40a-41a, 41a n.19.

2. Even if the government's question were worthy of certiorari, this case is a poor vehicle because it remains uncertain whether the government will need to (or be able to) use privileged material to defend itself, and, if so, whether the district court will seek to review privileged material in camera and ex parte to assess any such defense. This case is still at the motion-to-dismiss stage, and Respondents have not yet had the opportunity to make their prima facie case with non-privileged evidence. If they fail, the question presented will never arise. Moreover, assuming Respondents do make that showing, the district court has not yet considered whether this case could be resolved *without* the government disclosing any privileged material to the court—a possibility the court of appeals required the district court to address on remand. Pet.App. 41a-42a. That could occur based on any one of several contingencies: if the government determines it can win dismissal or summary judgment without having to rely on secret evidence; if either the government or the court determines, after seeing Respondents' prima face case, that secret evidence is not relevant to any potential defense; or if the district court identifies an alternative procedure that allows the issues to be litigated without disclosure (such as through non-privileged summaries, as are provided routinely in criminal cases under the Classified Information Procedures Act (CIPA)). If any of these

possibilities materialize, the question presented will not arise in this case.

Moreover, the decision below explicitly permits the government to reassert the privilege if the district court orders in camera review of secret evidence. Thus, if the case ever reaches that point, the Court could take up the question *then*—on a record that contains the available non-privileged material, a concrete privilege assertion, and a ruling about the viability of alternatives to dismissal or disclosure. *Cf. Zubaydah*, 595 U.S. at 214 (reviewing "specific discovery requests" for which "protective measures" would not suffice).

3. Finally, the Court should reject the government's suggestion that the Court grant, vacate, and remand for the district court to make new factual inquiries about the government's informant. Nothing about the informant's unsworn letters recanting some unspecified portion of his prior sworn declarations remotely warrants vacatur of the decision below, as that decision does not "rest[] upon a premise that the lower court would reject" based on fact-finding into the informant's recent statements. *Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 167-68 (1996) (per curiam). The district court dismissed this case on state secrets grounds; those grounds had nothing to do with the credibility of the informant. The decision below reversed that dismissal because of deficiencies in how the district court applied governing state secrets doctrine. Thus, even if the government had offered compelling reasons to believe the informant's recent unsworn letters rather than his prior (sworn)

declarations (and it has not), further inquiries into their content would not alter the court of appeals' opinion. It addressed a legal issue that did not presuppose the ultimate truth of Respondents' contentions. That truth remains to be seen: As the court of appeals' opinion emphasizes, Respondents have not yet presented their prima facie case based on non-privileged evidence. They must be afforded that opportunity on remand in the district court.

To be clear, Respondents wholeheartedly agree the district court should undertake an inquiry into all the informant's statements. But the need for that inquiry does not justify vacating the decision below, which addressed an entirely different issue. And if further fact-finding is required, as the government itself argues, then dismissal on Rule 12(b)(6) grounds is necessarily unwarranted. This Court should deny certiorari.[1]

## STATEMENT OF THE CASE

### A. The State Secrets Doctrine

The concept of state secrets encompasses two "quite different" doctrines. *Gen. Dynamics*, 563 U.S. at 485 (Scalia, J.). The first, implicated here, is a

[1] Respondents maintain that the state secrets privilege does not permit dismissal, rather than mere exclusion of evidence, based on the government's purported need to defend itself with secret evidence. *See* Br. for Resp'ts at 24-33, *FBI v. Fazaga*, No. 20-828 (S. Ct. Sep. 21, 2021). Should this Court grant certiorari, Respondents will advance that argument again. *See FBI v. Fazaga*, 595 U.S. 344, 357-58 (2022) (noting consensus that "dismissal is available in a 'spy-contracting case' when a case's 'very subject matter is secret'" but not addressing availability of dismissal in other contexts).

common-law privilege "in the law of evidence," concerning "military and state secrets." *Reynolds*, 345 U.S. at 6-7 (1953). It "permits the Government to prevent disclosure of information when that disclosure would harm national security interests." *Zubaydah*, 595 U.S. at 204 (citing *Reynolds*, 345 U.S. at 10-11). When the government successfully invokes this privilege, "[t]he privileged information is excluded and the trial goes on without it . . . . [T]he Court [does] not order judgment in favor of the Government." *Gen. Dynamics*, 563 U.S. at 485.

Like all other privileges, the common-law state secrets privilege recognized in *Reynolds* authorizes the exclusion of evidence. It deprives all parties of the evidence withheld. As with any privilege, its application may lead to dismissal where the plaintiffs cannot prove their claims without the excluded evidence. But plaintiffs must be given the opportunity to make their case without the privileged evidence prior to dismissal, as they were in *Reynolds* itself. 345 U.S. at 5, 11.

The second state secrets doctrine, not at issue here, is a justiciability bar this Court created from its "authority to fashion contractual remedies in Government-contracting disputes." *Gen. Dynamics*, 563 U.S. at 485. That doctrine requires dismissal of government-contracting lawsuits "where the very subject matter of the action . . . [is] a matter of state secret." *Tenet v. Doe*, 544 U.S. 1, 9 (2005) (citation modified); *Id.*, 544 U.S. at 12 (Scalia, J., concurring) (discussing *Totten v. United States*, 92 U.S. 105 (1875)) ("the bar of *Totten* is a jurisdictional one"). The authority for such dismissals is "something quite

different from a mere evidentiary point," and the "state-secrets jurisprudence bearing upon that authority is not *Reynolds*, but two cases dealing with alleged contracts to spy." *General Dynamics*, 563 U.S. at 485-86. Individuals who enter into such secret contracts "assume[] the risk that state secrets would prevent the adjudication of" any disputes that may arise from them. *Id.* at 491. "The secrecy which such contracts impose precludes any action for their enforcement." *Totten*, 92 U.S. at 107.

