

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	EDWIN S. KNEEDLER, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF:	
6	CATHERINE M.A. CARROLL, ESQ.	
7	On behalf of the Agent Respondents	53
8	ORAL ARGUMENT OF:	
9	AHILAN T. ARULANANTHAM, ESQ.	
10	On behalf of Respondents Fazaga,	
11	et al.	63
12	REBUTTAL ARGUMENT OF:	
13	EDWIN S. KNEEDLER, ESQ.	
14	On behalf of the Petitioners	134
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
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22
23
24
25

P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: Today's orders of the Court have been duly entered and certified and filed with the clerk.

We will hear argument first this morning in Case 20-828, the Federal Bureau of Investigation versus Fazaga.

Mr. Kneedler.

ORAL ARGUMENT OF EDWIN S. KNEEDLER
ON BEHALF OF THE PETITIONERS

MR. KNEEDLER: Mr. Chief Justice, and may it please the Court:

The state secrets privilege is firmly grounded in the Constitution and the common law and is critical to safeguarding the national security. The Ninth Circuit did not disagree with the district court's conclusion that the information concerning the foreign intelligence investigation at issue here was -- falls within that privilege.

The Ninth Circuit instead held that Section 1806(f) of FISA displaces the state secrets privilege and requires the district court to adjudicate the merits of plaintiffs'

1 challenge using the very information that is
2 covered by the privilege.

3 That novel interpretation cannot be
4 squared with the text, context, or purpose of
5 Section 1806(f). That section's purpose is to
6 provide a special mechanism for the suppression
7 of evidence when the government seeks to use it
8 against an aggrieved person in a judicial
9 proceeding or other proceeding.

10 The Ninth Circuit's first rationale
11 was that the government uses information against
12 a party when it invokes the state secrets
13 privilege. But the government invokes the
14 privilege to prevent the use of information, not
15 to facilitate its use.

16 Indeed, in this case, the government
17 argued, and the district court agreed, that
18 because the information concerning the reasons,
19 the subjects, the sources and methods of this
20 foreign intelligence investigation was so
21 central to the case that the case -- that the
22 First Amendment claim had to be dismissed.

23 The Ninth Circuit's other rationale
24 was equally erroneous. It ruled that
25 plaintiffs' prayer for relief seeking an

1 injunction requiring the FBI to destroy or
2 return the information comes with an 1806(f)
3 reference to a motion or request to discover or
4 obtain surveillance application orders and
5 related materials. But that clause governs
6 discovery in aid of a suppression motion. It
7 likewise does not displace the privilege.

8 At the very least, given the
9 constitutional and deep common law roots of the
10 state secrets privilege, Section 1806 cannot be
11 read to -- to reflect a congressional intent
12 that would be required to abrogate the
13 privilege.

14 JUSTICE THOMAS: Mr. Kneedler, do you
15 place -- a few times in your opening remarks you
16 referred to this as a common law privilege. Is
17 that your argument, that it's based in common
18 law rather than inheres in executive power?

19 MR. KNEEDLER: No, we -- we think it's
20 very strongly rooted in executive power. It --
21 it -- it's also firmly rooted in the common law,
22 and the -- the reflection of it being in the --
23 as part of the executive power goes all the way
24 back to the founding. Some -- many of those
25 early disputes were vis-a-vis Congress, not the

1 courts. But the basic point of the need for the
2 executive to protect information pertaining to
3 the nation's security as being part of the
4 presidential prerogative and the executive
5 branch necessity goes all the way back to the
6 founding.

7 But it's also recognized for very good
8 reasons, the same reasons, really, as a matter
9 of federal common law.

10 JUSTICE THOMAS: One final question.
11 The Respondent seems to make quite a bit of the
12 -- two cases, Totten and Reynolds, and argues
13 that these two have separate doctrines with
14 respect to executive powers or to state secrets.

15 Do you think they're two separate
16 doctrines, or is it just one doctrine?

17 MR. KNEEDLER: We think, at bottom,
18 that it's just one doctrine. The -- the
19 question of the privilege in the first instance
20 goes to the exclusion of the evidence --

21 JUSTICE THOMAS: Yeah.

22 MR. KNEEDLER: -- from the proceeding.
23 But then the next question is, what happens if
24 the evidence is excluded? And in that
25 situation, as we argued here, where the evidence

1 is so central, at least where the evidence is so
2 central to the case or its adjudication would
3 risk disclosing information at the core of the
4 case, the case should be dismissed.

5 And, in fact, this Court's decision in
6 Tenet versus Doe rejected the claim or the
7 contention that -- that the doctrine of Totten
8 was simply a contract doctrine. The Court said,
9 in fact, Totten was not so limited.

10 And the Court, quoting the -- the
11 famous passage from Totten, said public policy
12 forbids the maintenance of any suit in a court
13 of justice the trial of which would inevitably
14 lead to the disclosure of matters which the law
15 itself regards as confidential.

16 And in Reynolds itself, while the
17 Court was dealing with a privilege, it pointed
18 out that Totten was a particularly clear case,
19 and it was not necessary to -- even to get into
20 the question of evidence because the case
21 concerned the existence of a -- of a spy
22 agreement that was central to the case.

23 But I think the way the -- the Court
24 referred to Totten indicates that that was an
25 easy case that actually could be dismissed on

1 the face of the complaint because the face of
2 the complaint was alleging the existence that
3 was -- of a secret item that was -- that was
4 protected by the -- by the national security.

5 But, if you get further along, maybe
6 the face of the complaint doesn't say that, but,
7 as the government's declaration in this case
8 demonstrated, the adjudication of the case, if
9 it went forward, would concern the sources and
10 methods, et cetera, of the foreign intelligence
11 investigation that -- that -- such that
12 plaintiffs' First Amendment challenge could not
13 --

14 JUSTICE SOTOMAYOR: Mr. Kneedler --

15 MR. KNEEDLER: -- properly be
16 adjudicated.

17 JUSTICE THOMAS: Thank you.

18 JUSTICE SOTOMAYOR: -- part of -- I'm
19 sorry, Justice Thomas.

20 JUSTICE THOMAS: No, Im finished.

21 JUSTICE SOTOMAYOR: Did you finish?

22 Thank you.

23 I'm a little confused. I thought the
24 Ninth Circuit here basically only displaced the
25 state secrets privilege with respect to the

1 ability of the judge to determine whether, after
2 reviewing the information that was necessary,
3 that it thought necessary, that it then should
4 determine whether the seizure was lawful or
5 unlawful under 1806.

6 I thought that there were separate
7 writings basically saying that if, at that
8 point, it found the seizure unlawful, that then
9 it would consider disclosure only. I don't
10 think it said it would disclose if the seizure
11 was lawful. It said it would disclose only if
12 it's unlawful.

13 MR. KNEEDLER: But --

14 JUSTICE SOTOMAYOR: I don't know where
15 in any of our jurisprudence we've ever suggested
16 that an in camera review by a judge threatened
17 national security.

18 MR. KNEEDLER: Our submission is not
19 that when the government invokes the state
20 secrets privilege that a court is altogether
21 barred from looking at the -- at a in camera
22 submission by the government to explain why the
23 information is privileged.

24 But the Ninth Circuit went beyond
25 that. It relied on 1806(f) to actually

1 adjudicate the merits. It said the court should
2 consider all of the constitutional challenges
3 that -- that the plaintiffs are bringing.

4 JUSTICE SOTOMAYOR: I'm sorry. 1806
5 only permits on its terms a disclosure if the
6 information is seized unlawfully. So I don't
7 know where you would get that the Court was
8 trying to do anything else but determine that.

9 And I think there were some of the
10 majority who wrote separately and said, if the
11 Court chooses to disclose, then -- but that's a
12 big if -- assuming that your seizure was
13 unlawful, then it has to be disclosed.

14 I guess my bottom line is you seem to
15 be rendering 1810 a nullity by basically saying,
16 if I invoke state -- if I don't invoke 1806 by
17 move -- me, the government -- by moving to
18 suppress evidence, then -- and I tell you it's a
19 state secret, even if I seize these materials
20 unlawfully, the Petitioners have no claim under
21 1810.

22 Is that what you're saying?

23 MR. KNEEDLER: Well, several things.

24 1810 does not apply to the government.
25 1810 is only a suit for damages.

1 JUSTICE SOTOMAYOR: Exactly. So if
2 these --

3 MR. KNEEDLER: So it cannot be the
4 basis for -- for a suit for an injunction.

5 JUSTICE SOTOMAYOR: Well, that's
6 assuming we read 1806 the way you do.

7 MR. KNEEDLER: No. No, I --

8 JUSTICE SOTOMAYOR: But 1810 --

9 MR. KNEEDLER: -- I was making a point
10 --

11 JUSTICE SOTOMAYOR: -- lets a --

12 MR. KNEEDLER: -- about 18 -- about 18
13 --

14 JUSTICE SOTOMAYOR: -- person --

15 MR. KNEEDLER: Yes.

16 JUSTICE SOTOMAYOR: --- 1810 lets a
17 person who's been surveilled unlawfully sue for
18 actual damages, liquidated damages, punitive
19 damages, and reasonable attorneys' fees.

20 So assume, as I must, on the face of
21 the complaint that the plaintiffs might be able
22 to prove without your information that they have
23 standing because they've been unlawfully
24 surveilled, and they're suing for a violation of
25 1810.

1 You're claiming that they don't --
2 they're not entitled to have the judge determine
3 whether they've been surveilled unlawfully or
4 not?

5 MR. KNEEDLER: There -- there are two
6 points about 8 -- about Section 1806(f). One is
7 that it is simply a suppression mechanism, not a
8 -- a -- a determination to --

9 JUSTICE SOTOMAYOR: Do we need to
10 reach that if we -- if we just say that 1806
11 doesn't displace state secrets? Why would we
12 even reach that question?

13 MR. KNEEDLER: Well, I -- state secret
14 -- because there's a threshold question.
15 1806(f) only applies -- it's triggered by the
16 government's intention or obvious purpose --

17 JUSTICE SOTOMAYOR: No, sir.

18 MR. KNEEDLER: -- to use the
19 information.

20 JUSTICE SOTOMAYOR: You -- you say
21 that the state secrets is not displaced by
22 1806(f). If we agree with that, why would we
23 reach that very knotty question, which, in your
24 brief, you asked us not to reach, of whether or
25 not a claim under 1810 would permit the judge to

1 look at the materials and say a seizure is
2 unlawful or not?

3 MR. KNEEDLER: What we've -- what
4 we've suggested is not before the Court is the
5 question of dismissal as a remedy or as a
6 consequence of invocation of the state secrets
7 privilege.

8 The other arguments we're making go to
9 the interpretation of 1806 itself. In terms of
10 when can it be invoked, in our view, it can be
11 invoked only when the government affirmatively
12 will use the information against an aggrieved
13 party.

14 CHIEF JUSTICE ROBERTS: Mr. Kneedler
15 --

16 MR. KNEEDLER: And the invocation of
17 --

18 CHIEF JUSTICE ROBERTS: -- how is that
19 -- how is that consistent -- I mean, I think I
20 understand the argument you made in this respect
21 in your brief, but I'd like to hear it
22 concisely.

23 How is that consistent with the
24 language that any aggrieved person can use the
25 statute to discover or obtain applications or

1 orders or other materials relating to the
2 electronic surveillance? That sounds like the
3 other aggrieved person is using 1806(f).

4 MR. KNEEDLER: Yes, but in -- but we
5 submit in response, in the situation, just like
6 in an ordinary suppression situation, if the
7 government -- and -- and this is a statutory
8 codification of what is, at bottom, a regular
9 suppression motion or -- or procedure.

10 When the government intends to
11 introduce evidence obtained or derived from
12 foreign intelligence surveillance, then the
13 aggrieved party against whom the evidence would
14 be used has an opportunity, just as in a -- a
15 normal suppression motion, to challenge the
16 validity of the surveillance or -- or other way
17 in which the government obtained the evidence.

18 So it has to be triggered first by the
19 government's use of the information. And when
20 you -- when you read all the preceding sections
21 and (f) together, we think that's very clear.

22 Subsection (c) requires the government
23 to notify an aggrieved party when it intends to
24 use information against him in a proceeding.

25 (e) provides for a motion to suppress that. And

1 then (f) is about how a suppression procedure
2 would operate, whether -- whether it's the
3 result of the government's notification or a
4 motion under (e) or, as a -- as a safeguard to
5 make sure this procedure is exclusive, any other
6 way in which a aggrieved party might seek to
7 challenge the government's use of the
8 information.

9 And your reference to the language in
10 -- in (f) refers to a motion or request is made
11 by an aggrieved party to discover or obtain
12 applications or orders or other materials
13 relating to the surveillance.

14 That is all information. It's classic
15 suppression. We want -- we want to see what
16 went -- what went into the warrant or what went
17 into the application to the FISC. So it's about
18 suppression --

19 JUSTICE KAGAN: But why isn't --

20 MR. KNEEDLER: -- not about a -- a
21 general discovery.

22 JUSTICE KAGAN: -- well, why isn't it
23 about both? I mean, a significant part of it is
24 obviously about suppression, but there are also
25 these references to discovery. And why -- why

1 shouldn't we understand this provision as doing
2 both things, as codifying a suppression
3 procedure and also codifying a discovery
4 procedure? Because it may be that plaintiffs in
5 a case like this one look to discover very
6 sensitive materials and Congress wanted a
7 procedure in place to deal with those kinds of
8 discovery requests.

9 MR. KNEEDLER: Well, in a -- in a
10 civil case, if there is a discovery request and
11 the -- and the information is covered by the
12 privilege, the mechanism for dealing with that
13 is the assertion of the state secrets privilege.

14 There is no automatic right in a civil
15 plaintiff to get discovery from the government
16 vis-à-vis a privilege. But -- but where the
17 government actually comes forward and says we
18 want to use this information against you, then
19 --

20 JUSTICE KAGAN: But you're just --
21 you're just excising words from this statute. I
22 mean, this -- this statute is about discovering,
23 obtaining, or suppressing evidence. That's --

24 MR KNEEDLER: Well --

25 JUSTICE KAGAN: -- that's the (f)

1 language, right?

2 MR. KNEEDLER: Yes, but the -- but --

3 JUSTICE KAGAN: Suppressing,
4 obtaining, or discovering, right?

5 MR. KNEEDLER: Yes, but --

6 JUSTICE KAGAN: I mean, it just seems
7 as though Congress wanted to do two things here.

8 It said we realize there are these
9 very sensitive materials, and maybe the
10 government will want to use them, and the person
11 will say: Oh, that's illegal, the government
12 can't use them. That's one set of
13 circumstances.

14 And the other set of circumstances is
15 maybe a plaintiff wants access to those
16 materials, and the government wants to say: No,
17 you can't have them. And that's another way in
18 which this statute says here are the procedures
19 you use when that occurs.

