No. 25-430

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

REPLY BRIEF FOR THE PETITIONERS

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The state-secrets privilege protects information whose disclosure risks compromising the national security by removing that privileged information from a case and requiring dismissal of claims that cannot be fairly adjudicated without it. Pet. 2, 16-18, 21-22. The Ninth Circuit fundamentally erred and vitiated the privilege in holding that courts cannot dismiss claims unless the government first submits "the specific information that establishes its defense" and "the *privileged information* establishes that the defense is legally meritorious." Pet. App. 30a, 34a-35a (emphasis added). See Pet. 3, 15-23. Such encroachments on the state-secrets privilege present such grave national-security risks that this Court previously intervened in this case to reject the Ninth Circuit's earlier attempt to require materially similar merits litigation using state-secrets information under 50 U.S.C. 1806(f). Pet. 3-4, 10, 24-25.

The Ninth Circuit's latest decision compounds its prior error by upending the procedures for every state-secrets case in the Ninth Circuit, not just (as before) those involving electronic surveillance. Pet. 24-25. Respondents mount little defense of the merits of the Ninth Circuit's decision, instead objecting that the decision below is not certworthy, Br. in Opp. (Opp.) 17-28, and would be a poor vehicle, Opp. 28-34. Those objections would have also militated against this Court's review of the last iteration of this state-secrets case. This Court should again reject these objections and prevent the Ninth Circuit from seriously weakening the state-secrets privilege.

At a minimum, the Court should grant certiorari, vacate, and remand (GVR) because the source of respondents' core allegations of religion-based targeting—Craig Monteilh—has recently recanted. That significant intervening event has fundamentally altered the foundation on which this case has been litigated from the outset. Respondents counter that the recantation is unsworn and irrelevant to the judgment below. Opp. 35-37. But Monteilh's now-recanted allegations were the centerpiece of respondents' complaint, and his more recent allegations of litigation malfeasance cast serious doubt on whether this case can proceed at all—let alone on the bases that the Ninth Circuit envisioned below without having explored Monteilh's allegations of potential fraud on the court.

A. The Ninth Circuit's Decision Warrants Certiorari

The Ninth Circuit's decision significantly undermines the Executive's ability to safeguard the Nation's most sensitive information and raises exceptionally important questions warranting review. Pet. 23-25. Respondents' objections to review (Opp. 18-28) lack merit.

1. Respondents contend (Opp. 18-21) that the Ninth Circuit's decision does not implicate a circuit split and "breaks no new ground" because it follows *In re Sealed Case*, 494 F.3d 139 (D.C. Cir. 2007), Opp. 2. But as this Court's decision in *General Dynamics Corp.* v. *United States*, 563 U.S. 478 (2011), and other circuit authority reflect, the state-secrets privilege has long been understood to foreclose litigation that cannot be fairly conducted without resort to the privileged information, including litigation where the information is needed for a good-faith defense. Pet. 17-19, 21-22. Indeed, until the decision below, no court had required a merits adjudication of either claims or defenses using evidence protected by the state-secrets privilege. Even the Ninth Circuit admits (with considerable understatement) that its adjudicatory process using "privileged information" is "unorthodox." Pet. App. 34a-35a.

Contrary to respondents' contentions, *Sealed Case* is readily distinguishable because the D.C. Circuit held that the defense asserted by the individual-capacity defendant (Huddle) did *not* implicate state secrets—unlike the government's defense here, which clearly implicates state secrets, Pet. App. 208a, 216a. Huddle defended against a claim that he had unlawfully surveilled the plaintiff's telephone conversation by contending "that he learned of [the] conversation through [a third person]" —a defense that did not depend on the state-secrets-privileged information. *Sealed Case*, 494 F.3d at 149; see *id.* at 141, 145-146. The court thus held that Huddle would not be "deprived of a valid defense based on privileged materials" because he had "already revealed his defense" and it was "unprivileged." *Id.* at 149. The court added that dismissal could not be justified merely on the theory that "possible defenses" (which had not been as-

serted) might be foreclosed. *Ibid.* The court observed that such a dismissal would be "quite different from" that in *Molerio* v. *FBI*, 749 F.2d 815 (D.C. Cir. 1984) (Scalia, J.), where the court viewed the privileged information as showing that the defendant "could not have committed the alleged acts." *Sealed Case*, 494 F.3d at 149. Accordingly, the related statements in *Sealed Case* purporting to describe what might be a "valid defense" which, if asserted, could warrant dismissal, *ibid.*—which the Ninth Circuit invoked to support its requirement of actual merits adjudications using privileged information, Pet. App. 25a-26a, 36a—were unnecessary to the disposition in *Sealed Case*. Indeed, the D.C. Circuit has never since applied that dicta where, as here, the "privileged information provides essential evidence" for a defendant's *actual* defense, *id.* at 216a.