Several decades after *Reynolds*, some lower courts combined the two doctrines to create a new justiciability rule that authorizes dismissal without regard to whether the plaintiff needs privileged evidence to make their case, and even in cases that do not involve secret government contracts. Under these cases, the government can assert the state secrets "privilege" to win dismissal of a suit where permitting the case to go forward would effectively deprive the government of a valid defense. *See Molerio*, 749 F.2d at 825 (dismissing suit because, having seen the secret evidence at issue, the court knew "it would be a mockery of justice for the court" to permit the plaintiff "to convince the jury of a falsehood").

The D.C. Circuit later articulated a standard for determining what constitutes a valid defense, holding that it must be "meritorious and not merely plausible," and "would require judgment for the defendant." *In re Sealed Case*, 494 F.3d at 149.

The Ninth Circuit adopted the D.C. Circuit's approach when it first decided this case in 2020. *Fazaga v. FBI*, 965 F.3d 1015, 1067 (9th Cir.), *rev'd on*

*other grounds*, 595 U.S. 344 (2022). The government did not seek review of that holding in this Court.

### B. Factual Background

This Court will already be familiar with the facts of this case. *See FBI v. Fazaga*, 595 U.S. 344, 351 (2022). Respondents are Sheikh Yassir Fazaga, an imam at the Orange County Islamic Foundation, and Ali Uddin Malik and Yasser AbdelRahim, practicing Muslims who regularly attended services at the Islamic Center of Irvine, California nearly twenty years ago. On behalf of a putative class of Muslim Americans from Orange County, California, Respondents challenge a well-publicized set of incidents in 2006 and 2007 that arose after the FBI enlisted a paid informant, Craig Monteilh, to pose as a convert to Islam and infiltrate Muslim communities in Southern California.

The FBI directed Monteilh to gather information about Muslims, including Respondents. *See, e.g.*, Pet.App. 292a. The FBI did not identify specific targets for Monteilh, but "repeatedly made clear that they were interested simply in Muslims" and "told him to gather as much information on as many people in the Muslim community as possible." *Id.* at 292a-93a. FBI agents gave him daily quotas for the number of Muslims he should receive contact information from, *id.* at 304a-05a, and tasked him with gathering information on Muslims' charitable activities, travel plans, and programming conducted at mosques, *id.* at 297a-98a, 305a. They told him to target Muslims who appeared more devout because they were "more suspicious." *Id.* at 298a; *see also id.* at 292a, 294a,

297a. They told him that "Islam is a threat to our national security." *Id.* at 302a, 314a.

Following those instructions, Monteilh gathered information on thousands of Muslims, captured hundreds of hours of video recordings of the interiors of mosques, businesses, and homes, and made thousands of hours of audio recordings of discussion groups, classes, and lectures at Muslim religious and cultural events. *Id.* at 303a-04a, 306a-07a, 326a-28a. Monteilh also repeatedly recorded religious conversations, to which he was not a party, inside mosques by leaving behind a secret recording device hidden in his car keys. *Id.* at 302a-03a. Similarly, he planted audio-listening devices in Mr. Fazaga's office and Mr. AbdelRahim's home. *Id.* at 303a-04a, 306a, 326a, 328a. The FBI discarded information Monteilh inadvertently gathered on non-Muslims. *Id.* at 301a-02a.

Monteilh's surveillance activities lasted for over a year until, at the behest of his FBI handlers, he attempted to incite violence. *Id.* at 310a-11a. In response, community members reported him to the FBI and eventually won a restraining order against him. *Id.* at 311a. In separate federal court proceedings, the FBI revealed it had employed Monteilh as a confidential informant. *Id.* at 312a-13a. Monteilh himself confirmed this fact both in sworn declarations submitted in court and to the press, who

interviewed him and reported on his activities extensively.[2]

### C. Procedural History

Following the public fallout from this domestic spying operation, Respondents filed suit in 2011. Relying on publicly available sources, including the government's own public statements and documents obtained through the Freedom of Information Act (FOIA), the complaint describes in detail an FBI surveillance operation that explicitly targeted Muslims because of their religion.

Respondents named as defendants the United States and the FBI (collectively "the government"), and several individual FBI agents, and broadly alleged two types of misconduct: unconstitutional searches and unlawful religious discrimination or burden on religious practice. They sought damages, declaratory relief, and expungement or disclosure of the records of unlawful surveillance, under the First and Fourth Amendments, 42 U.S.C. § 1985, the Foreign Intelligence Surveillance Act (FISA), the Religious Freedom Restoration Act, the Privacy Act, and several California state-law torts brought under the Federal Tort Claims Act. Pet.App. 334a-42a.

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[2] *See, e.g.*, Sam Black, *The Convert*, This Am. Life (Aug. 10, 2012), https://perma.cc/WML2-4XYM; Teresa Watanabe & Scott Glover, *Man says he was an FBI informant*, L.A. Times (Feb. 26, 2009), https://perma.cc/N8U2-J6D5; Doug Irving, Salvador Hernandez & Sean Emery, *Man says he informed on Muslims for FBI*, Orange Cnty. Reg. (Feb. 26, 2009), https://perma.cc/5BD3-6VPV; Alexandra Marks, *FBI and American Muslims at odds*, The Christian Sci. Monitor (Mar. 25, 2009), https://perma.cc/V4QP-HNKR.