20 MR. KNEEDLER: I -- I think that that
21 phrasing has to be looked at in the context of
22 -- of all of the -- all of the subsections
23 dealing with the government's intent to use.

24 And, indeed, Section 1806 as a whole,
25 1806 is termed, is titled Use of Information.

1 Subsection (a) describes the uses to which the
2 government may put the evidence, that it can use
3 it only in connection with minimization
4 procedures.

5 Subsection (b) says that it -- that it
6 can't be turned over for law enforcement
7 purposes without a reservation by the attorney
8 general.

9 (c) through (g) deal with the
10 government's use of the information against a
11 party in a -- in a narrow situation in a legal
12 proceeding.

13 JUSTICE GORSUCH: Mr. Kneedler, I'm
14 curious, in the list you gave the Chief Justice
15 of the various sets -- subsections that you
16 think support your -- your position, you didn't
17 list (a), and -- which talks about preserving
18 privileges that otherwise exist. And I'm just
19 curious why the government didn't invoke (a).
20 There must be a reason.

21 MR. KNEEDLER: No, I think -- I think
22 (a) does cover that. I --

23 JUSTICE GORSUCH: Oh, so let's throw
24 that in now too. Okay. All right.

25 MR. KNEEDLER: Well --

1 JUSTICE GORSUCH: Okay. No.

2 MR. KNEEDLER: -- but -- but I think
3 it was --

4 JUSTICE GORSUCH: No, I just wondered
5 if you had a -- had thought about it, and if
6 not, that's fine.

7 MR. KNEEDLER: Yeah. No, I think it
8 also covers, like, attorney-client privilege --

9 JUSTICE GORSUCH: Okay.

10 MR. KNEEDLER: -- of the person being
11 surveilled.

12 JUSTICE GORSUCH: Okay. All right.
13 If you --

14 MR. KNEEDLER: But --

15 JUSTICE GORSUCH: I just wondered if
16 you had had a thought about it.

17 MR. KNEEDLER: Yeah. No, I -- I --

18 JUSTICE GORSUCH: And if you didn't,
19 that's fine.

20 MR. KNEEDLER: -- I -- I think that's
21 a further confirmation of the --

22 JUSTICE GORSUCH: Okay, okay. I got
23 it.

24 "Otherwise use," help me out with
25 that. The language is "enter into evidence,

1 disclose, or otherwise use."

2 Why doesn't "otherwise use" cover --
3 cover this circumstance?

4 MR. KNEEDLER: Well, I -- I think,
5 again, I'm not sure if you're looking at
6 subsection (c) --

7 JUSTICE GORSUCH: Yeah.

8 MR. KNEEDLER: -- or (e), but
9 subsection (c) says "whenever the government
10 intends to enter into evidence or otherwise use
11 or disclose." That --

12 JUSTICE GORSUCH: So -- so it has to
13 be a circumstance, it seems to me, where the
14 government isn't putting the evidence on and it
15 isn't disclosing it to the other side, but it's
16 making use of the evidence in some other
17 fashion.

18 And, here, I think there's a pretty
19 good argument on the other side that the
20 government is using it as a means to dismiss the
21 case without disclosing it. And -- and -- and
22 it is the existence of this secret evidence that
23 will neither be put in evidence nor disclosed
24 that is the basis for the dismissal under
25 Reynolds and Totten in the government's view.

1 So why doesn't that fit perfectly?

2 MR. KNEEDLER: I -- the -- the -- the
3 language "enter" -- "enter into evidence or
4 otherwise use or disclose" is intended, as we
5 understand it, to be a comprehensive description
6 of any way in which the evidence might be --

7 JUSTICE GORSUCH: But it isn't because
8 you've got "otherwise use." So it can't be that
9 "enter into evidence" and disclosure are
10 comprehensive.

11 MR. KNEEDLER: Well, you --

12 JUSTICE GORSUCH: By definition,
13 Congress says they aren't and that there's an
14 other -- there's another way to use this
15 evidence that doesn't involve its disclosure.

16 MR. KNEEDLER: Well, you -- "use"
17 could also -- I mean, "enter into evidence"
18 suggests a formal proceeding, either a judicial
19 proceeding or maybe a formal --

20 JUSTICE GORSUCH: I think we have --

21 MR. KNEEDLER: -- proceeding under the
22 --

23 JUSTICE GORSUCH: -- a pretty formal
24 proceeding here, Mr. Kneedler, don't you?

25 MR. KNEEDLER: Yeah. No, no, but my

1 -- my -- I think you were looking -- I
2 understood you to be looking for an explanation
3 for the word "use." And the explanation I'm
4 giving is that when -- when you don't have a
5 formal proceeding where you -- where you have
6 Rules of Evidence introducing something into
7 evidence, something received in evidence, but an
8 informal adjudication before an agency that does
9 not have that sort of system --

10 JUSTICE GORSUCH: But, Mr. Kneedler,
11 we're talking --

12 MR. KNEEDLER: -- you might use it
13 even if --

14 JUSTICE GORSUCH: -- Mr. Kneedler,
15 we're talking about "otherwise use" in court,
16 and -- and, clearly, because we've got
17 disclosure and -- and entry into evidence.
18 Those things happen in court.

19 Why couldn't it be, again, that
20 "otherwise use" might include when the
21 government cites the existence of secret
22 evidence it's not willing to disclose or put in
23 evidence as a basis for dismissal of the
24 lawsuit? That's using the evidence as an
25 offensive weapon?

1 MR. KNEEDLER: Well, it -- again, we
2 think, when the government invokes the state
3 secrets privilege, it is invoking it to keep it
4 out of the case. It's not -- what -- what --
5 what the language is, is "to use against the
6 person in the proceeding," but the -- but
7 assertion of the state secrets privilege
8 successfully --

9 JUSTICE BARRETT: Mr. Kneedler --

10 MR. KNEEDLER: -- keeps it out of the
11 proceeding. I'm sorry.

12 JUSTICE BARRETT: -- can I follow up
13 on Justice Gorsuch's question? I guess I had
14 understood -- and maybe I'm misunderstanding --
15 your position to be that in 1806(c), "intends to
16 enter into evidence or otherwise use or
17 disclose," that it's not simply in a trial, but
18 it's to otherwise use or disclose at any trial,
19 hearing, or other proceeding in or before any
20 court, department, officer, agency, regulatory
21 body, or other authority of the United States.

22 I had understood you to be saying,
23 well, in all of those situations, you might not
24 be introducing into evidence, but you might be
25 using the evidence, bringing it before a

1 regulatory body in some way that's not a
2 proceeding. Or am I misunderstanding --

3 MR. KNEEDLER: No, that's precise --

4 JUSTICE BARRETT: -- your argument?

5 MR. KNEEDLER: -- that's precisely our
6 explanation. One --

7 JUSTICE BARRETT: And I -- oh, go
8 ahead.

9 MR. KNEEDLER: I'm sorry.

10 JUSTICE BARRETT: Sorry. Go ahead.

11 MR. KNEEDLER: No, I was going to say
12 one other -- one other clue to this is the very
13 same phrase "intends to enter into" -- or "enter
14 into evidence or otherwise use or disclose" in
15 (c) is used in (e), which says "any person
16 against whom evidence obtained," et cetera,
17 "will be introduced or otherwise used or
18 disclosed, may file a motion to suppress."

19 So I think that links (c)'s language
20 about use to the motion to suppress, which is
21 the way in which, again, (e) uses the very same
22 language. And then (f) is about the procedures
23 for suppression. And (g) then says, if the
24 government -- if the district court determines
25 that the surveillance was not lawful, it shall,

1 in accordance with the requirements of law,
2 suppress the evidence which was unlawfully
3 obtained or otherwise grant the motion.

4 And "otherwise grant the motion" was
5 intended to leave open the question of whether
6 this Court's decision in Alderman would apply
7 under -- under FISA. So it --

8 JUSTICE BARRETT: Thank you.

9 MR. KNEEDLER: -- it all hangs
10 together. And this would be a surprising way in
11 which the government -- excuse me -- in which
12 court -- Congress would override, abrogate the
13 state secrets privilege in a sentence about
14 discovery in the middle of four -- five
15 subsections of this statute dealing pretty
16 clearly with the suppression of evidence.

17 And even when you look at 1806(f)
18 itself, it -- it -- it talks about discover or
19 obtain applications or orders or other materials
20 relating to the electronic surveillance. It's
21 not -- it's not talking about evidence about the
22 plaintiffs' claim generally. It's focused
23 specifically on the things dealing with the
24 electronic surveillance.

25 JUSTICE ALITO: It --

1 JUSTICE BARRETT: Mister --

2 JUSTICE ALITO: -- it seems to me, Mr.
3 Kneedler, you have at least one textual argument
4 regarding the language in subsection (f), and
5 that is whether the prayer for relief
6 constitutes a motion or request.

7 But putting that aside, do you have
8 any other arguments about the literal meaning of
9 the language in subsection (f) on which the
10 Respondents rely? And if you don't, what are
11 the structural features that you rely on?

12 I understand your argument to be based
13 mostly on structure and not on the literal
14 language of -- of subsection (f). So two parts
15 to that. Any other strictly textual arguments?
16 And, if not, which structural arguments are you
17 relying on or which anomalies would result if
18 their interpretation were adopted?

19 MR. KNEEDLER: Well, there are, I
20 think, very important textual arguments in the
21 pertinent phrase, which actually has two parts,
22 but it says "discover or obtain."

23 And "discover" could, again, tie into
24 formal court proceedings, where -- where you
25 might file a discovery motion, but -- but

1 outside of formal proceedings, if you want to
2 obtain -- excuse me -- obtain the evidence
3 effectively in the same way you would through
4 discovery, but what you were --

5 JUSTICE ALITO: But the point is,
6 literally, they want to obtain this information,
7 do they not?

8 MR. KNEEDLER: No, what -- what their
9 prayer for relief seeks is -- is actually
10 expungement of it, not -- not to receive it.

11 JUSTICE GORSUCH: I thought they made
12 very plain that they'd be very happy to get the
13 documents back, which I think would be to obtain
14 them.

15 MR. KNEEDLER: Right, but -- but if --

16 JUSTICE GORSUCH: No?

17 MR. KNEEDLER: Yes, but that doesn't,
18 I think, really tie in with -- with what they --
19 what their complaint was. But the more
20 fundamental point is 8 -- 1810 does not provide
21 for injunctive actions against the United
22 States. And the Privacy Act does not provide
23 for expungement.

24 But the structural point, we think, is
25 also very important. As I mentioned here, the

1 -- the entirety of 1806 is addressed to the
2 government's use of information derived from
3 foreign intelligence surveillance. That's the
4 title. (a) talks about use with minimization;
5 (b) talks about when it's going to be furnished
6 for law enforcement purposes. All of these
7 other provisions that -- that we're discussing
8 go to when the government tries to use it in the
9 proceedings.

10 JUSTICE ALITO: Okay. I've got that
11 point. This is -- they are taking some language
12 out of this and interpreting it to mean
13 something that is quite different from most of
14 what is addressed in 1806. I -- I've got that.

15 Any other structural features that you
16 rely on?

17 MR. KNEEDLER: Well, the -- the
18 language -- I don't know whether it's structural
19 or -- but the language in -- in (c) and --
20 excuse me -- (c) and (e) that I referred to,
21 which ties "otherwise use" to suppression, and
22 then (f) being an implementation of the -- of
23 the method for suppression, and on -- on (g),
24 which talks about grant -- suppress the evidence
25 or otherwise grant the motion.... it's the same

1 motion to exclude the evidence from the
2 proceeding. The court can either suppress it
3 or, I think Congress hoped, do something else
4 besides -- besides turning over all the
5 information to the defendant as part of the
6 suppression. That's --

7 CHIEF JUSTICE ROBERTS: Thank --

8 MR. KNEEDLER: -- but -- but (g) talks
9 about suppression of evidence, not -- not
10 obtaining it.

11 CHIEF JUSTICE ROBERTS: Thank you, Mr.
12 Kneedler.

13 MR. KNEEDLER: I'm sorry.

14 CHIEF JUSTICE ROBERTS: Justice
15 Thomas, anything further?

16 JUSTICE THOMAS: Mr. Kneedler, you
17 were -- just one brief thing. You were in the
18 process when you were discussing subsection (c)
19 and the -- it's 1806(c), you -- the phrase
20 "against an aggrieved person," you were about to
21 tell us what you thought of that before you got
22 distracted.

23 MR. KNEEDLER: I think that's very
24 important because it -- it -- it -- it shows
25 that it -- it has to be triggered by something

1 that the government is doing before you even get
2 into this procedure, and -- and that's why the
3 word "suppress" is very important here.

4 If the government intends to use the
5 information against somebody, you can move to
6 suppress it, or, if it's in a more informal
7 proceeding, you move to have it excluded or
8 don't consider it or whatever its -- whatever
9 its equivalent is.

10 Now there may be some civil
11 proceedings where -- where the evidence, you
12 know, maybe there's an argument it shouldn't
13 even be suppressed, but -- but, again, it's all
14 -- in 1978, it was all directed toward
15 suppression, where the government intends to use
16 information against the person in the
17 proceeding, whereas the state secrets privilege
18 keeps it out of the proceeding.

19 JUSTICE THOMAS: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Breyer?

22 JUSTICE BREYER: Well, assume you're
23 right that 180 -- that this particular statute
24 doesn't displace the state secret doctrine.
25 Still, there are many situations and different

1 kinds in which it might arise.

2 This is an unusual one. A plaintiff
3 sues government officials and says: You have
4 unlawfully been wiretapping or surveying,
5 whatever. Okay?

6 The government goes back and says:
7 Judge, we have a good reason for doing that
8 wiretapping, and we don't want to tell people
9 what it is.

10 Doesn't the judge -- shouldn't he
11 still look to see if they're right? I mean,
12 one, maybe they don't. Two, maybe it isn't that
13 important. Three, maybe how they got it,
14 legally or illegal, has something to do with
15 whether -- and, E, maybe there are different
16 ways in which you could disclose some but not
17 all.

18 I mean, wouldn't that be generally
19 true whether this applies or it doesn't apply?

20 MR. KNEEDLER: What you're describing,
21 I think, is the normal administration of the
22 state secrets privilege.

23 JUSTICE BREYER: Uh-huh.

24 MR KNEEDLER: If the government
25 invokes it, yes, we're saying the court can look

1 at it, but it can't use it as a vehicle to
2 decide the merits of the case.

3 JUSTICE BREYER: Why not? Well,
4 that's Justice Scalia's opinion. I mean, I
5 don't know.

6 MR. KNEEDLER: No, I --

7 JUSTICE BREYER: Here, we have a
8 motion to dismiss, and all we have is that. And
9 before we decide whether the case should have
10 been dismissed or not dismissed, doesn't the
11 district judge and perhaps the court of appeals
12 and, for all I know, maybe us, have to look at
13 this information?