Respondents also invoke (Opp. 2, 8, 18, 21) *Molerio*, but that case simply indicates that dismissal is appropriate if the relevant defense appears particularly strong—a rationale that could equally apply here. In *Molerio*, the D.C. Circuit stated that during the "necessary process" of reviewing the government's privilege assertion, it had "satisfied [itself]" that the government's "in camera affidavit set forth the genuine reason for denial of [Molerio's] employment," which "had nothing to do" (as Molerio had alleged) "with [his father's] assertion of First Amendment rights." *Molerio*, 749 F.2d at 825; see *id.* at 824-825. The court added that it would be a "mockery of justice" to allow further litigation that "would involve an attempt, however well intentioned, to convince the jury of a falsehood." *Id.* at 825. *Molerio* does not hold, however, that a good-faith defense will warrant dismissal only in such circumstances. And *Molerio* does not support the Ninth Circuit's requirement of *additional* pro-

ceedings for submitting privileged evidence for adjudicating the merits. By emphasizing that it had "satisfied" itself of the reason for the FBI's decision "as a *necessary consequence* of [its] in camera consideration of the state secrets privilege," *Molerio* contemplated no proceedings at all beyond that necessary review. *Id.* at 825 (emphasis added).

The Ninth Circuit's decision is an outlier that departs significantly from the principles governing the state-secrets privilege reflected in decisions of this Court and other courts of appeals. Pet. 16-23. And like the Ninth Circuit's first decision in this case—which this Court unanimously reversed—review is again warranted because the Ninth Circuit's decision threatens the national security. Pet. 23-25.

2. Respondents assert (Opp. 23-24) that the Ninth Circuit's decision parallels "[s]ettled [p]ractice" reflected in courts' "authority to review classified documents" under the Freedom of Information Act (FOIA), 5 U.S.C. 552, the Classified Information Procedures Act (CIPA), 18 U.S.C. App. 3, at 414 (2018), and Section 1806(f) of the Foreign Intelligence Surveillance Act of 1978 (FISA), 50 U.S.C. 1801 *et seq*. Those statutes, however, address materially different contexts, none of which involves national-security-endangering merits litigation using state-secrets evidence.

The relevant question in FOIA is whether withheld classified records are "properly classified," 5 U.S.C. 552(b)(1), which does not require submission of the classified information itself. CIPA, as respondents acknowledge, applies only in "criminal cases." Opp. 23. There, the government can decline to bring (or decide to drop) charges whenever it concludes a prosecution would impose unwarranted national-security risks. By contrast,

this case involves a civil action filed by private plaintiffs seeking injunctive relief and damages, which the government cannot unilaterally forgo. And whatever the proper scope of Section 1806(f), see *FBI* v. *Fazaga*, 595 U.S. 344, 353-355 (2022) (noting different interpretations), FISA "does not displace the state secrets privilege," *id.* at 355. Where, as here, private litigants bring suit and attempt to use FISA as a sword, the privilege protects state-secret information. See *id.* at 359.

Respondents suggest (Opp. 6 n.1, 7-8, 24-25) that the state-secrets doctrine warrants dismissal only where, as in *Totten* v. *United States*, 92 U.S. 105 (1876), the underlying claims involve government contracts. But this Court has already rejected the contention that a state-secrets dismissal is "merely a contract rule," emphasizing that "*Totten* was not so limited" and reflects the broader principle 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.'" *Tenet* v. *Doe*, 544 U.S. 1, 8 (2005) (quoting *Totten*, 92 U.S. at 107). The Court has accordingly applied that principle outside contract contexts to direct the dismissal of an environmental claim "where, '[d]ue to national security reasons,' the Navy could 'neither admit nor deny' the fact that was central to the suit." *Id.* at 9 (quoting *Weinberger* v. *Catholic Action*, 454 U.S. 139, 146-147 (1981)) (brackets in original). This case is materially similar: The "fact[s] that [are] central" to respondents' religion claims (*ibid.*) are *who* were the subjects of the FBI's counterterrorism investigations and *why* they were targeted —information that the state-secrets privilege protects from litigation use. Pet. 7-9, 11, 22-23.