### 1. District Court Dismissal

The government moved to dismiss Respondents' claims on various grounds, including by invoking the state secrets privilege on a limited basis to support dismissal of the religion claims. Mot. to Dismiss Am. Compl. and for Summ. J. at 45-52, *Fazaga v. FBI*, No. 11-cv-301 (C.D. Cal. Nov. 4, 2011), Dkt. No. 55. The government explicitly did not assert the privilege with respect to much of the information Monteilh collected, including "audio and video information" that the government itself had produced in other proceedings. It stated that it "expect[ed] that the majority of the audio and video will be available in connection with further proceedings" in this case. *Id.* at 4-5.

Instead, the government argued it needed to rely on privileged information—evidence in its exclusive possession—to assert a defense to the religion claims, and that because it was unable to introduce that evidence without divulging secret information, it was entitled to dismissal. *Id.* at 46-52; *see also id.* at 50-51 (citing *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1083 (9th Cir. 2010)).

Alternatively, in the event the district court "wishe[d] to assess the impact of the privilege assertion" on Respondents' claims, the government suggested the district court "should require plaintiffs to proffer in proceedings under Rules 16 and 26 precisely what discovery [they] intend[] to seek against the Government," after which it offered to assert the privilege anew in response to specific requests. Mot. to Dismiss at 52-53.

As to the search claims, the government did not move to dismiss them on privilege grounds because, it

represented, "sufficient non-privileged evidence may be available to litigate these claims should they otherwise survive motions to dismiss on non-privilege grounds." *Id.* at 4.

The district court granted the government's motion to dismiss the religion claims on privilege grounds and also dismissed nearly all the search claims on the same grounds (even though the government had not moved to dismiss them on that basis).[3] Pet.App. 222a. After examining an ex parte classified memorandum and accompanying declarations in camera, the district court concluded dismissal was warranted both because the government would require the privileged information to defend itself and because privileged and non-privileged information were inextricably intertwined. *Id.* at 218a.

### 2. The First Court of Appeals Decision and This Court's Review

The court of appeals affirmed in part, reversed in part, and remanded. As relevant here, it held the district court erred when it dismissed Respondents' search claims on privilege grounds because the government had not sought dismissal on that basis. It reversed the district court's dismissal of Respondents' religion claims because it held that FISA displaced the state secrets privilege, at least at the pleading stage.

It further held that, to the extent certain privileged evidence could not be introduced through

[3] The district court did not dismiss Respondents' FISA claim under 50 U.S.C. § 1810 as to the individual FBI agents. *See id.* at 61a.

FISA's procedures, the government would be "free to interpose a specifically tailored, properly raised state secrets privilege defense," at which point the district court would consider again whether dismissal is appropriate or whether the privileged information could be excluded and the case litigated without it. *Id.* at 139a-40a. The district court could then order dismissal only if exclusion of the privileged information deprives the government of a "valid defense" or if privileged and non-privileged evidence are "'inseparable' such that 'litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets.'" *Id.* at 140a (citing *Jeppesen*, 614 F.3d at 1083).

As to how to determine what constitutes a "valid defense," the court of appeals adopted longstanding D.C. Circuit caselaw, holding a "valid defense" means one that "is meritorious and not merely plausible and would require judgment for the defendant." Pet.App. 140a (citing *In re Sealed Case*, 494 F.3d at 149). The court of appeals explained that under the D.C. Circuit's rule, the district court can dismiss on "valid defense" grounds "only if it conducts an 'appropriately tailored *in camera* review of the privileged record.'" Pet.App. 141a (citing *In re Sealed Case*, 494 F.3d at 149).

The government then sought this Court's review of the Ninth Circuit's holding that FISA displaced the state secrets privilege. This Court granted certiorari and reversed on the FISA issue, resolving "only the narrow question whether § 1806(f) displaces the state secrets privilege." *Fazaga*, 595 U.S. at 359. It did not decide "whether the District Court was correct to

dismiss respondents' claims on the pleadings," or whether "the state secrets privilege authorizes dismissal only where the case concerns a Government contract or where the very subject of the action is secret." *Id.*

### 3. The Second Court of Appeals Decision

On remand (as relevant here), the court of appeals reaffirmed its prior holding that the district court erred by not affording Respondents an opportunity to make their case using non-privileged information. Pet.App. 36a-37a. It also reaffirmed its prior "valid defense" holding, *id.* at 25a-35a, and then provided the district court with instructions for how to apply it.[4] Pet.App. 35a-46a.

First, the court of appeals reiterated that the *Reynolds* privilege can result in dismissal of a case. *Id.* at 25a. It held such dismissal permissible where state-secrets privileged information would provide a "legally meritorious" defense that "would require judgment against the plaintiff." *Id.* at 30a.

Following the D.C. Circuit, the decision below further held the government cannot win a valid-defense dismissal on the pleadings, but instead must present at least some information, in some form, to demonstrate its defense would have merit. *Id.* at 33a-34a. "[O]f course," the exact "form and specificity of

[4] The court of appeals also affirmed the dismissal of the *Bivens* claims, concluding that no *Bivens* remedy is available for Fazaga's First and Fifth Amendment religion claims or Fazaga's Fourth Amendment claim. *See* Pet.App. 8a-9a, 11a-13a.

the government's submission" will "depend on the circumstances of the case and the nature of the information." *Id.* at 34a. Still, "the submission must be detailed enough" to substantiate that "dismissal is *required*" on the basis of privileged information. *Id.*

The court authorized the district court on remand to consider a variety of options for the government to make such a submission, including in camera, ex parte review of privileged material by the district court; unclassified summaries of information and statements admitting relevant facts as occurs under CIPA, *id.* at 40a (citing 18 U.S.C. app. III § 6(c)(1)); and the use of a special master with the requisite security clearance, among others. Pet.App. 41a. It further authorized the government to reassert its argument for dismissal if it concluded these options were insufficient to protect its interests in secrecy. *Id.* at 41a n.19.