14 MR. KNEEDLER: Yeah, we -- we are --
15 we are not -- we are not saying in the normal
16 state secrets case the court, if -- if
17 necessary --

18 JUSTICE BREYER: Could look at it.

19 MR. KNEEDLER: -- can't -- can't look
20 at the --

21 JUSTICE BREYER: Okay. Then why don't
22 we just say this, say this case needn't be
23 dismissed. What should happen -- and -- and it
24 doesn't displace -- this 1806, it doesn't
25 displace anything that's relevant here, but we

1 should send it back, and the Ninth Circuit was
2 wrong, and the district court and maybe the
3 circuit too should go and look at the
4 information if they deem that necessary in terms
5 of the relevance to the case and decide --

6 MR. KNEEDLER: But --

7 JUSTICE BREYER: -- its relevance, how
8 it was obtained, dah, dah, dah, dah, dah, dah,
9 dah.

10 MR. KNEEDLER: But --

11 JUSTICE BREYER: And then someone can
12 move, like the government --

13 MR. KNEEDLER: -- the district court
14 --

15 JUSTICE BREYER: -- hey, keep this
16 out, dismiss the case.

17 MR. KNEEDLER: -- the district court
18 -- the government -- the district court already
19 did that. The government moved to --

20 JUSTICE BREYER: And did the Ninth
21 Circuit?

22 MR. KNEEDLER: The Ninth Circuit did
23 not reach the dismissal question --

24 JUSTICE BREYER: No.

25 MR. KNEEDLER: -- because it concluded

1 --

2 JUSTICE BREYER: So maybe they should
3 go back and say: Well, given the nature of this
4 information and how it was obtained, we will
5 review whether the district court was right to
6 dismiss it. Maybe we send it back to the
7 district court. A lot of things.

8 But, I mean --

9 MR. KNEEDLER: No, we --

10 JUSTICE BREYER: -- my point is there
11 should be a way to look at the information for
12 the court and decide what to do, not whether
13 this particular statute applies or not. I don't
14 know.

15 MR. KNEEDLER: Yeah. Yeah, we don't
16 think this statute in this point in context --

17 JUSTICE BREYER: And that's the end of
18 the case. All we have to do is say that you're
19 out of it?

20 MR. KNEEDLER: No, that -- that -- I
21 mean, that's -- that's what we think the proper
22 disposition is.

23 JUSTICE BREYER: Okay.

24 MR. KNEEDLER: It should reject the
25 district court -- or the court -- court of

1 appeals' erroneous view of 1806(f) and that it
2 displaces the state secrets privilege and have
3 it go back to the Ninth Circuit to review the
4 district court's determination that the evidence
5 was covered by the privilege, which Respondent
6 did not challenge below, and then whether
7 dismissal is necessary because --

8 JUSTICE BREYER: Yeah, because those
9 are separate questions.

10 MR. KNEEDLER: -- the evidence is so
11 central to the -- to the case.

12 JUSTICE BREYER: No more questions.

13 CHIEF JUSTICE ROBERTS: Okay. Justice
14 Alito, anything further?

15 Justice Sotomayor?

16 JUSTICE SOTOMAYOR: Can you answer my
17 question directly? 1810 gives any person who's
18 been unlawfully surveilled the right to seek
19 damages, punitive and otherwise, and attorneys'
20 fees.

21 If I'm hearing you right, your
22 arguments, you say that if a party has standing
23 -- and very few have standing because very few
24 people know they've been surveilled in the way
25 these plaintiffs do.

1 I've had research done, and the only
2 plaintiffs that have standing that I found where
3 a court has found standing to bring an 1810
4 claim is the Fourth Circuit case.

5 So -- but I think what you're saying
6 to me is, if those -- these plaintiffs, who
7 appear to have reasonable grounds to believe
8 they were surveilled, so they have standing,
9 that they can't proceed if you claim state
10 secrets.

11 They can't have a judge look at this
12 evidence to determine whether it was lawful or
13 unlawful because you say, if a judge says it's
14 unlawful, and I don't know how, because if a
15 judge says it's unlawful, how are you injured?
16 All they have to do after that is prove their
17 damages.

18 MR. KNEEDLER: First of all --

19 JUSTICE SOTOMAYOR: You have no
20 defense once they've proven --

21 MR. KNEEDLER: -- first of all, we
22 don't believe that they have established
23 aggrieved party status. Whether -- whether --
24 whether, to what extent, or against whom
25 electronic surveillance was used has not been

1 disclosed. And so --

2 JUSTICE SOTOMAYOR: My bottom line is
3 you're saying a person who's been unlawfully
4 surveilled, if I -- if the government claims
5 secret, doesn't have recovery under 1810?

6 MR. KNEEDLER: Unless it could be
7 proved in -- in some other way. Now, in -- in
8 --

9 JUSTICE SOTOMAYOR: They have proved
10 it some other way.

11 MR. KNEEDLER: Well, you -- you could
12 -- you could have -- you could have other
13 disclosures of -- of surveillance maybe in a
14 criminal prosecution or in some other way.
15 There was testimony by the -- the informant here
16 in a criminal proceeding that disclosed some
17 information that could have been the -- the
18 basis for an 1810 proceeding.

19 But our bottom line is 1810 says
20 nothing about the state secrets privilege. It
21 is --

22 JUSTICE SOTOMAYOR: But answer my
23 question. If they -- if -- you -- once you
24 claim state secret, you say there's no way to
25 look at the information to determine whether it

1 was unlawfully obtained?

2 MR. KNEEDLER: If the requisites for
3 dismissal are satisfied, which means the court
4 agreeing that the information is privileged and
5 that the case cannot proceed because the
6 information is so central. But there's nothing
7 in 1810 that suggests the displacement of the
8 state secrets privilege.

9 And, yes, if -- if -- if all those
10 requisites were shown, then, yes, the case would
11 not go forward.

12 CHIEF JUSTICE ROBERTS: Justice Kagan?

13 JUSTICE KAGAN: I'm going to follow up
14 on Justice Breyer's question, and I'm not sure I
15 understood the government's position.

16 Is the government's position now that
17 it would be wrong to dismiss on the pleadings
18 without any further inquiry into the nature of
19 the materials and how they affect the lawsuit?

20 MR. KNEEDLER: No. I mean, the
21 government invoked the state secrets privilege.
22 The government -- the district court found it
23 was privileged. The government argued that,
24 therefore, the First Amendment claim needs to be
25 dismissed because that claim is the invest --

1 this foreign intelligence surveillance
2 investigation was actually based solely on their
3 First Amendment rights.

4 And to defend against that, it would
5 be necessary to look at the sources, methods, et
6 cetera, of -- of that --

7 JUSTICE KAGAN: Yes. So --

8 MR. KNEEDLER: -- investigation.

9 JUSTICE KAGAN: -- I mean, I -- I -- I
10 think what Justice Breyer was suggesting is, in
11 a case like this, I mean, maybe dismissal would
12 be the only appropriate remedy for the problem,
13 but maybe not. It depends, and it depends on
14 some investigation of the materials and how they
15 figure in the case and what harms they present
16 and so forth.

17 And the Ninth Circuit seems to have
18 misunderstood that point. Maybe you contest
19 that point. But the Ninth Circuit seems to say
20 in a kind of old-fashioned Totten-like way, the
21 government says state secrets and we just have
22 to dismiss it in the ordinary case, putting
23 aside the statute.

24 And I thought we made clear in General
25 Dynamics that that's only true in a small

1 category of cases where the subject matter of
2 the lawsuit itself revealed a state secret but
3 that in cases like this -- in cases like this,
4 where asked -- it's an evidentiary privilege.

5 And, first, we're going to decide what
6 kind of evidence should be excluded, and then
7 we're going to decide based on the -- the full
8 evidence of the case whether the suit can go
9 forward or not in all fairness to the parties.

10 And that's what it seems the Ninth
11 Circuit didn't understand, and maybe you
12 contest, but I'm not sure you do.

13 MR. KNEEDLER: Well, no, no, I -- I
14 think the Ninth Circuit did get confused, but I
15 -- I want to make the point that the district
16 court already did what you're describing.

17 The government invoked the state
18 secrets privilege. The district court held in
19 the Ninth -- Respondents, and the Ninth Circuit
20 did not disagree, that -- that all the
21 information about the investigation was
22 privileged.

23 The district court then proceeded to
24 say, can this court -- can this case properly go
25 forward without that information? And said no,

1 both because that -- that's the very central
2 fact of the case, what was the basis or reason
3 for the investigation, and that can't be
4 adjudicated without delving into that
5 information or, at the very least, it would risk
6 disclosure of that. Therefore, that First
7 Amendment claim should be dismissed.

8 We -- and that should have been
9 affirmed, in our view, by the Ninth Circuit.
10 But they didn't reach that question because they
11 -- they went through this other process of
12 saying 1806(f) displaces the state -- state
13 secrets privilege. Therefore, there's no basis
14 for dismissal under the state secrets privilege
15 at least -- at least as of now.

16 So we think it should go back, where
17 we think the Ninth Circuit should affirm the
18 district court's --

19 JUSTICE KAGAN: But it should --

20 MR. KNEEDLER: -- dismissal.

21 JUSTICE KAGAN: -- but your -- it
22 should have -- you think it should affirm, but
23 you're saying the Ninth Circuit should reach
24 that question --

25 MR. KNEEDLER: Yes. Yes.

1 JUSTICE KAGAN: -- and should decide
2 that question --

3 MR. KNEEDLER: Yes.

4 JUSTICE KAGAN: -- as to whether all
5 of those conclusions about whether the nature of
6 the evidence required dismissal was -- was
7 correct?

8 MR. KNEEDLER: Yes.

9 CHIEF JUSTICE ROBERTS: Justice
10 Gorsuch?

11 JUSTICE GORSUCH: I -- I'd like to
12 come at that same question from a different
13 angle. Here's where I'm stuck, Mr. Kneedler.
14 You know, Reynolds told us and General Dynamics
15 reaffirmed that the state secret privilege
16 allows the government to keep evidence away from
17 a party but that generally the party is free to
18 prove its case using other evidence.

19 And so the government's really at a
20 choice. Does it want to disclose the evidence
21 and defend itself, or does it want to let a
22 judgment, a tort judgment, go ahead against it
23 and -- and keep -- keep national security safe?

24 Okay. And FISA was enacted against
25 that backdrop. And -- and if I were pressed, I

1 would say FISA is perfectly consistent with that
2 understanding of state secrets.

3 The problem is that now the government
4 takes a very -- much stronger view of what state
5 secrets doctrine is and it imports a lot of the
6 Totten stuff into it and says anytime we have a
7 secret, we're -- we're entitled to use that
8 evidence in our possession without telling you
9 anything about it as a basis for dismissing the
10 suit more or less as a matter of routine.

11 And instead of being put to the choice
12 of accepting a tort judgment but keeping a
13 secret, it now gets both. It gets to reject the
14 tort judgment and keep the secret. And in a --
15 in a world in which the national security state
16 is growing larger every day, that's quite a
17 power.

18 And it seems like the Ninth Circuit
19 operated on this understanding of the state
20 secrets doctrine, which might be inconsistent
21 with FISA, I think probably is inconsistent with
22 FISA, and then we have to ask the question of
23 which displaces. But that question only arises
24 if we accept a mistaken view of the state
25 secrets doctrine.

1 And so I think your friends on the
2 other side have made this point and suggested
3 why don't we just address the state secrets
4 problem and say the Ninth Circuit misunderstood
5 state secrets doctrine and reverse or remand on
6 that basis, and then we don't have to get into
7 this question of a conflict which only arises on
8 a mistaken understanding of state secrets
9 doctrine.

10 What say you to that?

11 MR. KNEEDLER: The Ninth Circuit did
12 not -- did not reach the -- the dismissal issue
13 in this case.

14 JUSTICE GORSUCH: I -- I -- I
15 understand that.

16 MR. KNEEDLER: But -- and -- and with
17 respect to their argument about 1806(f)
18 displacing, in their view, it displaces the
19 state secrets privilege with respect to the
20 exclusion of the evidence also, not just to the
21 -- not -- not just to the dismissal remedy.

22 We think that is -- that that is
23 clearly wrong and that it -- what they're
24 basically saying --

25 JUSTICE GORSUCH: Why wouldn't this be

1 an alternative basis for affirmance and -- and
2 for finding for the Respondent?

3 MR. KNEEDLER: Because it would change
4 the judgment. The Ninth Circuit's judgment
5 contemplated -- I mean, in two ways -- well, the
6 opinion contemplated that if -- it -- it
7 assumed, with, frankly, I think maybe no basis
8 to assume, but anyway, that -- that the -- that
9 the entire case would be wrapped up in terms of
10 whether there was electronic surveillance, which
11 --

12 JUSTICE GORSUCH: That's clearly --

13 MR. KNEEDLER: -- has not been the --

14 JUSTICE GORSUCH: -- wrong. So why
15 not just say that and send it back, and we don't
16 have to get into this question about whether
17 FISA displaces state secrets, which begs the
18 question of what state secrets is?

19 MR. KNEEDLER: No, I -- I -- I think
20 it's the other way around, with all respect,
21 Justice Gorsuch. This is a -- this is a case in
22 which the Ninth Circuit relied on a statutory
23 holding, which could have ramifications much
24 more -- much broader than this.

25 But -- but the point about the court

1 deciding it, it would require an alteration of
2 the judgment because the Ninth Circuit
3 contemplated that in proceedings on remand,
4 there could -- the state secrets privilege could
5 be invoked and maybe even the dismissal remedy
6 would be available in the district -- in the
7 court of appeals' view on -- on remand.

8 So that -- so it's not properly before
9 this Court without a -- without a
10 cross-petition.

11 CHIEF JUSTICE ROBERTS: Justice
12 Kavanaugh?

13 JUSTICE KAVANAUGH: Yeah, I have
14 several questions, Mr. Kneedler.

15 First, I just want to make sure, with
16 respect to Justice Gorsuch, is it your view that
17 that issue's before us?

18 MR. KNEEDLER: I -- I don't think it
19 is before you. I mean, it has been advanced as
20 an alternative ground for affirmance, but I
21 think it would require an alteration of the
22 judgment. But, in any way -- in any event, it
23 does seem to us that the statutory question is
24 antecedent the way the court looked at it.

25 And if the court was wrong, then it

1 should reach the question of dismissal. And --
2 and I would think this Court would want the
3 Ninth Circuit's view of -- of looking at the
4 evidence is this a case where dismissal might be
5 appropriate before it entered into the question
6 of -- of how dismissal can -- how and when
7 dismissal can follow a successful --

8 JUSTICE KAVANAUGH: You've said this
9 --

10 MR. KNEEDLER: -- invocation of
11 privilege.

12 JUSTICE KAVANAUGH: -- but I just want
13 to nail it down. The district court looked at
14 the evidence, concluded that the state secrets
15 privilege applied and dismissed.