Respondents suggest (Opp. 26-27) that review is unwarranted because, earlier, the government sought review only of a FISA-focused question when the Ninth Circuit held that Section 1806(f) requires a merits adjudication with "state secrets evidence" and that the resulting assessment could be applied "to determine the lawfulness of the surveillance falling outside FISA's purview," Pet. App. 139a. The Ninth Circuit then speculated that *if* the FISA-relevant surveillance were to drop from the case or *if* pertinent evidence did not "overlap," the government could assert a "tailored" state-secrets defense, adding, in dicta, that a valid defense would be one that requires judgment for the defendant based the privileged record. *Id.* at 139a-141a. This Court, however, reversed the Ninth Circuit's *judgment* as the government requested, *Fazaga*, 595 U.S. at 359, wiping the slate clean. Only now that the Ninth Circuit has reversed based on its current state-secrets-merits-adjudication requirement is that issue ripe for review.

3. Respondents suggest (Opp. 28) that review is unwarranted because the state-secrets issue "[r]arely [a]rises." That was true of the earlier iteration of this case too, and it was no barrier to review because state-secrets cases are generally uncommon but involve extraordinary national-security implications that warrant this Court's intervention when lower courts distort the doctrine. Respondents' inability to identify any state-secrets decision or analogous context that similarly endangers the national security underscores the importance of the question presented and need for this Court to again correct the Ninth Circuit's deeply flawed decision.

B. This Case Cleanly Presents The Question Presented

Respondents contend (Opp. 4-5, 28-33) that review would be "premature" because the Ninth Circuit did "not require the government to disclose secret evidence" and "any threat of disclosure [of state secrets] remains speculative," Opp. 28-29. Those contentions are meritless.

1. Respondents incorrectly suggest (Opp. 30-32) that the question presented might "[n]ever [a]rise" in this case because the government might "never seek to use privileged material in its defense." The question has already arisen and is squarely presented for review.

Respondents' religion claims—which concern surveillance conducted in several FBI counterterrorism investigations—rest on their "core allegation" that "they were targeted for surveillance solely because of their religion." Pet. App. 39a, 117a & n.38; see Pet. 7-9. Yet the state-secrets privilege here protects, *inter alia*, information identifying the particular individuals who were the subjects of, and the initial reasons (*i.e.*, predicates) for, those investigations. Pet. 7-9, 11. After "thoroughly" reviewing the "public and classified submissions," the district court specifically found that "the Government will *inevitably* need the privileged information to defend against [that] core allegation" because the "privileged information provides *essential* evidence for [the government's] full and effective defense" that the FBI investigations were "properly predicated and focused," "not indiscriminate schemes to target Muslims." Pet. App. 208a, 216a (emphases altered); see Pet. 7-8. The court then correctly determined that the merits of respondents' religion claims could not be properly adjudicated and had to be dismissed. Pet. App. 213a-214a, 222a; see Pet. 21-23.

The Ninth Circuit did not disturb the finding that state-secrets information is essential to, and would inevitably be needed for, the government's defense. It instead reversed because the district court did not adjudicate the "merit[s]" of that defense using the "privileged information." Pet. App. 30a, 34a-35a. That deeply flawed holding is the basis for the judgment of reversal and is now cleanly presented for review.

2. Respondents observe (Opp. 32-33) that the Ninth Circuit did not "*require*" the government to disclose privileged information because, they say, a merits adjudication with privileged information was just "one of several options." Respondents misread the Ninth Circuit's decision, which separately rejects the district court's two *independent* bases for dismissing respondent's claims: that (1) privileged information was necessary for the government's defense (Pet. App. 25a-38a) and (2) litigation would unacceptably risk state secrets because the privileged and nonprivileged information were "inseparable" and could not be "disentangled" (*id.* at 38a-44a (citations omitted)). See *id.* at 24a. Respondents discuss (Opp. 32-33) the Ninth Circuit's analysis addressing possible ways to separate privileged from nonprivileged information. Pet. App. 40a-41a. But such options do not alter the Ninth Circuit's distinct requirement to conduct a *merits adjudication using privileged evidence* necessary for a defense.