Explaining this approach, the court of appeals distinguished between the procedures to be employed when the government seeks valid-defense dismissal and procedures used in other state secrets contexts. "When the government seeks only to exclude privileged information," the Government need not make a "complete disclosure," and a court need not "insist upon an examination of the evidence" before it accepts the assertion. *Id.* at 34a (citing *Reynolds*, 345 U.S. at 10). However, when the government seeks dismissal based on its own need to use secret evidence for a defense, further steps are necessary. Granting dismissal without any evidentiary review would lead to "closing the courthouse door to potentially

meritorious lawsuits because of a defense that may or may not be viable." *Id.* at 35a.

The court of appeals determined the district court had not applied this standard when it dismissed the case, as it relied upon "speculat[ion] that defending against Fazaga's claims *could* require the government to 'marshal' privileged information." *Id.* at 36a. Its conclusion on that point was also stale, given the passage of more than a decade since its ruling. *Id.* at 37a n.16, 44a-45a.

Finally, the court of appeals reiterated that "nothing in this opinion forecloses the government asserting the privilege over specific pieces of evidence that become pertinent in the course of litigation . . . or from seeking dismissal because specific privileged evidence is essential to an articulated defense and cannot feasibly and safely be presented only *in camera*." *Id.* at 45a-46a.

## ARGUMENT

### I. THIS CASE PRESENTS NO CERTWORTHY ISSUE

No aspect of the decision below warrants certiorari. The government seeks review on a narrow issue: the conditions under which it can obtain a valid-defense dismissal—i.e., dismissal based on its own need to use privileged evidence in its defense. The government does not assert a circuit split on that question, which the D.C. Circuit has answered with the same rule for close to two decades. And it is of minimal national importance, as it rarely arises.

### A. The Government Does Not Assert a Split.

The government does not argue a circuit split on the question it presents. In the decision below, the Ninth Circuit adopted what has been the D.C. Circuit's approach for at least eighteen years.

In 2007, the D.C. Circuit held that when the government seeks a valid-defense dismissal it must show its defense is "valid," which means "meritorious and not merely plausible," such that it "would require judgment for the defendant." *In re Sealed Case*, 494 F.3d at 149. The decision below followed the D.C. Circuit's reasoning: that permitting the government to win dismissal based on the mere *possibility* that it could use secret evidence to defend itself "would mean abandoning the practice of deciding cases on the basis of evidence . . . in favor of a system of conjecture." *In re Sealed Case*, 494 F.3d at 150. *Compare* Pet.App. 30a ("[a]ny lesser standard could foreclose potentially meritorious claims based on conjecture").

*In re Sealed Case* also recognized that the valid-defense dismissal rule involved a substantial departure from traditional state secrets privilege. Normally, "a [successful] claim of state secrets privilege results in 'no consequences save those resulting from the loss of the evidence,' including 'no alteration of pertinent substantive or procedural rules.'" *In re Sealed Case*, 494 F.3d at 150 (citing *Ellsberg v. Mitchell*, 709 F.2d 51, 64 (D.C. Cir. 1983)); *see also Molerio v. FBI*, 749 F.2d 815 (D.C. Cir. 1984). But the D.C. Circuit concluded that an exception to that rule was appropriate to accommodate the

government's claimed need for privileged information to defend itself. Under that rule, a successful valid-defense assertion results in dismissal even where plaintiffs *can* make their prima facie case without privileged information. *In re Sealed Case*, 494 F.3d at 150. Given that unusual result, the D.C. Circuit also concluded it would be "manifestly unfair" to plaintiffs to permit such a result without some evaluation of the government's evidence by the district court. *Id.*

The court of appeals reached the same conclusion below. It explained that "dismissal because privileged information supports a valid defense turns the normal principles of evidentiary privilege on their head; normally, 'privileged information is excluded and the trial goes on.'" Pet.App. 28a (citing *Gen. Dynamics*, 563 U.S. 485). It therefore held valid-defense dismissals permissible only after the district court conducts a "detailed and fact-intensive inquiry," Pet.App. 37a, into the validity of the government's asserted defense, because "[a]ny lesser standard could foreclose potentially meritorious claims based on conjecture." *Id.* at 30a.

Here, the government seeks an even more extreme departure from basic procedural fairness: a rule that would allow it to obtain not just exclusion, but outright dismissal on the pleadings, based on the assertion that privileged information is "relevant to" its defense. *See* Pet. at I, 21. But the D.C. Circuit recognized that adopting the government's preferred approach would lead to a regime in which "virtually every case in which the United States successfully

invokes the state secrets privilege would need to be dismissed." *In re Sealed Case*, 494 F.3d at 150. The decision below recognized the same concern, noting that adoption of too lenient a standard would allow the privilege to "be invoked not to protect the public interest . . . but to shield the government from embarrassment," which is precisely what happened in *Reynolds* itself. Pet.App. 31a (citing *Zubaydah*, 595 U.S. at 251 (Gorsuch, J, dissenting)).