16 When -- when we send it back to the
17 Ninth Circuit, they will be able to review that,
18 I think you said?

19 MR. KNEEDLER: Yes, that evidence is
20 in the record. It's available to -- to this
21 Court. It's quite -- there was a classified
22 declaration that was presented to the attorney
23 general, Attorney General Holder, when he
24 invoked or asserted the state secrets privilege.

25 JUSTICE KAVANAUGH: So your -- that

1 was your answer to Justice Breyer and Justice
2 Kagan, I think. So --

3 MR. KNEEDLER: Yes.

4 JUSTICE KAVANAUGH: Okay. And then
5 picking up on Justice Thomas's first question,
6 back to the statutory issue, he referred to the
7 constitutional status of the state secrets
8 privilege, and I think -- I would be curious how
9 that plays into our statutory interpretation.

10 I think you said at one point we
11 shouldn't expect Congress to do a drive-by
12 incursion on the state secrets privilege through
13 this kind of language. But how does the
14 constitutional -- potential constitutional
15 backdrop of the state secrets privilege play in?

16 MR. KNEEDLER: I think the -- I think
17 the Court should insist upon some sort of clear
18 statement or clear indication that Congress
19 intended to abrogate a privilege that is, in our
20 view, critical to the president's exercise of
21 his Article II powers. And -- and so there is,
22 I think, a strong presumption against reading a
23 phrase buried in a statute clearly otherwise
24 dealing with the suppression of evidence and --
25 and a statute that is protective of the

1 government's interests and protective of the
2 national security, to read it to abrogate a
3 privilege in a -- in a disposition of a case
4 that would undermine that.

5 JUSTICE KAVANAUGH: Because there
6 would be a major Article II issue if Congress
7 tried to do that, but we don't need to get into
8 that. Is that --

9 MR. KNEEDLER: That -- that's correct.
10 And the same thing would be true about a statute
11 that is said to be in derogation of the common
12 law. You --

13 JUSTICE KAVANAUGH: Right.

14 MR. KNEEDLER: -- you wouldn't
15 naturally read a statute to overcome that.

16 JUSTICE KAVANAUGH: Last question.
17 The search claims are still alive regardless of
18 what we're talking about here, right? We're
19 talking about the religious claims?

20 MR. KNEEDLER: The -- the district
21 court dismissed the Fourth Amendment claims. We
22 did not -- we did not seek that. So, on appeal,
23 it's the religion claims because that goes to
24 the reasons and the scope of the investigation.
25 That's the core of the state secrets privilege.

1 And the government decided that at
2 this point it was not going to assert the state
3 secrets privilege over the Fourth Amendment
4 claims. But down the road, it might if they
5 can't be disposed of on -- on another basis.

6 JUSTICE KAVANAUGH: So are they still
7 alive in the district court then, the search
8 claims?

9 MR. KNEEDLER: Well, not the way the
10 district court disposed of it, but the -- but
11 the Ninth Circuit said it was wrong for the
12 district court to do that. So, if this case
13 goes back, the Ninth Circuit presumably would --
14 would reach the same conclusion.

15 JUSTICE KAVANAUGH: Would the
16 government oppose the search claims continuing?

17 MR. KNEEDLER: No, I -- I think that
18 was our -- our position on appeal. I -- I --

19 JUSTICE KAVANAUGH: That's --

20 MR. KNEEDLER: -- standing here, I
21 can't think of a reason why, but I -- you know,
22 I --

23 JUSTICE KAVANAUGH: I'm not binding
24 you for all time --

25 MR. KNEEDLER: No, I -- I just --

1 JUSTICE KAVANAUGH: -- but at this
2 moment. Yeah.

3 MR. KNEEDLER: -- I would just want to
4 make sure.

5 JUSTICE KAVANAUGH: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Barrett?

8 JUSTICE BARRETT: Mr. Kneedler, do you
9 concede that 1806(f) could apply in a suit
10 brought against the government? Maybe under
11 1810, maybe under something else.

12 MR. KNEEDLER: No, 1810 could not be
13 brought against the government because of --

14 JUSTICE BARRETT: I'm sorry.

15 MR. KNEEDLER: Yeah. Only damages.
16 But, if the government intended to introduce or
17 use the evidence in that case against -- against
18 the civil plaintiff, it could be used, yes. But
19 -- but it's not a free-floating discovery
20 device.

21 JUSTICE BARRETT: No, I understand
22 it's not a free-floating discovery device. I'm
23 just -- I understand your position that it's,
24 you know, when the government wants to use or
25 introduce evidence, that it -- that it applies

1 then, but the government may seek to do that
2 even if -- even if it's not a criminal
3 prosecution, for example, that the government
4 has brought?

5 MR. KNEEDLER: Yes. If the government
6 -- if -- or if -- if a plaintiff brings a suit
7 against the government and the government
8 intends to use the information --

9 JUSTICE BARRETT: Right.

10 MR. KNEEDLER: -- then 1806(f) would
11 be available.

12 JUSTICE BARRETT: So you're not taking
13 the position that Judge Bumatay took in the
14 Ninth Circuit, where he seemed to view it more
15 as confined to that circumstance?

16 MR. KNEEDLER: Yeah. No, we think it
17 -- it -- it applies irrespective of who brought
18 the proceeding.

19 JUSTICE BARRETT: Okay.

20 MR. KNEEDLER: It's the use,
21 introduction into evidence, use, et cetera,
22 against the person. So the -- the -- the
23 against is what -- is what triggers it.

24 JUSTICE BARRETT: Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you, Mr.

1 Kneedler.

2 Ms. Carroll.

3 ORAL ARGUMENT OF CATHERINE M.A. CARROLL

4 ON BEHALF OF THE AGENT RESPONDENTS

5 MS. CARROLL: Thank you, Mr. Chief

6 Justice, and may it please the Court:

7 I'd like to make two points.

8 First, Section 1806(f) provides only a

9 narrow mechanism for deciding the admissibility

10 and discoverability of surveillance materials.

11 It does not speak at all to the fact that the

12 government's assertion of the state secrets

13 privilege deprives the individual defendants of

14 a valid defense, a defense that depends not on

15 the surveillance evidence that would be at issue

16 in a FISA proceeding but on the privileged

17 information about the targets, predicates, and

18 scope of the investigation.

19 Second, adjudicating the individual

20 defendants' liability in camera and ex parte

21 with no jury and no right to participate would

22 violate the Seventh Amendment and Due Process

23 Clause.

24 Even if the court of appeals'

25 interpretation were plausible, FISA does not

1 compel it, and this Court should reject a
2 reading that raises those grave concerns.

3 I welcome the Court's questions.

4 JUSTICE THOMAS: If we accept the
5 government's argument, though, we don't have to
6 get to that, right?

7 MS. CARROLL: Accepting the
8 government's argument that -- that FISA does not
9 displace the privilege --

10 JUSTICE THOMAS: Yeah.

11 MS. CARROLL: -- I think that that
12 resolves the -- the question because that was
13 the holding of the Ninth Circuit. The Ninth
14 Circuit instructed the district court to decide
15 in camera and ex parte whether the defendants
16 violated the constitutional and statutory
17 provisions. That's the invocation --

18 JUSTICE THOMAS: No, I'm -- actually,
19 I'm -- I may have confused matters. I mean the
20 constitutional avoidance argument.

21 MS. CARROLL: Correct. These are
22 constitutional issues that would arise if the
23 court of appeals' interpretation of FISA were
24 accepted. And I think it's largely undisputed
25 that under the court of appeals' reading you

1 would have an in camera ex parte adjudication
2 not just of the lawfulness of the surveillance
3 under FISA but of the ultimate liability on the
4 First Amendment and equal protection claims.

5 And I think it's undisputed that that
6 would violate the individual defendants' jury
7 trial rights and due process rights.

8 Now Mr. Kneedler, I think, has made
9 some good points that we agree with about the
10 language of 1806(f) regarding what a use is and
11 what a -- what a covered motion or request is.

12 But I think there's a -- just a
13 broader point to make about that statute, and
14 that is that the FISA, both 1806(f) and,
15 frankly, an 1810 claim, are completely
16 orthogonal to what is at issue in the First
17 Amendment and equal protection claims and the
18 defenses that are necessary to those claims.

19 As has been discussed, the result of
20 an 1806(f) procedure is limited to suppression
21 or admission of the fruits of the surveillance,
22 so the recordings, and potentially disclosure to
23 the aggrieved party of the application,
24 materials, and court orders.

25 None of that enables revelation of or

1 certainly not disclosure to my clients or the
2 ability to adjudicate the merits and defenses of
3 the religious discrimination claims, which, as I
4 said, don't turn on the surveillance evidence.
5 They turn on who was or was not a target of
6 investigation, why were they under
7 investigation, what were the motivations and
8 predicates, and what was the degree of fit
9 between the methods used and legitimate
10 counterterrorism goals, what were my clients'
11 individual motivations.

12 Those are all classic jury questions.
13 They are questions that are completely subject
14 to the privilege, as Judge Carney found, and
15 they -- they cannot come out, even in a limited
16 FISA proceeding, even if we thought that 1806
17 was available. So I think that that's kind of a
18 broader reason why the statute as a whole can't
19 be read to displace the privilege.

20 The -- the privilege here, as Mr.
21 Kneedler indicated, was properly asserted, and
22 the -- the court of appeals did not dispute
23 that.

24 In -- in making that determination,
25 the district court -- and he says he paid

1 especially close attention to the classified
2 materials, which the district court described as
3 providing comprehensive and detailed
4 information, informing the court as to the
5 sensitive and privileged facts.

6 And Judge Carney concluded from that
7 classified material that it provided essential
8 evidence to showing "that the purported dragnet
9 investigations were not indiscriminate schemes
10 to target Muslims but were properly predicated
11 and focused." That is the information that the
12 individual defendants need to be able to defend
13 themselves.

14 And this Court recognized in *General*
15 *Dynamics*, as the lower courts have uniformly
16 recognized, that it would be manifestly unfair
17 to allow claims to go on in that situation where
18 the government's assertion of the privilege
19 prevents an individual capacity defendant from
20 putting forward a defense that depends on that
21 privileged information, which, again, even if
22 there were some reason -- reading of FISA that
23 would allow a limited proceeding in camera to
24 determine the lawfulness of the proceeding under
25 FISA, that has nothing to do with the privileged

1 information and is not a mechanism for bringing
2 it out or allowing my clients to rely on it.

3 Just a -- a couple of quick points on
4 the text of 1806(f). Justice Gorsuch, you asked
5 what could the phrase "otherwise use" mean if
6 we're not talking about entry into evidence.

7 And I agree with Mr. Kneedler that
8 that language certainly covers use of
9 information in a proceeding outside of a court.
10 But even in court, as Your Honor knows, there
11 are many ways to use information without
12 entering in -- into evidence. I think, in this
13 context, with surveillance information, the most
14 likely use would be to impeach a witness. But
15 there are other ways --

16 JUSTICE GORSUCH: Counsel, on that,
17 you'd agree, though, that there aren't many ways
18 to use evidence in court without either entering
19 it into evidence or disclosing it, impeachment
20 being a good example of disclosing it?

21 MS. CARROLL: Impeachment, I think, is
22 also a use because you're not --

23 JUSTICE GORSUCH: It involves
24 disclosure, right?

25 MS. CARROLL: And I think refresh --

1 JUSTICE GORSUCH: Can you think of
2 another example?

3 MS. CARROLL: -- refreshing a
4 witness's recollection, I think, is one.

5 JUSTICE GORSUCH: Can you think of
6 another example? Refreshing recollection,
7 that's a good one. That's a good one. Others?

8 MS. CARROLL: I think -- I think also,
9 in -- in a summary judgment proceeding, as the
10 language of Rule 56 indicates, that when you use
11 information in support of a summary judgment
12 motion, it is not officially being entered into
13 evidence. It has to be in a form that could be
14 admissible into evidence, but it is not --

15 JUSTICE GORSUCH: I guess my question,
16 though, for -- for -- for Mr. Kneedler and I
17 guess for you is, can you think of another use
18 in court that doesn't involve disclosure or
19 entry into evidence? Each of the examples
20 you've given me involves at least disclosure.

21 MS. CARROLL: I'm not actually sure
22 that you do disclose to the jury when you're
23 refreshing a witness's recollection. But, in
24 any event --

25 JUSTICE GORSUCH: No, but you're

1 disclosing it to the witness, right?

2 MS. CARROLL: You're disclosing it to
3 the witness, that -- that is true, and if it --
4 if it's something that would help them to
5 remember their recollection. But I think,
6 again, that that also brings in the fact that we
7 could be talking about proceedings that aren't
8 subject to the Rules of Evidence as well.

9 And I think, again, thinking back to
10 the broader question, even if the Court thought
11 it were plausible to read that language more
12 capaciously, a reading of Section 1806(f) that
13 would allow, as the court of appeals thought,
14 adjudication not just of whether the privilege
15 was properly asserted, not just of whether the
16 FISA surveillance was lawfully authorized and
17 conducted, but whether the individual defendants
18 are liable for damages on constitutional claims,
19 to have that adjudication conducted without a
20 jury in an ex parte procedure in which they have
21 no apparent right to participate would plainly
22 raise grave and I think undisputed
23 constitutional questions that -- that plainly
24 favor the government's equally and, we think,
25 more plausible interpretation of the statute.

1 So we think the Ninth Circuit was
2 clearly wrong to hold that the privilege was
3 displaced by FISA. It should, as Mr. Kneedler
4 has suggested, instead have affirmed on the
5 ground that Judge Carney relied on given that
6 the classified information indicated, as the
7 district court put it, the classified
8 information gives defendants a valid defense
9 that is no longer available because of the
10 assertion of the privilege.

11 JUSTICE SOTOMAYOR: Counsel, why is it
12 -- why is it that the government's reading helps
13 you? I thought the essence of your claim is
14 that an ex parte review hurts your client
15 because it doesn't give your clients an
16 opportunity to be a part of it, as the Seventh
17 Amendment, correct?

18 MS. CARROLL: That's correct.

19 JUSTICE SOTOMAYOR: So why does it
20 matter if the government is the one that's
21 moving to use the evidence? Why wouldn't your
22 agents be suffering the same deprivation?

23 MS. CARROLL: I think it -- I think it
24 would be, and I think that relates to the
25 broader point I was making that even if 1806(f)

1 is invoked, regardless of how you think it could
2 be invoked, it doesn't get to the real problem
3 in this case, which is the unavailability of the
4 privileged information.

5 To Your Honor's point, the
6 constitutional claims we've mentioned under the
7 Seventh Amendment and the Due Process Clause are
8 violations that would arise from the court of
9 appeals' -- may I finish my response?