3. Respondents' suggestion (Opp. 30) that the government may "never seek to use privileged material in its defense" blinks reality. Respondents contend that the government may never need to use state secrets to mount a defense because respondents may not establish a *prima facie* case using non-privileged information or because respondents might prevail regardless of the

government's privileged evidence. But below, respondents argued that "[t]he record already establishes" their "prima facie case" because "[t]he Government's own informant"—Craig Monteilh—"has submitted sworn declarations showing the Government engaged in intentional discrimination specifically against Muslims." Resp. Supp. C.A. Br. 24-25. And because the Ninth Circuit accepted respondents' premise that state secrets would be unnecessary to establish their *prima facie* case, it focused specifically on the government's defense. Pet. 11-12, 28.

C. Alternatively, This Court Should Grant, Vacate, And Remand

Although the importance of the state-secrets question makes a grant of certiorari the proper course, the Court may wish to grant certiorari, vacate the court of appeals' judgment, and remand in light of a significant intervening event: the recent recantation of Monteilh, the only source for respondents' core allegation that the FBI targeted them for surveillance solely because of their religion. Pet. 25-29.

Monteilh now states that he and respondents' counsel concocted "[m]ost of the information" in his declarations, knowing the information to be false. Pet. App. 452a, 462a-463a. Among other things, Monteilh represents that, contrary to respondents' allegations, the FBI's surveillance "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; see Pet. 13-14, 26. That comports with the government's longstanding position disputing respondents' allegations of religion-based dragnet surveillance. Pet. 7-8. And it fatally undermines the

premise on which respondents have adjudicated this case from the outset.

Because respondents had filed Monteilh's declarations (Pet. App. 353a-405a) describing what his FBI handlers purportedly told him to do, there was previously every reason to expect that respondents could establish a *prima facie* case of religion-based targeting. Indeed, even now, respondents emphasize (Opp. 30-31) Monteilh's "declarations and other publicly available information describing his activities" as critical elements of their non-privileged *prima facie* case. Both courts below accordingly concluded—as respondents argued, see p. 10, *supra*; Pet. 8-9—that the case did not turn on whether they could establish a *prima face* case without privileged evidence and, instead, turned on the government's defense. Pet. 11-12; Pet. App. 214a. A GVR is therefore appropriate because Monteilh's recantation constitutes a fundamental change that could significantly alter the Ninth Circuit's analysis. Pet. 28-29.

Respondents suggest (Opp. 30-31) that they can rely on other "non-privileged evidence" to establish a "prima facie case," but ignore that Monteilh is the *only* source for their "core allegation" that the FBI "targeted [them] for surveillance solely because of their religion," and that both courts below accordingly treated his allegations as central. Pet. App. 39a, 117a & n.38; see Pet. 26. Respondents' statement of facts (Opp. 9-10), for instance, cites their complaint (Pet. App. 261a-352a), but its allegations of religion-based targeting mirror Monteilh's declaration used to draft the complaint. See Pet. 5-6; Pet. App. 360a-362a, 366a, 370a, 372a, 378a, 380a-382a. Media reports providing hearsay descriptions of Monteilh's earlier statements, Pet. 5, merely repeat what Monteilh has disavowed. And significantly, re-

spondents identify no source independently showing that the FBI targeted them for surveillance solely because of their religion.

Respondents oppose (Opp. 35-36) a GVR on the grounds that the Ninth Circuit's ruling "does not rest on the veracity of Monteilh's claims" and that their case "rest[s] on the personal knowledge" of respondents and "other witnesses." But no one other than Monteilh and the FBI agents with whom he worked have personal knowledge of the dispositive facts of what the agents instructed Monteilh to do. Pet. 26.

Respondents see "no reason" to believe Monteilh's recantation, Opp. 36-37, but his recantation comports with the government's position throughout this case and he has fully explained why he lied. Pet. 7-8, 13. Respondents complain that Monteilh recanted in "unsworn letters," Opp. 36, but Monteilh repeatedly stated that he would willingly cooperate with an investigation into his recantation, Pet. 14. Below, respondents successfully opposed the government's repeated efforts to obtain a prompt investigation. Pet. 28. Yet now, respondents "wholeheartedly agree the district court should undertake [that] inquiry." Opp. 6.

The recent extraordinary and fundamental changes to the factual posture of this case amply warrant a GVR with instructions (see Pet. 29-30).

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted

or, alternatively, it should be granted, the judgment of the court of appeals vacated, and the case remanded.

Respectfully submitted.

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