No circuit has rejected this approach. Indeed, the Second Circuit endorsed a similar framework well over thirty years ago. It suggested valid-defense dismissals "may be appropriate" where secret evidence "will prevent the defendant from establishing a valid defense." *Zuckerbraun v. Gen. Dynamics*, 935 F.2d 544, 547 (2d Cir. 1991) (citing *Molerio*, 749 F.2d at 819). Like the court of appeals below, the Second Circuit stated "[t]he precise rule under which dismissal should occur is not entirely clear," *Zuckerbraun*, 935 F.2d at 547; *cf.* Pet.App. 33a. Nevertheless, it too concluded that granting a state secrets dismissal on the pleadings alone "seems inappropriate." *Zuckerbraun*, 935 F.2d at 547. It therefore posited the government will generally need to establish its entitlement to valid-defense dismissal under the more fact-driven Rule 56 summary judgment standard.

Although the government does not explicitly assert a split, it suggests other courts' holdings are consonant with the rule it seeks—namely, that it should win dismissal so long as secret evidence is "relevant to" its defense or its defense "cannot be fairly

adjudicated" unless it uses secret evidence, without having to show the defense has any merit. *See, e.g.*, Pet. 21, 15, 23. But no circuit court has ever dismissed a case by adopting that test, as it would permit dismissal at the pleading stage even where the government has in fact engaged in blatantly illegal conduct, based on the mere *possibility* that it could establish a valid defense.

The scant lower court cases the government cites do not come close to showing any conflict that requires resolution by this Court. The government suggests *Tenenbaum v. Simonini*, 372 F.3d 776 (6th Cir. 2004), adopted some version of its proposal, Pet. 22, but that case, which involved someone who sought to work for the CIA, never mentions the government's preferred rule. It states only that it "reviewed the materials Defendants produced under seal" and determined their exclusion "deprived Defendants of a valid defense." *Tenenbaum*, 372 F.3d at 777. Moreover, like the opinion below, *Tenenbaum* draws on then-Judge Scalia's reasoning in *Molerio* to explain that "dismissal is appropriate" only where evidence substantiates that "the trier of fact is likely to reach an erroneous conclusion." *Id.* at 778 (citing *Molerio,* 749 F.2d at 825). The government's approach would not require that showing.

The government also approvingly cites *Sakab Saudi Holding Co. v. Aljabri*, 58 F.4th 585 (1st Cir. 2023). But that case also creates no conflict with the D.C. Circuit or the decision below. It involved a suit by someone who had contracted to "work on sensitive

operations with, or at least alongside, the U.S. Intelligence Community." *Id.* at 598. It therefore was subject to dismissal based on the distinct state-secrets justiciability doctrine from the contract-to-spy cases—*General Dynamics*, *Tenet*, and *Totten*—which is not applicable here. Moreover, because the plaintiff himself possessed secret information, the court found the case could not be litigated "without risking disclosure of information" covered by "the incredibly broad privilege assertion" in that case. *Id.* The decision below also permits courts to dismiss cases where privileged material is "impossible to isolate" from non-privileged material. Pet.App. 39a. But that is not this case: Here, only the government possesses secret evidence. *Cf.* Pet.App. 41a, n.20 (acknowledging privilege invocation is "limited" and much of the case turns on non-privileged materials).

Only the Fourth Circuit has arguably taken a different approach. But the government recently assured this Court that the relevant Fourth Circuit opinion does not "reflect a determination by the court of appeals," "constitute precedent," or "bind any court in any future case" because it sets out only the view of a single judge. Br. in Opp'n at 16, *Wikimedia v. NSA*, No. 22-190 (S. Ct. Jan. 6, 2023).

At bottom, the court of appeals' approach here is consistent with the decisions of other circuits that have considered valid-defense dismissal, and the government itself has discounted the one arguable outlier. The decision below simply followed the D.C. Circuit in recognizing the need for some degree of evidentiary testing to show the government's asserted defense has merit, because "[a]ny lesser standard

could foreclose potentially meritorious claims based on conjecture." Pet.App. 30a.

### B. Settled Practice and the Government's Own Actions Show Review Is Unwarranted.

Rather than allege a split, the government's petition primarily asserts the court of appeals' decision will lead to disaster because it now must submit privileged materials ex parte and in camera to the district court to win a valid-defense dismissal. *See, e.g.*, Pet. at 4. But the court of appeals did not order the government to disclose privileged material to anyone—not even the district court. *See* Pet.App. 40a-41a. And regardless, the government has failed to show any harm from the possibility of limited, ex parte, in camera review as contemplated below, including over the eighteen years since the D.C. Circuit adopted the same approach in 2007.

Experience from multiple statutory contexts confirms this point. Courts possess longstanding authority to review classified documents, including documents over which the government has asserted the state secrets privilege, under CIPA. They also possess authority to review highly classified documents under FOIA and FISA. None of those procedures impermissibly endanger national security. District courts routinely review state-secrets privileged material in camera and ex parte to resolve discovery disputes in criminal cases under CIPA. *See*

18 U.S.C. app. III §§ 4, 6.[5] This Court approved a similar process for FOIA cases nearly fifty years ago. *Cf. N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 226 (1978) (1974 FOIA amendments reaffirmed courts' authority to conduct in camera review to determine if documents are properly classified—and even to order public release). And courts routinely review highly secret information using protective procedures under FISA. *See* 50 U.S.C. §§ 1803, 1806(f) (creating Foreign Intelligence Surveillance Court and other procedures to review applications for surveillance orders under FISA). Indeed, district and circuit courts already review classified declarations in order to adjudicate the government's state secrets claims in civil cases—something that happened repeatedly here. Pet.App. 43a (noting "the detailed classified disclosures [the government] has already presented to the district court, our court, and the Supreme Court").