10 CHIEF JUSTICE ROBERTS: Yes.

11 MS. CARROLL: From the court of
12 appeals's interpretation. And under the
13 avoidance canon, where this Court has before it
14 two plausible interpretations of the statute,
15 the avoidance canon calls for rejecting the
16 interpretation that would raise those grave
17 questions.

18 And we think the government's
19 interpretation, as recently adopted as well by
20 the Fourth Circuit, is certainly plausible and
21 that the Ninth Circuit's interpretation is
22 certainly not more than plausible. And so the
23 avoidance canon would come into play there.

24 CHIEF JUSTICE ROBERTS: Thank you, Ms.
25 Carroll.

1 Justice Thomas?

2 JUSTICE THOMAS: Nothing for me,
3 Chief.

4 CHIEF JUSTICE ROBERTS: All right.
5 Justice Sotomayor?

6 Justice Gorsuch, anything further?
7 No?

8 Justice Barrett? Justice Barrett?

9 JUSTICE BARRETT: No.

10 CHIEF JUSTICE ROBERTS: Okay. Thank
11 you, counsel.

12 Mr. Arulanantham.

13 ORAL ARGUMENT OF AHILAN T. ARULANANTHAM
14 ON BEHALF OF RESPONDENTS FAZAGA, ET AL.

15 MR. ARULANANTHAM: Thank you, Mr.
16 Chief Justice, and may it please the Court:

17 Defendants do not seek just to exclude
18 secret information from this case. If that were
19 true, there would have been no need for them to
20 file a motion to dismiss our religion claims.

21 Instead, what they seek is not just to
22 exclude information but also to dismiss it. And
23 to be clear, as we've said repeatedly below, we
24 will not seek discovery on the religion claims.
25 We're prepared to proceed just on our own

1 evidence. So this case is entirely about
2 dismissal based on their need to use secret
3 information to defend themselves.

4 Now we recognize they have a
5 legitimate interest in defending themselves, but
6 neither Congress nor the common law permit
7 dismissal on that basis.

8 Congress struck a balance. FISA
9 permits them to defend the suit using
10 information that we will never see, but, as
11 Justice Sotomayor had suggested earlier, it
12 requires the court to review the information ex
13 parte and in camera to determine if the
14 surveillance was lawful.

15 Section 1806, as Justice Gorsuch has
16 already mentioned, applies not just when they
17 seek to enter secret information into evidence
18 but also when they otherwise use it. "Use" is
19 very broad. It means to put into service, and
20 "otherwise use" means, as Justice Gorsuch has
21 been saying, in a different manner. So there
22 has to be a way different from just using or
23 disclosing that's also covered by the statute.
24 Relying on information to win dismissal of a
25 lawsuit is obviously using that information.

1 The government is also wrong on the
2 common law. As General Dynamics explained, the
3 Reynolds privilege is a privilege. The
4 privileged information is excluded, but the case
5 goes on without it. And in a -- that's 150
6 years of case law on which Reynolds relies. In
7 both the U.S. and England, they can't point to a
8 single case where plaintiffs could make their
9 case without the privileged information and yet
10 still the court ordered dismissal.

11 Like the widows in Reynolds itself, we
12 are entitled to that opportunity, whether under
13 FISA's rules or under the common law.

14 Lastly, I want to emphasize again,
15 Your Honors, that the court of appeals did not
16 hold that we can ever see privileged evidence.
17 If the district court orders disclosure to us,
18 the government can reassert the privilege.

19 JUSTICE THOMAS: Counsel, can you give
20 me an example of a case where "used" was
21 employed the way you are suggesting?

22 MR. ARULANANTHAM: Yes, Your Honor.
23 In the firearms context, this Court has done it
24 even without the word "otherwise" actually. So
25 the Court has said, for example, in Bailey v.

1 United States that just referring to a gun in
2 the course of a criminal transaction is using
3 it.

4 I -- I think, also, that statute,
5 again, is only "use." We have "otherwise use."
6 So I think ours is even more -- more broad than
7 the one that -- the examples that the government
8 uses or Judge Bumatay's.

9 And sticking on the same point, if I
10 may, Your Honor, it is conceivable, I suppose,
11 that there might be some other use you could
12 come up with, although I don't think I've heard
13 one yet that is not a -- a disclosure or enter
14 into evidence, but that's not really the
15 question, right?

16 The question is whether, when you
17 refer to a document in your motion and say we
18 win and the other side loses their religion
19 claims because of those documents, is that also
20 a use of it? And it just seems perfectly clear
21 that that must be true.

22 JUSTICE THOMAS: But it seems
23 counterintuitive that you would say you use it
24 by excluding it.

25 MR. ARULANANTHAM: Yes, Your Honor.

1 And this goes to Justice Gorsuch's point also
2 about the relationship between the common law
3 and FISA. If they were only seeking to exclude
4 it, if they say we will keep it in our vault and
5 then let the chips fall where they may, I don't
6 think that would be a use.

7 But, when they then go further and say
8 we don't just want the common law traditional
9 rule, we want to now dismiss the religion
10 claims, even though you can make your case with
11 your own evidence, that transforms it from just
12 keeping it excluded into an affirmative use.
13 They're using it to effectuate the dismissal of
14 the religion claims.

15 So, at that point, it becomes a use.
16 And that's why I think it's also relevant that
17 the Ninth Circuit -- the decision below only --
18 they said they only are finding it displaced
19 with respect to the dismissal remedy.

20 And -- and that's, I think, important
21 because it's -- it's when they move to dismiss
22 that it becomes a use and isn't merely exclusion
23 of the information at issue.

24 CHIEF JUSTICE ROBERTS: Well, you just
25 said "the information at issue." And what

1 they're using, it seems to me, is the privilege.
2 They're not using the information. The whole
3 point of this statutory provision in 1806 is to
4 keep the information from being used. I think
5 it makes more sense to talk about using the
6 privilege as opposed to a counterintuitive
7 reading, at least, I guess this is their
8 argument, which -- which is that this is to --
9 this proceeding is to prevent -- prevent the use
10 as opposed to using it.

11 Maybe a consequence of it is that the
12 privilege is established, and then that meant --
13 means the information can't be used, but I don't
14 see how the -- not allowing the information to
15 be introduced is using the information.

16 MR. ARULANANTHAM: So I -- I don't
17 disagree with Your Honor there. I think, if all
18 they were doing was trying to keep it out and
19 nothing else, that would not be a use.

20 And I think it's because they argue
21 that the state secrets privilege actually
22 authorizes dismissal, unlike every other
23 privilege, even when the plaintiffs can move
24 forward without the privileged information,
25 that's why it becomes a use.

1 But, to go back to the beginning of
2 your question, Mr. Chief Justice, I think to say
3 that they're using the privilege and not using
4 the information is a little odd. I think they
5 are using the privilege, but the -- the motion
6 makes no sense without the references to the
7 secret information, without the, you know,
8 submission of actually two classified
9 declarations and a classified memorandum. So
10 they're using both.

11 And -- and I think that that is the
12 most natural meaning of the word "otherwise
13 use." It -- it -- it -- I really can't imagine
14 how their motion would make any sense if it
15 didn't refer to the information.

16 So -- and once they're referring to
17 it, again, not just to keep it out but also to
18 win dismissal of the religion claims, that's
19 what makes it into a use.

20 JUSTICE GORSUCH: Could -- could they
21 win dismissal by invoking a privilege if there
22 were no evidence to support the invocation of
23 the privilege?

24 MR. ARULANANTHAM: Yeah, and we
25 struggled, Your Honor, we could not think of a

1 -- a context in which that would arise. It
2 seems like they have to, in order to win, say
3 it's not just the fact that we're excluding the
4 information, it's also now that the -- the
5 evidence, even though it's out of the case, is
6 actually not out of the case and is doing some
7 kind of work to come and dismiss claims, even
8 though the plaintiffs say that they can make
9 their case without it.

10 CHIEF JUSTICE ROBERTS: But it would
11 be a perfectly natural argument to say we think,
12 because of the national security basis, this
13 information cannot be used. I mean, that's how
14 you'd say it before the judge. And then the
15 judge is supposed to say: Well, you're using
16 it, so you lose.

17 MR. ARULANANTHAM: Again, Your Honor,
18 I -- I really think, if that's all they were
19 saying, if they were saying because of the
20 national security implications, this information
21 has to go out of the case, then they would have
22 filed a motion in limine. They wouldn't have
23 filed it just in response to the complaint.

24 They would have waited for us to file
25 either a discovery motion, which, again, we're

1 not going to file, or a motion for summary
2 judgment. And -- and then they'd file a motion
3 in limine. That would not be a use.

4 But, instead, what they've come --
5 what they've done is they've said: On the
6 pleadings and declarations, only because we put
7 them in the case because we were concerned about
8 this possibility, really, because normally we
9 could have waited and filed the declarations
10 later, just on the pleadings they've said the
11 whole -- the whole religion aspect of the case,
12 the first eight counts, have to be gone.

13 That's not just a result of the
14 exclusion of the evidence. So this is very
15 different from a case like most state secrets
16 cases where the plaintiffs need the information
17 in order to receive it. This is a case where we
18 have all the evidence that we need on these
19 religion claims just based on our own evidence,
20 and yet they're still saying the religion claims
21 cannot go forward.

22 JUSTICE ALITO: Can you explain the
23 basis for the distinction that I understand you
24 to have just made? And perhaps I didn't
25 understand what you said, but what I thought you

1 said was that invoking the state secrets
2 privilege for the purpose of excluding evidence
3 is a use, but invoking the privilege for the
4 purpose of seeking dismissal is not a use.

5 MR. ARULANANTHAM: I must have
6 misspoken. I'm very sorry --

7 JUSTICE ALITO: Oh.

8 MR. ARULANANTHAM: -- Your Honor.
9 That's exactly backwards. So if they just
10 invoke it to exclude the information --

11 JUSTICE ALITO: I'm sorry. All right.
12 Backwards. I --

13 MR. ARULANANTHAM: -- that is not a
14 use.

15 JUSTICE ALITO: What is the basis for
16 drawing that distinction? It seems that you're
17 -- you're -- if invoking the privilege is using
18 the privilege, wouldn't it be -- wouldn't you --
19 wouldn't you be using the privilege in both of
20 those situations? Why -- why in one and not in
21 the other?

22 MR. ARULANANTHAM: I -- I think it's
23 using the privilege, but it's not using the
24 information.

25 JUSTICE ALITO: Why is it not using

1 the information?

2 MR. ARULANANTHAM: Well, I -- I just
3 think, in normal discovery, normal privileges,
4 all the privileges, if -- and the -- these are
5 arguments that we agree with, that they're in
6 their brief, if I'm in an attorney-client
7 situation and someone tries to get discovery and
8 we say, well, that information is privileged, we
9 want to keep it out of the case, you don't say
10 you're using the evidence.

11 But, if I then say: Oh, because you
12 have done that, now the underlying claim on
13 which you sought discovery has to be dismissed,
14 even though you say you don't need the evidence
15 and you don't want it anymore, or, actually, I
16 mean, like, we never wanted it, but anyway, you
17 know, you -- you don't want it.

18 Now you're doing something more than
19 just keeping it out of the case, and that --
20 that -- that distinction is -- is critical.

21 JUSTICE BREYER: So -- so, look, I
22 read Professor Donohue's brief from Georgetown,
23 and so that's very much in my mind. I thought
24 it was a good brief, and I think she seems to
25 know what she's talking about, I think she does.

1 So I'm thinking, look, the thing is
2 that you don't want the case dismissed. Of
3 course. And Totten doesn't apply. And so they
4 shouldn't have had anything to do with that.
5 They should just look to Reynolds.

6 MR. ARULANANTHAM: That's right, Your
7 Honor.

8 JUSTICE BREYER: All right. Now give
9 -- that's what seems to be the issue and the
10 problem. So do you really care whether the
11 government's right or wrong on the displacement
12 of the state secrets doctrine by 1806 or
13 whatever?

14 Suppose we said, no, it doesn't, but
15 it doesn't matter that it doesn't because, of
16 course, as quoting the government, the judges
17 will look at this information, and if the
18 information -- it doesn't solve the problem --
19 simply to say we don't want the information,
20 namely you, of course, you don't.

21 But the government says: Judge, look
22 at this. You will see that we both can't
23 introduce the information because it's just too
24 secret, it's unbelievable harm if we do, and it
25 proves beyond any doubt their case is wrong.

1 What is the Court supposed to do then?
2 And there I don't know. And we have Justice
3 Scalia's opinion on that. And where I am at the
4 moment is I don't know, but I don't have to
5 decide that yet.

6 And it might not be those situations
7 that are the dilemma I just described until not
8 only the district court under the proper
9 standard but also the court of appeals looks at
10 this and sees if there's some special reason to
11 dismiss the whole case or not.

12 No automatic dismissal. No automatic
13 no dismissal. I don't know.

14 All right. There you are. That's
15 where I am. Say anything you like.

16 MR. ARULANANTHAM: Thank you, Your
17 Honor. Three -- three thoughts I have about
18 that.

19 First, I just want to be clear on the
20 very first point you made, why do we even care
21 about FISA? We have two distinct paths, as we
22 see it, to success in -- in this Court.

23 The Court could hold that the state
24 secrets privilege does not authorize dismissals,
25 either at all, outside of contracting cases, or

1 where the very subject matter is not secret, or
2 the narrower ground, which I think Your Honor
3 had discussed with Mr. Kneedler, which is on the
4 pleadings before any of the information has been
5 looked at. And the district court looked at
6 declarations, not at the underlying information.

7 JUSTICE KAGAN: But Mr. Kneedler says
8 that that way of resolving the case would not
9 get to an affirmance. How would it get to an
10 affirmance?

11 MR. ARULANANTHAM: I -- I think it
12 gets to an affirmance because, at the very end
13 of the court of appeals decision, the court says
14 it's adopting -- this is in the proceedings on
15 remand -- it says it's adopting the D.C.
16 Circuit's rule from *In re Sealed Case* that the
17 government -- it's essentially Judge -- then
18 Judge Scalia's view in *Molerio*, the valid
19 defense rule saying you can't dismiss that on
20 the pleadings.

21 You've got to look at the information
22 and see if the injustice that we're
23 contemplating here actually would happen. Is it
24 true that, actually, there was no bug in Mr.
25 Fazaga's office when he was giving very, you

1 know, intensive religious instruction to his
2 congregants, or maybe it was warranted, you
3 know, meaning there was a warrant for it.

4 And -- and then, if that's true, and
5 so this would be -- work a grave injustice on
6 the government, once we know that, if that's
7 actually true, then you dismiss the case.

8 That was what Judge -- then Judge
9 Scalia said in Molerio; the decision below
10 adopts that through its affirmance of In re
11 Sealed Case. And so that's why I think it would
12 be an affirmance.

13 This Court could just say: We hold it
14 was too early, send it back, and I suppose you
15 could say FISA displaces it or you -- you could
16 not -- or, excuse me, you could say FISA doesn't
17 displace it or you could say we don't have to
18 decide that, we vacate that, and just send back
19 the state secrets portion of the case, and that
20 would be an affirmance because it would lead you
21 to a very similar result, which is that, just as
22 Congress wanted, the Court is looking at the
23 evidence not just to decide if it should be
24 secret but if the government broke the law, if
25 the surveillance was actually unlawful.

1 You know, that -- that, I think, is
2 the critical reason why, because of that last
3 part, it is an affirmance.

4 Now that being said -- and I still
5 want to come back to the other parts of your
6 question, Justice Breyer -- we only have to win
7 that it's a basis for -- an alternative basis
8 for affirmance if it's not in the question
9 presented, right?

10 I mean, if it's in the question,
11 because you can't determine if FISA displaces
12 the state secrets privilege without knowing what
13 the state secrets privilege does, then it seems
14 to me that the Court can address it that way as
15 well.

16 We said in our brief in opposition, in
17 compliance with this Court's rule, 15.2, we said
18 we are going to argue that under General
19 Dynamics, there is no dismissal remedy available
20 in this case. We also argued that in the court
21 of appeals, a slightly different theory, but we
22 preserved the claim.

23 And then they replied in their reply
24 on the merits, and they cited a long set of
25 court of appeals cases that they said affirmed

1 their rule. And now they've come and said it's
2 not in the question presented. I think it is in
3 the question presented, and we also gave notice
4 of that, and they didn't say that it was not.

5 So I do think it's an alternative
6 basis by which the -- an alternative path to
7 victory. But just to go back then to, Justice
8 Breyer, the second part of your question, and
9 not to abandon in any way our arguments on FISA,
10 I want to stress another part of our
11 displacement argument which has actually not
12 been discussed thus far today.

13 1806(f) says, if the attorney general
14 files a declaration that disclosure or an
15 adversary hearing would harm national security,
16 then it shall apply these ex parte in camera
17 procedures that we have been talking about to
18 determine if the surveillance was lawfully
19 authorized and conducted.

20 Now that standard, the attorney
21 general files a declaration that disclosure
22 would harm national security, is almost
23 identical to the standard in Reynolds that
24 divulging the information could risk endangering
25 national security.

1 Substantively, the substantive rule is
2 almost identical. And the result of their view
3 is that the same attorney general declaration,
4 because this declaration satisfies 1806(f), it
5 says disclosure of this information would
6 reasonably endanger national security, an
7 attorney general declaration in our case, gives
8 the government two options.

9 They can move to dismiss under state
10 secrets privilege, which is what they've done,
11 or they can go through 1806(f) and give the
12 information ex parte and in camera to the court
13 even though the statute says these are the
14 procedures that shall be applied,
15 notwithstanding any other law, whenever these
16 conditions are met.

17 And so that is a powerful displacement
18 effect not for the state secrets privilege in
19 general but for the state secrets privilege as
20 applied to cases involving the domestic
21 electronic surveillance of Americans.

22 And that's all that's at issue in this
23 case, is just about giving the district court ex
24 parte in camera review, not -- not evidence, not
25 -- not disclosure to us, because the decision

1 below says they can reassert the privilege if
2 there's a disclosure to us.

3 But just that -- that aspect, the ex
4 parte in camera review for cases involving
5 domestic electronic surveillance, on that
6 aspect, 1806(f) occupies the field. It takes
7 away any other options, including outright
8 dismissal under what they say is the state
9 secrets privilege.

10 JUSTICE KAGAN: I -- I guess what
11 strikes me as wrong about that argument is that
12 if you look at 1806 and you just take a step
13 backward and you're not focusing on, like, what
14 does this word mean and what does that word
15 mean, but if you just take a step backward, what
16 1806 is all about is deciding whether
17 surveillance is legal.

18 And according to 1806, that matters
19 with respect to whether the government can use
20 it in the standard way that illegal evidence
21 can't be used in a proceeding, and, for whatever
22 reason, Congress thought it also mattered with
23 respect to discovery requests on the part of,
24 let's say, a plaintiff.

25 And -- and that's a very different

1 focus, you know, is -- was this -- was this
2 obtained illegally, because we think that that
3 question has something to do with whether we --
4 it should be discoverable or whether it should
5 be usable in court from the normal state secrets
6 inquiry, which is, you know, illegal, legal, who
7 cares? It's just dangerous for national
8 security.

9 MR. ARULANANTHAM: Yes, Your Honor. I
10 agree that both -- both parts of that. I -- I
11 certainly agree that the purpose of it is to
12 determine if it was lawfully authorized and
13 conducted.

14 And while I -- I do think that's
15 broader -- if you'll permit a slight
16 deviation -- I think it's broader than what the
17 individual defendants' counsel has suggested,
18 that it's only about Fourth Amendment. It
19 certainly incorporates First Amendment, and FISA
20 was very much about the First Amendment and, in
21 part, the persecution of religious minorities
22 actually.

23 So I -- I think that it's broader than
24 that. But I agree it's just about determining
25 whether the surveillance was lawful in whatever

1 context it may arise.

2 And I also agree, Your Honor, that
3 often, in the pre-FISA practice, the only
4 inquiry in the state secrets privilege analysis
5 was whether or not the information should be
6 secret.

7 But there were also cases where the
8 courts were not simply interested in whether or
9 not it was secret. They were also interested in
10 whether the Fourth Amendment was violated here.
11 We have cited a few of those in our brief,
12 *Jabara v. Kelly*. There's also a dissent in
13 *Halkin v. Helms* from the rehearing en banc where
14 the judge makes this argument.

15 So I don't think it's implausible that
16 the -- Congress might have looked -- seeing a
17 backdrop of abuses identified in the Church
18 Committee, surveillance of Vietnam War
19 protestors and MLK and even a justice of this
20 court, I believe, they -- they would have said
21 we don't just want to know whether this is
22 secret. We also want to know did you break the
23 law.

24 And so I don't think it's that
25 implausible to believe that they used the same

1 substantive standard but said we want to bring
2 the courts in to decide if the government was
3 acting illegally.

4 JUSTICE ALITO: What is your answer to
5 Ms. Carroll's argument about the rights of -- of
6 her clients? Suppose that, in conducting this
7 ex parte in camera review, the judge says this
8 was illegal because it was based on religion.

9 Does that -- is that the end of the
10 case for her clients?

11 MR. ARULANANTHAM: I don't think it's
12 the end of the case.

13 JUSTICE ALITO: Well, then can they
14 have a trial?

15 MR. ARULANANTHAM: I mean, on that
16 question, I think, if the Court finds that, then
17 you're not going to be able to give that same
18 question to the jury. We acknowledged that at
19 --

20 JUSTICE ALITO: Well, isn't that a
21 violation of -- of their due process rights?

22 MR. ARULANANTHAM: So we have
23 deliberately not said in our briefing whether we
24 think that's true or not and instead left it --

25 JUSTICE ALITO: Well, that's why I'm

1 asking you now. How can that possibly be
2 consistent with -- with due process?

3 MR. ARULANANTHAM: Well, I think --

4 JUSTICE ALITO: I mean, that's --
5 that's the Star Chamber. I mean, a judge in
6 camera ex parte, without any -- not -- not only
7 without the participants -- the presence of the
8 defendants, without the presence of their
9 attorneys, determines that they violated the --
10 the plaintiffs' First Amendment rights.

11 MR. ARULANANTHAM: So I want to say,
12 after I answer your question, why I think it's
13 not a reason to construe the statute, so if
14 you'll -- but -- but, to answer your question
15 directly, I think the -- the tricky issue for a
16 court, if they were actually considering this
17 constitutional question, it would have to first
18 consider what about the mirror image, because,
19 obviously, the same exact thing that you have
20 said is true of us.

21 And if it's true that they have
22 engaged in entirely lawful conduct, it sure
23 sounds bad for the reasons Your Honor has said,
24 but if they've engaged in unlawful conduct and
25 you're going to dismiss the claim without us

1 having any opportunity to have a jury trial and
2 all the rest of it and due process as well, it
3 is -- and as -- we have not been able to
4 understand why it's any --

5 JUSTICE ALITO: Well, do you think
6 that every --

7 MR. ARULANANTHAM: -- different. It's
8 exactly the mirror problem.

9 JUSTICE ALITO: -- do you think that
10 everybody who is aggrieved and would like to
11 bring suit has a due process right to bring that
12 suit and recover?

13 MR. ARULANANTHAM: No, but this is a
14 different situation. For both sides, we're
15 hypothesizing -- and this gets to my reasons for
16 believing it's premature -- we're hypothesizing
17 we've beaten summary judgment, both sides,
18 right? Both sides have beaten summary judgment.
19 We've shown standing. There's no sovereign
20 immunity problem. All the other doctrines,
21 Iqbal, et cetera. And yet, still here we are.
22 And in that situation, I think it's the mirror
23 image problem.

24 The other thing I would say, Your
25 Honor --

1 JUSTICE ALITO: Well, it's not -- I
2 don't see how it can be a mirror image problem
3 because the due process rights of potential
4 plaintiffs are not the same as the due process
5 rights of -- of potential defendants.

6 But, beyond that, if this is the
7 conclusion -- if this is the result to which
8 your argument leads, isn't that a powerful
9 reason for interpreting the statutory language
10 differently?

11 MR. ARULANANTHAM: Right. Thank you,
12 Your Honor. So I think it's not for two
13 reasons. You know, the -- the -- the main
14 reason is because, if you look at Section
15 1806(g), which is the provision which authorizes
16 relief in the case, once the district court has
17 determined that the surveillance either was or
18 was not lawfully authorized and conducted, it
19 says you suppress the evidence or otherwise
20 grant the motion in accordance with the
21 requirements of law.

22 And what read -- we read that to mean
23 that if we have an 1806(f) process, whether on
24 summary judgment or however it comes up, and
25 then the court finds the surveillance is

1 unlawful, they now have the right to say at that
2 point this would violate the Seventh Amendment
3 to bind us to that.

4 And, therefore, it would not be in
5 accordance with the requirements of law, and
6 then the issue can be litigated. And I should
7 say, when I say the issue would be litigated,
8 the Bivens litigation hasn't happened. The
9 1810 -- our 1810 claim in this case, which no
10 one has moved to dismiss, although you heard Mr.
11 Kneedler say they might move to dismiss it,
12 right, that claim still remains to be litigated.

13 And the defendants may well be out of
14 this case long before we get to this spot. Or,
15 if there really wasn't a warrant and they were
16 spying on Mr. Abdelrahim while he was leading
17 his housemates in prayer without a warrant, then
18 they might lose on summary judgment, and then
19 the case will be gone.

20 So I think it would be a mistake to
21 construe the statute very narrowly and, on their
22 view, basically destroy the ability to litigate
23 1810 claims because of this possibility which
24 is, you know, very, very unlikely to happen.

25 JUSTICE ALITO: What about this -- the

1 -- the "grant the motion in accordance with law"
2 language that you just mentioned? In -- "in
3 accordance with law," does that include in
4 accordance with the state secrets privilege?

5 MR. ARULANANTHAM: It actually does.
6 Your Honor. On the relief side, it does. And
7 that's consistent with the Ninth Circuit's
8 holding as to what would happen -- well,
9 actually, I'm sorry. The Ninth Circuit had, I
10 think, two reasons -- you know, let me step back
11 a second.

12 The Ninth Circuit said we think the
13 privilege is still available here and we haven't
14 required disclosure to the plaintiffs. And I
15 think that is consistent with FISA, both
16 1806(f), when we're going through the process of
17 deciding whether or not the information was
18 lawfully authorized or conducted, and on the
19 relief side.

20 It's consistent on the (f) part
21 because the statute does not say that the
22 district court "shall" disclose to the
23 plaintiffs if needed to -- to determine the
24 lawfulness of surveillance. It says you "may
25 disclose to the plaintiffs subject to security

1 procedures and protective orders only if needed
2 to determine the lawfulness of the
3 surveillance."

4 And what that means is that the
5 government has the ability to argue in the
6 extremely unlikely event -- it has never
7 happened -- that -- that -- it happened once and
8 then it got reversed on appeal. You know, the
9 -- a district court ordered a disclosure when
10 determining the legality of surveillance to the
11 plaintiffs, right?

12 In the extraordinarily unlikely event
13 that that happens, the government will have the
14 ability to come in and say no, even with
15 protective orders, even with whatever else you
16 want to do with your SCIF or whatever it is,
17 there is no way to protect national security to
18 give this information to them. And that is, I
19 think, the -- the state secrets privilege.
20 That's the same argument.

21 JUSTICE BARRETT: And -- and to kind
22 of go back, like Justice Kagan was saying, the
23 state secrets privilege says, lawfully or
24 unlawfully obtained, we don't care because it
25 would harm national security. So you're

1 conceding that, even after you run through the
2 gamut of 1806(f) and conclude, listen, this was
3 unlawfully obtained, you're conceding that the
4 state secrets privilege could kick in and still
5 keep it out?

6 MR. ARULANANTHAM: At the relief
7 stage, so it -- it doesn't -- the main thing it
8 does is -- what -- what FISA does is it brings
9 the court into the picture where they can see
10 the evidence.

11 But -- but, when the portions of it
12 that require disclosure to plaintiffs, that has
13 "may" in it. And so that's why it's a -- it's a
14 -- I -- I think it's perfectly consistent with
15 the state secrets privilege at common law, but I
16 just want to make sure clearly that I'm
17 understanding -- that I'm answering your
18 question. You're looking like I'm not answering
19 your question.

20 JUSTICE BARRETT: No, I'm just trying
21 to follow how this actually would play out.

22 MR. ARULANANTHAM: Yeah. Sure. So
23 you have to give the information to the court.
24 And that's what -- that's what Congress wanted.
25 The courts get to find out if the government is

1 breaking the law or not.

2 But, if you ever want to disclose to
3 the plaintiffs to go beyond just the court and
4 now go to us and to the public, now the
5 government has the ability to argue that -- that
6 that's not permitted in the --

7 JUSTICE BARRETT: So you would be --

8 MR. ARULANANTHAM: -- interests of
9 national security.

10 JUSTICE BARRETT: -- deprived of your
11 opportunity to get relief?

12 MR. ARULANANTHAM: Yes. In our -- in
13 our -- yes. And in our --

14 JUSTICE BARRETT: So you would lose?
15 Like, you couldn't -- it was unlawfully
16 obtained, but because it was protected by the
17 state secrets privilege, you can't recover?

18 MR. ARULANANTHAM: No -- well, I mean,
19 I think that's possible in some cases. In our
20 particular case, we said -- the prayer for
21 relief clearly says we want the evidence -- the
22 unlawful -- the information unlawfully obtained
23 to be destroyed or returned. That's what we
24 said.