Instead of demonstrating any workability problems with the D.C. Circuit's longstanding rule, the government makes the broad assertion that it is contrary to the "very purpose of the privilege." Pet. 19. But this ignores the crucial distinction between a valid-defense dismissal, where the government seeks

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[5] District courts have done so more than a dozen times just since this Court decided this case in 2022. *See, e.g.*, *United States v. Asainov*, 618 F. Supp. 3d 105 (E.D.N.Y. 2022); *United States v. Lemma*, No. 24-cr-573, 2025 WL 2817723 (D.D.C. Oct. 3, 2025). *Cf. United States v. Salas-Aguayo*, No. 12-cr-3109, 2024 WL 95372 (D.N.M. Jan. 9, 2024); *see also United States v. Shih*, 73 F.4th 1077, 1102 (9th Cir. 2023).

dismissal based on its asserted need to defend itself using privileged material, and the traditional state secrets privilege under *Reynolds* and its progeny, which concern only the exclusion of privileged evidence.

This Court has never suggested that the state secrets doctrine authorizes district courts to dismiss claims on the pleadings "because of [the] *excision*" of secret evidence, as the government argues here. Pet. 17 (emphasis added). As *General Dynamics* held, this Court's "state-secrets jurisprudence bearing upon [dismissal] authority is not *Reynolds*, but two cases dealing with alleged contracts to spy." 563 U.S. at 485-86 (citing *Totten* and *Tenet*). In both those cases, and in *General Dynamics* itself, the Court authorized dismissal based on its "common-law authority to fashion contractual remedies in government-contracting disputes." *Id.* at 485 (citation omitted).

*Totten* and its progeny do not apply here. Respondents are not seeking to enforce a contract to spy. Nor is the "very subject matter" of this case otherwise a state secret. *Reynolds*, 345 U.S. at 11 n.26 (citing *Totten*). The government has never suggested otherwise. Indeed, it did not need to assert the privilege to keep information out of this case. Only the government possesses the information it seeks to keep secret. Respondents have repeatedly made clear they will not seek discovery of privileged information, and the decision below relies on Respondents' promise, thereby binding them to it. Pet.App. 42a.

Thus, nothing in the decision below runs contrary to the "very purpose of the privilege." Pet. 19. The decision reaffirms that in the ordinary application of

the state secrets privilege (as in *Reynolds*)—that is, "[w]hen the government seeks only to exclude privileged information"—it generally need not make "a complete disclosure" to the court. Pet.App. 34a (citing *Reynolds*, 345 U.S. at 10). But the court of appeals recognized that the government seeks something different, and more drastic, here. The court of appeals countenances the possibility of ex parte, in camera review of privileged material only when the government seeks to use it as both sword and shield "to justify dismissing a claim outright rather than simply excluding privileged information." based on its own need to use the very evidence it argues is privileged. *Id.*

While the decision below does recognize the possibility that the district court could order in camera, ex parte review of privileged evidence (albeit subject to another opportunity for the government to appeal), that aspect of the ruling merely confirms that "sometimes a court must personally review the evidence at issue in order to assess the Government's assertion of the state secrets privilege." *Zubaydah*, 595 U.S. at 212 (citing *Reynolds*, 345 U.S. at 10). The government offers no justification for reversing course from that recent ruling, and now eliminating even the possibility that a court might use that common-sense method for protecting the government's interests while maintaining the courts' role in ensuring compliance with law.

Finally, the government's stated concerns about the ex parte, in camera procedures contemplated here are difficult to square with its failure to seek review of

that rule *in this same case* four years ago. When the court of appeals first decided this case, its primary holding (which this Court subsequently reversed) was that FISA displaced the state secrets privilege. But the court of appeals also addressed what procedures should govern evidence falling outside FISA's purview. As to that question, it adopted the valid-defense rule from *In re Sealed Case*.[6] Pet.App. 139a-41a.

Nevertheless, in its last petition for certiorari in this case, the government did *not* seek review of the Ninth Circuit's ruling that the government must show a meritorious defense where it seeks a valid-defense dismissal. Even after the Court granted certiorari, the government continued to resist review of that question. In their brief on the merits, Respondents asked this Court to affirm on the alternative ground that the privilege does not permit valid-defense dismissal at all. But the government urged this Court not to address that question. *See, e.g.*, Reply Br. for Pet'rs at 17, *FBI v. Fazaga*, No. 20-828 (S. Ct. Oct. 21, 2021).

In light of the government's previous position that the Court should *not* review the question it now presents, the government's dire warnings about the consequences of the court of appeals' decision ring hollow.

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[6] In the decision below, the court of appeals recognized its prior holding as controlling on this issue because it had become the "law of the circuit." Pet.App. 26a.

### C. The Issue on Which the Government Seeks Certiorari Rarely Arises.

The question presented also does not warrant review because it is vanishingly rare. As the government already acknowledged, "the occasions to dismiss claims on state-secrets grounds have been relatively infrequent." Reply Br. for Pet'rs at 19-20, *FBI v. Fazaga*, No. 20-828 (S. Ct. Oct. 21, 2021). That is an understatement. Since this Court first decided this case more than three years ago, the only circuit court case even to discuss the state secrets privilege more than in passing was *Aljabri*, which had no occasion to apply the valid-defense rule at issue here. *Aljabri*, 58 F.4th at 595. Counsel have identified only one other civil case containing substantial discussion of the privilege in that time period. It granted the government's motion to dismiss on multiple grounds. *See Kunstler v. CIA*, No. 22-cv-6913, 2025 WL 522598, at *5 (S.D.N.Y. Feb. 14, 2025) (dismissing because "there is no feasible way to segregate nonprivileged information in this case"; "[t]he subject matter of this litigation . . . is subject to the state secrets privilege in its entirety"; and "defendants . . . cannot mount a valid defense").

The question the government presents arises too rarely to warrant this Court's review, at least at this time.