25 So I think we have made a request to

1 obtain, absolutely, because we said "return."
2 That's one of the things that we asked for. But
3 we said "destroyed or returned," and that means
4 that -- I mean, what we would argue in the
5 district court if we ever got to this spot was
6 that, look, even if they say they can't show it
7 to everyone, they still need to destroy it.

8 And that would make a difference. I
9 mean, then our clients would at least still know
10 that the government, whatever records they got
11 from them because, you know, Mr. Fazaga was
12 leading his congregation in prayer or Mr. Malik
13 decided as a young man to embrace his faith,
14 they would at least know then that got burned
15 because it wasn't right. It wasn't right to spy
16 on them because you thought that they were
17 dangerous just because they were embracing their
18 faith.

19 And so it wouldn't be everything, you
20 know, perhaps that we want, but it's well --
21 well within the scope of the complaint, and it
22 would also preserve the government's state
23 secrets privilege.

24 That being said, I feel all of this
25 we're so far ahead of it, Right? All the Court

1 would have to decide now in either of the two
2 paths is that FISA displaces the state secrets
3 privilege when the government is seeking to use
4 information, as it is here. And you wouldn't
5 even have to decide this question about request
6 to obtain. You could just decide they are using
7 it. They're otherwise using it. And because of
8 that, they can keep the information in their
9 vault, but they can't win dismissal of our
10 religion claims. We get our day in court on the
11 religion claims.

12 Or the Court could decide it was
13 premature to dismiss -- I think, as Justice
14 Kagan perhaps was suggesting, you could decide
15 it's premature to dismiss on state secrets at
16 this stage --

17 JUSTICE KAVANAUGH: Where does Article
18 II fit into your analysis? Because Judge
19 Bumatay and then Judge Diaz on the Fourth
20 Circuit both started with an Article II backdrop
21 and the roots of the state secrets privilege and
22 said, in interpreting 1806(f), we think this is
23 the better reading as a matter of text, but we
24 also think this would be a very odd way for
25 Congress to narrow, I guess, the state secrets

1 privilege, which is so foundational to the
2 national security of the country.

3 MR. ARULANANTHAM: So the bottom-line
4 answer -- and I have lots of thoughts on the
5 doctrine that they were discussing -- but the
6 bottom-line answer is, when we're not talking
7 about an area of exclusive and conclusive
8 executive power --

9 JUSTICE KAVANAUGH: Well, that's --
10 I'm going to stop you right there, sorry --
11 that's debatable --

12 MR. ARULANANTHAM: Well --

13 JUSTICE KAVANAUGH: -- right? And
14 that's the issue that hopefully we never have to
15 decide.

16 MR. ARULANANTHAM: So --

17 JUSTICE KAVANAUGH: But -- but I
18 think, right now, that's -- that's a question.
19 And so you avoid deciding that question, which
20 has a lot of ramifications, and I understand
21 exactly what you're saying on the Jackson
22 framework there, and we avoid deciding that by
23 not interpreting the statute to trigger that
24 question.

25 MR. ARULANANTHAM: So, if -- if we're

1 on the same page on the standard, right, then I
2 would say it's limited to the domestic
3 electronic surveillance of U.S. persons, and, I
4 mean, this Court in Keith invited Congress to
5 legislate in that area, right?

6 And also, equally important, Your
7 Honor, only ex parte in camera review, and that
8 second element is also important. If you look
9 at Nixon, for example, look at the last footnote
10 in Nixon. It's Footnote 21 on page 716. What
11 the Court says is we expect the district court
12 is now going to have to go through -- this is
13 high-level communications between the president
14 and his advisors -- and excise the information
15 that may be privileged under Reynolds.

16 JUSTICE KAVANAUGH: Nixon also, as you
17 know well, distinguished national security
18 information, so that would not be -- that would
19 be different, at least if it's presidential
20 communications, and I think that's --

21 MR. ARULANANTHAM: Right, but -- but,
22 respectfully, Your Honor, I'm -- I'm making a
23 narrow point here just about ex parte review.

24 JUSTICE KAVANAUGH: Yeah.

25 MR. ARULANANTHAM: That footnote cites

1 Reynolds. It doesn't just cite it. It says we
2 will have to -- the district court should -- and
3 it says you should cooperate with government
4 counsel to go through the information that may
5 need to be excised under Reynolds.

6 And so what I think that the Court was
7 imagining was the -- the president's
8 communication about national security with his
9 high-level advisors may not belong anywhere out
10 in the New York Times or anywhere else, but the
11 Court can look at it to determine if -- and --
12 and exclude it in the course of litigation,
13 which is important to determine if the president
14 broke the law.

15 And that's all FISA did here. That's
16 why I think the -- the -- the scope of the
17 displacement here is very narrow. It's just
18 limited to ex parte in camera review by courts.
19 And that's why I think there's not even a
20 serious Article II question here.

21 I mean, this is --

22 JUSTICE KAVANAUGH: One other
23 question. Sorry.

24 MR. ARULANANTHAM: Sure. No.

25 JUSTICE KAVANAUGH: I appreciate all

1 that explanation, which is helpful.

2 One other question, which is, are you
3 seeking to narrow Totten on your state secrets
4 argument, or are you taking it as written?

5 MR. ARULANANTHAM: We -- we take it
6 exactly as General Dynamics described it.

7 JUSTICE KAVANAUGH: Okay. Not as
8 written?

9 MR. ARULANANTHAM: And in our view,
10 also as Tenet described it, yes, Your Honor.

11 JUSTICE KAVANAUGH: Yeah.

12 MR. ARULANANTHAM: And I know you had
13 asked -- I can't remember, I think it was Mr.
14 Kneedler -- the -- about the passage in Totten
15 where they say: Look, judicial -- I can't
16 remember the exact language, but it's something
17 like review of -- of any matter that could give
18 rise to the divulging of secret information, you
19 know, that passage, and I would just point to
20 the fact this is the same passage that's picked
21 up in Tenet and that the government relies on to
22 say it's -- it's broad.

23 The very next paragraph there, the
24 Court says: As a -- I'm talking about Totten
25 now -- as a general matter, we can say that

1 suits about matters which are sort of inherently
2 secret cannot be maintained. And what they cite
3 is marital communication, attorney-client
4 communication, all of these things, regular
5 privilege law.

6 JUSTICE KAVANAUGH: Well --

7 MR. ARULANANTHAM: It's -- that part
8 of the case is actually not resting on a
9 national security rationale. It's just saying,
10 look, if I want to sue my wife over a promise
11 that she made in the kitchen or something, you
12 know, that's going to be -- that's going to be
13 barred. And the court can figure that out very
14 early. You don't need to wait for discovery to
15 figure out that, obviously, that suit is barred.

16 JUSTICE KAVANAUGH: To pick up Justice
17 Breyer's question earlier, though, it doesn't
18 seem like we need to get into that.

19 If we conclude -- if we agree with the
20 government -- I know you don't want us to -- but
21 if we agree with the government on the 1806(f)
22 issue and send it back to the Ninth Circuit, as
23 Justice Breyer and Justice Kagan described and I
24 mentioned earlier, all these kinds of issues can
25 be fleshed out and come back to us where that's

1 the central focus of the case.

2 I feel like we'd be doing a drive-by
3 in this case on a massively important issue if
4 we get into that.

5 MR. ARULANANTHAM: Yeah, I -- I agree,
6 Your Honor, that the narrowest ruling in our
7 favor probably in the whole case, yeah, I mean,
8 I think the "otherwise use" -- maybe I'm the
9 only one, or maybe not, I don't know, but I -- I
10 -- I think -- I think "otherwise use" is very
11 plausible as -- as a ground of statutory
12 interpretation for FISA.

13 You don't need to get into the
14 question, Justice Sotomayor, you had asked about
15 whether plaintiffs can use it in discovery if
16 you find the government is using it here, right?
17 But -- but the narrowest ground, perhaps even
18 narrower than that, would just be to say it was
19 wrong to dismiss on the pleadings in this case.

20 We know the very subject matter of
21 this case is not a state secret. The government
22 said this person worked for them. They said
23 they expect the majority of the audio and video
24 will be available for the litigation below. And
25 the district court still dismissed the whole

1 thing without ever looking to see whether --

2 JUSTICE KAVANAUGH: Well, the -- I'm
3 sorry to interrupt. The Ninth Circuit hasn't
4 really passed on that yet.

5 MR. ARULANANTHAM: They didn't. They
6 didn't.

7 JUSTICE KAVANAUGH: So why would we
8 pass on it before the Ninth Circuit did? That
9 would seem out of order to me.

10 MR. ARULANANTHAM: Well, yes, I -- I
11 -- it's true -- our argument that the dismissal
12 was premature, that was our primary argument. I
13 guess the issue is that I read their brief --
14 perhaps you can ask them -- but I -- I -- I read
15 their brief to be arguing for an affirmance, you
16 know, going underneath, an affirmance of the
17 district court order. And you cannot affirm the
18 district court order. But maybe that's wrong.
19 Maybe that's not what they're saying.

20 JUSTICE KAVANAUGH: Well, I -- I guess
21 I heard a little different from Mr. Kneedler,
22 but he can get back into that on rebuttal.

23 MR. ARULANANTHAM: Yes, but -- but --
24 but I think the Court could also say we disagree
25 on FISA, but we want you, court of appeals, to

1 address the prematurity argument, and state
2 secrets is nowhere here.

3 I think I would -- I would say, if --
4 if Your Honors find that the question presented
5 does not include state secrets at all, then that
6 would also mean you shouldn't touch the valid
7 defense issues that are in the -- that are in
8 the case as well.

9 JUSTICE GORSUCH: I'd like your help
10 with a related problem, and -- and that is, you
11 know, asking this question that we're struggling
12 with about 1806's consistency with state
13 secrets, it raises a question what state secrets
14 is.

15 And in 1978, when the Church Committee
16 issued -- after Church Committee issued its
17 report and Congress adopted FISA, Reynolds was
18 on the books, and that was pretty much it, and
19 Totten was over there having to do with spy --
20 contracts with spies. And so -- so the state
21 secrets doctrine pretty clearly meant you
22 exclude the evidence and the case continues.

23 It's only since then in relatively
24 recent times that the government has asserted
25 the Totten bar really kicks in in a lot of cases

1 and that lower courts have run with that ball.

2 So asking what the state secrets means
3 today and whether that implicates FISA seems to
4 me a different question.

5 MR. ARULANANTHAM: Yes, I completely
6 agree, Your Honor. I would note that in their
7 long string cite footnote in their reply brief,
8 where they say here is all the court of appeals
9 cases, and leaving aside that most of those
10 cases are about where the plaintiff can't make
11 their case, but, even leaving that aside, the
12 string cite ends before 1978. You know, it ends
13 around 1980, I think.

14 I mean, there's -- there's -- even in
15 all of the cases that they have cited, they
16 don't prove that dismissal was a contemplated
17 remedy under state secrets outside the
18 government contracting context in 1978.

19 And I think it's quite clear that
20 actually, in 1978, if you -- there's lots of
21 state secrets cases. These are in Professor
22 Donohue's brief, among other places, and,
23 actually, several of them are in ours as well,
24 but -- but, you know, it's very clear that that
25 prior rule, the evidence was excluded and the

1 case goes on without it.

2 I mean, we cite cases from England
3 from the early 1800s, Wyatt v. Gore --

4 JUSTICE GORSUCH: I mean, I -- I -- I
5 -- I'm sorry to interrupt, but the -- but the --
6 but the -- but I do want to interrupt because I
7 think my real problem and what I'm hoping for an
8 answer for, we're -- we're -- we're in
9 tremendous agreement on this point, but -- but
10 what I'm struggling with is your -- the case
11 asked us, does -- does FISA displace state
12 secrets doctrine? And if this Court hasn't
13 definitively answered what the state secrets
14 doctrine is, that's hard, and if Congress had in
15 mind one version of the state secrets doctrine,
16 is that relevant -- the one that's relevant that
17 we should be asking about, you know, or do we
18 ask something -- other question?

19 MR. ARULANANTHAM: I mean, I --

20 JUSTICE GORSUCH: That's what I need
21 your help with.

22 MR. ARULANANTHAM: -- I see. I see.
23 I haven't thought, to be perfectly honest, about
24 whether the question presented is incorporating
25 today's understanding versus that one.

1 I think, when you're looking at what
2 -- what Congress contemplated -- I can answer
3 that part of the question for you -- Congress
4 obviously in 1978 is thinking about a state
5 secrets doctrine in 1978.

6 And so the fact that they are saying,
7 oh, look, FISA is not displaced and, yes, allow
8 us to dismiss claims, that -- that doesn't make
9 any sense because, if you're going to say, okay,
10 freeze the world and -- and operate as it
11 existed in 1978, then you can't be giving them a
12 dismissal remedy.

13 I don't know if that -- that
14 satisfactorily answers your question, but, yeah,
15 that -- that's my -- that's my view on that
16 subject.

17 I also think that if the Court thinks
18 that the state secrets question is not within
19 the question presented, if that's -- if that's
20 the Court's view, then -- but -- but the Court
21 also thinks that the district court can, you
22 know, proceed on the state secrets question, I'm
23 not sure there's a rationale for answering
24 either one, to be perfectly honest with you,
25 but, yeah, that's my -- that's my view on that.

1 JUSTICE ALITO: What happens in your
2 view in this situation? The plaintiff claims
3 that electronic surveillance was conducted for
4 discriminatory reasons, in violation of the --
5 the plaintiff's right to the free exercise of
6 religion, makes that a prima facie case. That's
7 not that hard to do in an employment case.

8 The evidence obtained through the
9 electronic surveillance shows without any doubt
10 that, in fact, the surveillance was not based on
11 the plaintiff's religion; it was based on the
12 fact that there was evidence that the plaintiff
13 is a terrorist.

14 What happens in that situation? And
15 the latter is covered by state secrets. And the
16 government says this can't be, it -- this is too
17 sensitive to be disclosed. What happens there?

18 MR. ARULANANTHAM: Yeah, I think
19 there's two options. Under the decision below,
20 which adopts the D.C. Circuit's view, which --
21 sort of based on the Molerio decision that we
22 discussed earlier, Judge -- then Judge Scalia's
23 view, the court can look at that information,
24 find the exact finding that you just made, and
25 then rule for the defendants. That -- that's

1 one view.

2 The common law view is different. The
3 common law view is that, look, privilege
4 sometimes hurts one side, sometimes hurts the
5 other side. It often leaves evidence out that
6 probably would have resulted in a victory, you
7 let the chips fall where they may.

8 And the -- and the decision below did
9 not adopt that rule. It adopted the rule from
10 the D.C. Circuit. I think those are the two
11 plausible options.