## II. THIS CASE IS A POOR VEHICLE FOR RESOLVING THE QUESTION PRESENTED

This case is a poor vehicle for addressing the question presented because any decision on it would be premature and may not affect the outcome of this

case. That is so because the district court granted dismissal on the pleadings before Respondents had a chance to make their prima facie case. As a result, any threat of disclosure remains speculative and contingent on further proceedings in the district court. The case may well end—in either side's favor—without the need to rely on any privileged evidence. Moreover, even if privileged evidence ultimately proves material, the court of appeals' decision does not require the government to disclose secret evidence to the district court.

The government suggests otherwise, Pet. at 19, and then urges review essentially because it believes federal judges cannot be trusted to review privileged material in camera and ex parte. But the court of appeals did not *require* the procedure the government finds objectionable; it only described it as one among several possibilities for the district court to consider on remand, and explicitly authorized the government to object if the district court orders disclosure of information the government believes should not be disclosed even to the court. Pet.App. 40a-41a, n.19. Thus, whether the in camera, ex parte procedure to which the government objects will be used on remand remains uncertain. And because the government has sought this Court's review before any further development of the issues, there is no concrete lower-court order to review; nor is there a record on which this Court could assess the rules that should apply when the government asserts a defense based on privileged information.

The motion-to-dismiss posture likewise makes the constitutional objections raised by individual defendants Allen and Armstrong wholly premature.

### A. The Question Presented May Never Arise In This Case.

The government's concerns about forced disclosure of secret evidence are highly speculative. The government may well never seek to use privileged material in its defense, and even if it does so the decision below does not require the government to disclose such information to the court.

Because this case remains at the motion-to-dismiss stage, the court of appeals rightly directed the district court to address the government's privilege claim on remand only *after* Respondents develop and present their prima face case. Pet.App. 36a-38a. Under *Reynolds* and the longstanding state secrets privilege law on which it rests, Respondents must have the opportunity to present their case based on non-privileged evidence. 345 U.S. at 5, 11. *See also Wyatt v. Gore*, [1816] Holt N.P.C. 299, 305 (plaintiff permitted to present case using non-privileged evidence); *Cooke v. Maxwell*, [1817] 2 Stark. 183, 185-86 (same). Accordingly, the decision below directed that, as a preliminary step, Respondents "be given the opportunity" to use non-privileged evidence to "prove up a *prima facie* case." Pet.App. at 33a-34a.

In this preliminary posture, the possibility that the district court might order disclosure of privileged evidence is highly speculative. As Respondents have stated from the outset, they will rely entirely on non-privileged evidence to make their prima facie case. That evidence will include declarations from Respondents and other individuals targeted by the government's informant, describing his actions based on their own first-hand observations; the informant's

declarations and other publicly available information describing his activities; and the informant's tasking orders, contemporaneous recordings, and notes over which the government has not asserted privilege. *See* Pet.App. 41a, n.20, 43a (acknowledging privilege invocation is "limited" and much of the case turns on non-privileged materials); Pet.App. 406a-14a (declassified tasking order government submitted on appeal); Letter, *Fazaga v. FBI*, No. 12-56867 (9th Cir. June 24, 2019), Dkt. No. 141 (letter from informant explaining other such orders).

Whether the government will seek to advance a defense based on privileged information after Plaintiffs present their non-privileged evidence is uncertain. For example, the government may seek dismissal or summary judgment on the ground that Respondents have failed to prove their claims based on non-privileged evidence. If it prevails, the case will end without resort to privileged material. Alternatively, after seeing Respondents' prima facie case, the government may decide it can mount its defense based only on non-privileged material—such as its anticipated attack on Monteilh's declarations based on his recent letters. Or it may be that Respondents will prevail because the government's privileged evidence has no bearing on the discrimination claims, as Respondents' legal theory does not rest on the identity of any particular "subjects" of the FBI's investigation, but rather on the allegation that the FBI instructed Monteilh to surveil Muslims generally, focusing only on those who appeared more religious. *See* Pet.App. 295a-302a; *Emp. Div. v. Smith*, 494 U.S. 872, 886 n.3 (1990) ("Just as we subject to the most exacting scrutiny laws that

make classifications based on race, or on the content of speech, so too we strictly scrutinize governmental classifications based on religion.") (citations omitted). Under any of these scenarios, the risk of disclosure cited by the government would not come to pass. Indeed, the government does not allege any national security risk from merely permitting Respondents to make their affirmative case using non-privileged materials.[7]

### B. The Decision Below Does Not Require the Government to Disclose Secret Evidence.

Even if the litigation proceeds and the government continues to maintain that it needs secret evidence to defend itself, the decision below does not *require* in camera, ex parte review of any such evidence. Rather, it suggests that as one of several options. It only orders the district court to "consider the viability of procedures that will enable this litigation to move forward," Pet.App. 45a, contemplating several ways it might "undertake [a] factual inquiry" into the merits of the government's putative defense, *id.* at 37a. These include producing non-privileged summaries of privileged information analogous to what happens routinely in CIPA cases, *see* supra n.5, appointing a security-cleared special master who can summarize privileged information for

[7] Nor would further record development create any risk of "graymail." Pet. at 24. That risk exists when a litigant with secret information brings a suit "to induce the [government] to settle a case . . . out of fear that any effort to litigate the action would reveal classified information." *Tenet*, 544 U.S. at 11. Here, Respondents possess no secret evidence.

the district court's benefit, or requiring the Government or a neutral third-party to redact privileged information before disclosure to the district court. Pet.App. 40a-41a.

Moreover, because the decision below does not order disclosure of privileged information even to the district court, and because no specific procedures have been adopted on remand, there is no record on which this Court can resolve the question the government presents. Courts decide privilege questions in response to specific assertions, not theoretical ones. *Cf.* Pet.App. 23a ("[O]rdinarily, an evidentiary privilege is invoked to prevent the disclosure of *specific* evidence sought in discovery."). *Cf. Zubaydah*, 595 U.S. at 214 (reviewing "specific discovery requests" for which "protective measures" would not suffice). Doing so ensures the "assertion and its impact on the parties can be concretely evaluated and refined through discovery processes that serve to narrow and clarify the evidentiary issues in dispute between the parties." Pet.App. 23a (citing *Hickman v. Taylor*, 329 U.S. 495, 501 (1947)). But at this stage, no one knows what, if any, evidence the district court may require the government to provide in order to advance its defense, and what alternatives to disclosure it might consider and reject.

### C. The Individual Defendants' Constitutional Concerns are Premature.

For similar reasons, this Court should not address the constitutional objections of individual defendants Allen and Armstrong ("the Individual Defendants"). They argue the Court should grant certiorari because the decision deprives them of their Seventh

Amendment and due process rights. But it does no such thing at this stage of the case. As described above, there remain various possible outcomes not involving trial that would obviate any Seventh Amendment and Due Process concerns. The canon of constitutional avoidance counsels strongly against taking up such questions before it becomes necessary. *Matal v. Tam*, 582 U.S. 218, 230 (2017). If the Individual Defendants believe their rights are impaired on remand, they will have every opportunity to object and appeal.

In any event, even if the district court ordered disclosure of privileged evidence in camera and ex parte, it is far from clear that that procedure would violate the Individual Defendants' constitutional rights. Courts have upheld other procedures involving adjudication of the merits without complete disclosure to a litigant. *See, e.g.*, *United States v. Abu-Jihaad*, 630 F.3d 102, 129 (2d Cir. 2010) (rejecting due process challenge to in camera and ex parte review of legality of electronic surveillance under FISA); *see also* 18 U.S.C. app. III § 6(c)(1) (CIPA provision allowing procedures that "provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information"). And no court has ever held the assertion of the state secrets privilege violates a *plaintiff's* Seventh Amendment or Due Process rights, even though it leads to the exclusion of evidence and, sometimes, the dismissal of claims that would otherwise go to a jury. *See, e.g.*, *Reynolds*, 345 U.S. at 10; *Jeppesen*, 614 F.3d at 1076. The Individual Defendants never explain why they should have procedural rights superior to plaintiffs'.

## III. THERE IS NO BASIS TO GRANT, VACATE, AND REMAND THIS CASE

The government suggests in the alternative that the Court grant, vacate, and remand with an instruction to the court of appeals to remand to the district court to address the unsworn letters that Craig Monteilh has sent to the court, in which he recants some unspecified portion of his declarations. That suggestion is meritless. The government's argument requires a showing that the state-secrets ruling below would likely be altered by the government's new factual claims *and* that it might affirm the grant of the motion to dismiss on the completely new ground that Respondents cannot satisfy the pleading requirements set forth in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (construing Federal Rule of Civil Procedure 8). Neither of those are true.

First, the decision below does not rest on the veracity of Monteilh's claims, and there is no connection between those claims and the state secrets holding on which the government seeks review. *See Wellons v. Hall*, 558 U.S. 220, 225 (2010) ("A GVR is appropriate when '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 where it appears that such a redetermination may determine the ultimate outcome' of the matter.") (citation omitted).

Second, the government errs in suggesting that Monteilh's (partial) recantations call into doubt the plausibility of the complaint. This case has never progressed beyond the motion-to-dismiss stage. The

question at this stage is not which of Monteilh's competing statements are more credible or how strongly they are corroborated—such disputes of fact cannot be resolved on a motion to dismiss. At this stage, the only question is whether the detailed allegations in the complaint are plausible. Monteilh's recantations do not render the complaint so implausible as to require dismissal. Plausibility is analyzed on the face of the complaint, which contains detailed allegations about the informant's surveillance of congregants and their places of worship—allegations that rest on the personal knowledge of Respondents and various other witnesses, not just Monteilh. *See* Pet.App. 283a-91a, 295a-302a. Monteilh's recent, unsworn letters may bear on the parties' factual showings at the next stage of the case, but they lie outside the four corners of the complaint and thus do not negate the plausibility of Respondents' allegations.

Finally, procedural posture aside, the government offers no reason to credit Monteilh's recent unsworn letters over his prior sworn declarations. *United States v. Kearney*, 682 F.2d 214, 219 (D.C. Cir. 1982) (recanting witnesses "are looked upon with utmost suspicion by the courts" (citation modified)); *id.* (collecting cases); *cf. Carriger v. Stewart*, 132 F.3d 463, 483 (9th Cir. 1997) (Kozinski, J., dissenting) ("recanting testimony is easy to find but difficult to confirm or refute: . . . witnesses with personal motives change their stories many times, before and after trial").

There is still more reason to doubt Monteilh's recantation because the declarations now being

challenged were extensively corroborated by the press and Respondents themselves. *See, e.g.*, *supra*, n.3. Although the government's use of Monteilh to surveil and target Respondents is "central to [Respondents'] case" as the court of appeals found, Pet.App. 5a, his *declarations* are not. The parties will dispute the reliability of Monteilh's competing statements as the case proceeds in district court. But given that the letters constitute only a change in factual circumstances, they are irrelevant at this motion-to-dismiss stage and cannot justify a GVR.

## CONCLUSION

For the foregoing reasons, this Court should deny the petition.

Respectfully submitted,


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