12 What is not acceptable in our view is
13 to say even if the evidence may show the
14 opposite, it may show it was blatant religious
15 discrimination, it said simply on Muslims,
16 that's what -- that's what -- that he was told,
17 the FBI told him to surveil simply on Muslims,
18 that nonetheless you would still win dismissal
19 because, hypothetically, they could have a full
20 and effective defense. That's the Fourth
21 Circuit view. It's the view that's pressed by
22 the other side. And that we would strongly
23 object to, Your Honor.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 1806(f), the provision we're talking
2 about, takes up the whole page of 207a and yet
3 it consists of two sentences. The sentence
4 we've been talking about is 20 lines, and
5 squirreled away in there are these few words
6 that you're relying on for displacement of the
7 state secrets privilege, for a reading of -- of
8 FISA that has enormous consequences for state
9 secrets, for national security.

10 And I just wonder, why would Congress
11 put such significant language stuck in this
12 provision? Isn't that an oblique way to have
13 the consequences you're ascribing to that
14 language?

15 The -- the -- the jargon in our
16 opinions, as you know, is this is, you know,
17 burying an elephant in a mouse hole, which is a
18 little overused, but what's the answer to that?

19 MR. ARULANANTHAM: Yes. So I favor
20 short declarative sentences, but, you know,
21 leaving that aside, I -- I -- I disagree with
22 their claim that FISA as a whole is hiding
23 anything in a mouse hole. You know, it's --
24 it's passed in the wake of extensive abuses that
25 were uncovered by the Church Committee. And

1 this provision, it says, if the attorney general
2 -- you know, perhaps it should have been written
3 in a sentence or in its own section. You know,
4 I would have probably put it in three sections,
5 I think, if you think of its parts.

6 But -- but it clearly says that if the
7 attorney general finds that disclosure of the
8 information or an adversarial hearing would harm
9 national security, then you adopt the ex parte
10 in camera review process and determine if the
11 surveillance was lawful. So --

12 CHIEF JUSTICE ROBERTS: But -- but --

13 MR. ARULANANTHAM: -- I --

14 CHIEF JUSTICE ROBERTS: I'm sorry. Go
15 ahead.

16 MR. ARULANANTHAM: No, just I -- I --
17 I think this is a statute about domestic
18 electronic surveillance. The whole thing is --
19 I mean, it creates the foreign intelligence
20 surveillance court. It does all these things,
21 as Your Honor obviously knows. I just -- I just
22 don't see this as a mouse hole.

23 If it were trying to displace state
24 secrets privilege in other contexts not related
25 to electronic surveillance, I think there would

1 be a better argument that it doesn't make any
2 sense if they did this here. But the
3 displacement is only in the -- in the sense that
4 it creates all the procedures, the exclusive
5 procedures for how you litigate cases --

6 CHIEF JUSTICE ROBERTS: But I think --

7 MR. ARULANANTHAM: -- about
8 surveillance.

9 CHIEF JUSTICE ROBERTS: -- I -- I
10 think your argument really does hinge on the "or
11 other materials" language. Everything else is
12 consistent with Mr. Kneedler's point that this
13 governs when the government wants to introduce
14 evidence and not affording a vehicle for what
15 the court below did.

16 MR. ARULANANTHAM: No, Your Honor, I
17 -- I -- I would -- I would say there's two parts
18 that really contradict that view.

19 One is the plain language, "any motion
20 and request under any other statute or rule,"
21 which they really have to add words into and say
22 any motion about admissibility or in response
23 to -- I mean, they -- they're having to cram
24 narrow -- narrowing construction onto this very
25 broad text.

1 The second point -- I think this is
2 something Justice Sotomayor said right early
3 on -- is, on their view -- and I think Mr.
4 Kneedler agreed with this -- they can just
5 dismiss 1810 claims. They can just win
6 dismissal of 1810 claims on the state secrets
7 privilege.

8 So Justice Alito had asked about
9 structural considerations earlier. I mean, the
10 structural argument in our favor is
11 extraordinarily strong. I mean, on their view,
12 every 1810 claim they can just pick and the ones
13 they want to dismiss on state secrets, they can
14 dismiss it using the same attorney general
15 declaration that is described in 1806(f).

16 So I think those are our two
17 arguments, strongest arguments, for why that
18 part, the request to obtain part of the case --
19 part of our argument goes for us. Obviously,
20 the "use" argument is different, right? If we
21 win on that, then we don't have to get into
22 this.

23 CHIEF JUSTICE ROBERTS: Thank you.
24 Justice Thomas?
25 Justice Breyer?

1 Justice Alito?

2 JUSTICE ALITO: Yeah, a technical
3 argument about the use provision. The use
4 provision requires the government to give notice
5 that it is going to use the information. And
6 that makes sense when the government wants to
7 introduce it -- it at trial, so it gives notice
8 that it's going to use it at trial, and that
9 allows the other party to move to suppress the
10 evidence.

11 But what sense does it make to require
12 prior notice when what the government is going
13 to do is to invoke the state secrets privilege?
14 You just invoke the state secrets privilege, but
15 you have to send a notice that says we intend to
16 invoke the state secrets privilege and now we
17 invoke the state secrets privilege? Does that
18 make any sense?

19 MR. ARULANANTHAM: I -- I think it
20 does. In -- in this case, it served a useful
21 function. They filed a notice of motion, and
22 then they filed -- filed the motion. And we
23 said -- as a preliminary matter before even
24 briefing it, we tried to make some of these
25 Totten versus Reynolds kinds of arguments to the

1 district court, and we said don't even look at
2 the information; first, decide as a threshold
3 matter whether or not the state secrets evidence
4 -- doctrine can apply here. And we said it may
5 be a necessary evil that you'll have to look at
6 the ex parte information, but if you can avoid
7 doing that, that would be better. We said it's
8 presumptively unconstitutional.

9 So it served a very important function
10 -- we lost, obviously, that argument. But --
11 but -- but I think it served a very important
12 function here, and -- and, yeah, I do think it's
13 -- it's important for that reason.

14 JUSTICE ALITO: One other question.
15 Under 1806, do you think that the judge must be
16 able to look at all of the evidence to the
17 extent it's necessary to decide whether the
18 surveillance was lawful?

19 MR. ARULANANTHAM: It's applications,
20 orders, and such other materials as are
21 necessary to determine. I don't -- I don't know
22 what the scope of "such other materials" is.
23 You know, the court of appeals predicted -- it
24 didn't decide -- it predicted that the scope of
25 evidence that would be reviewable to determine

1 whether the clearly electronic surveillance for
2 FISA purposes, like him leaving recording
3 devices in a prayer hall and walking away, to
4 decide if that was discriminatory on the basis
5 of religion would be the same information that
6 you would need to decide if, say, his consensual
7 conversations were also in violation of the Free
8 Exercise Clause.

9 But the court said, if that's wrong,
10 then that's fine. Then the district court can
11 say it's wrong --

12 JUSTICE ALITO: But --

13 MR. ARULANANTHAM: -- and then it can
14 separate -- it can -- it can apply normal --

15 JUSTICE ALITO: -- what I'm --

16 MR. ARULANANTHAM: -- or state secrets
17 privilege.

18 JUSTICE ALITO: -- what I'm interested
19 in is this. In cases involving the state
20 secrets privilege, isn't it true that the court
21 does not necessarily look at all of the -- of
22 the evidence? There are situations in which the
23 evidence is too sensitive.

24 Think the most secret -- think of the
25 most secret evidence that the -- the government

1 possesses. Yet, 1806 seems to say that the --
2 the court reviews ex parte in camera the
3 evidence -- the -- that evidence if it's -- if
4 it has a bearing on whether the surveillance was
5 lawfully conducted.

6 MR. ARULANANTHAM: Yes. So our
7 position would be that FISA brings the courts
8 into the process. And so, you know, the
9 government can always choose not to rely on some
10 piece of information. It doesn't even want to
11 give it to a court because it's worried the
12 court might leak the information. And they can
13 choose to do that.

14 But, if they -- if they want to use it
15 to show that the surveillance was lawful, they
16 have to give it to the court as long as it's
17 within that "such other materials relating to
18 surveillance."

19 But, you know, that's what I -- that's
20 what we think. I'm not sure the Court has to
21 address that question here. Obviously, it's,
22 again, quite premature. And I think the -- the
23 Court could hold that, you know, if this were
24 like nuclear weapons in Hawaii or one of these
25 other things -- I don't know how this would

1 happen in this case, it's 15 years old -- but --
2 but, you know, I think the Court could say we're
3 not deciding whether there might be, you know,
4 some set of information, maybe it's because that
5 part is in the constitutional core if somehow
6 the president were involved in our case, which
7 seems quite implausible to me, but, you know --
8 and -- and say, well, you know, we're not
9 deciding that little part of it, but, in
10 general, FISA displaces the privilege and what
11 it says is that other such materials relating to
12 the surveillance have to be turned over to the
13 court, not to us, but to the court.

14 JUSTICE ALITO: Wouldn't that be quite
15 something? Because just dealing with some
16 super-secret information in district court -- in
17 district courthouses around the country would
18 create an incredible security problem. Most of
19 the -- most district courts don't have the
20 facilities to deal with information of that
21 sensitivity.

22 MR. ARULANANTHAM: Well, I -- we're
23 only talking about domestic electronic
24 surveillance of Americans. It doesn't arise --
25 the -- the claims don't arise if we're talking

1 about things like, for example, what you -- this
2 Court was dealing with, you know, last month in
3 a different state secrets case.

4 So we're only talking about that.
5 And, obviously, in criminal cases, Justice
6 Alito, already, courts all the time are doing
7 FISA ex parte in camera review where the
8 government is trying to use the information in
9 criminal cases. So I --

10 JUSTICE ALITO: Yeah, only if the
11 government chooses to -- wants to use the
12 information in a criminal case.

13 MR. ARULANANTHAM: Yes, that -- that's
14 true, Your Honor. I -- I -- our view is that
15 Congress thought, in this context, given the
16 history of abuse that had happened in this
17 particular area, it was important to interpose
18 the courts to play their role to ensure that
19 surveillance remained within the confines of the
20 law.

21 CHIEF JUSTICE ROBERTS: Justice
22 Sotomayor?

23 JUSTICE SOTOMAYOR: Counsel, you
24 disclaim wanting to use this information. The
25 government hasn't made a motion to use it. It

1 made a motion to dismiss.

2 You concede that whether or not that
3 motion to dismiss is appropriate under Reynolds
4 and General Dynamics and all that case law
5 shouldn't be addressed by us, correct?

6 MR. ARULANANTHAM: No, Your Honor. I
7 -- I believe it's within the question presented,
8 and the Court has the authority -- and we did
9 argue it below. We said --

10 JUSTICE SOTOMAYOR: Yes, but --

11 MR. ARULANANTHAM: -- we put it in the
12 BIO. So --

13 JUSTICE SOTOMAYOR: -- but you agree
14 --

15 MR. ARULANANTHAM: -- our position
16 is --

17 JUSTICE SOTOMAYOR: -- that it hasn't
18 been properly briefed before us, and the Ninth
19 Circuit didn't look at that?

20 MR. ARULANANTHAM: No, the Ninth
21 Circuit didn't look at that because en banc 6-5
22 in the Jefferson decision, it -- it ruled that
23 Totten and Reynolds were on a continuum.

24 JUSTICE SOTOMAYOR: Right. But -- but
25 -- but --

1 MR. ARULANANTHAM: And this is before
2 General Dynamics.

3 JUSTICE SOTOMAYOR: Exactly. So --

4 MR. ARULANANTHAM: Right. So -- so it
5 --

6 JUSTICE SOTOMAYOR: -- that hasn't
7 been really addressed by them, not the way
8 you've argued it before us?

9 MR. ARULANANTHAM: No, Your Honor, it
10 was foreclosed --

11 JUSTICE SOTOMAYOR: All right. So --

12 MR. ARULANANTHAM: -- under circuit
13 precedent. So we didn't make this exact -- this
14 argument there.

15 JUSTICE SOTOMAYOR: So, if you were to
16 lose -- and I know you desperately don't want
17 to, but assume my assumption that all we hold is
18 that no one's invoked 1806 here, and we send it
19 back for the Court below to decide how state
20 secrets interacts with a motion to dismiss.

21 Is that the narrowest ruling that we
22 could issue?

23 MR. ARULANANTHAM: Yes, Your Honor. I
24 think holding that either, as I had discussed
25 with Justice Kavanaugh, either that you

1 shouldn't have dismissed on the pleadings or
2 that we want the Ninth Circuit to decide if you
3 should have dismissed on the pleadings, I would
4 just point -- just note, I guess, that the en
5 banc Ninth Circuit foreclosed our argument about
6 the scope of the Reynolds privilege here.

7 It was before General Dynamics, so
8 perhaps we could argue, hey, look, you know --

9 JUSTICE SOTOMAYOR: Exactly. So if we
10 tell them look at your holding in light of
11 General Dynamics --

12 MR. ARULANANTHAM: Yes, Your Honor.

13 JUSTICE SOTOMAYOR: -- they should do
14 that anyway?

15 MR. ARULANANTHAM: Yes, Your Honor.
16 Yes, Your Honor. That would be the -- the
17 narrowest.

18 JUSTICE SOTOMAYOR: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice Kagan?

20 JUSTICE KAGAN: So this question
21 doesn't assume you lose. Suppose, you know,
22 just on this question of the relationship
23 between the two questions, suppose that the
24 easiest question in this case, I think, is the
25 question of when dismissal is appropriate and

1 that the Ninth Circuit decision was in some
2 important way premised on an incorrect
3 understanding of when dismissal is appropriate
4 in a state secrets case.

5 And suppose too that I find the 1806
6 questions quite difficult. And if the entire
7 discussion of the Ninth Circuit was premised on
8 this error about state secrets dismissals, one
9 wouldn't have to get into that. That would seem
10 an attractive solution to me.

11 But that leaves an opinion on the
12 books which may well be wrong, that the Ninth
13 Circuit's view of 1806, in fact, is incorrect.
14 So what should I do?

15 MR. ARULANANTHAM: I think the Court
16 could affirm on the alternative ground, but that
17 would still leave the Ninth Circuit opinion on
18 the books, I guess, is your -- your point, Your
19 Honor.

20 I guess -- I -- I suppose the Court
21 could say, under these circumstances, where --
22 you know, our first argument to the Ninth
23 Circuit was the dismissal was premature.

24 Perhaps the Court should say: We
25 think that the court should have addressed that

1 question first and, for that reason, we vacate
2 the -- the decision and ask the Court to -- to
3 address that -- that question first.

4 I'm not sure -- I mean, under that
5 view, you wouldn't say whether it was right or
6 whether it was wrong. You were saying that
7 under these circumstances, given the
8 significance of the issues or, you know, for
9 whatever other reasons, we think it more
10 appropriate to address the question whether the
11 dismissal here was premature.

12 The district court did not look at the
13 actual underlying evidence. The district court
14 didn't explain why, when we said we would move
15 on our summary -- for summary judgment on the
16 religion claims, didn't say why that would still
17 somehow lead to inevitably the disclosure of
18 information, you know, unless -- unless they --
19 they carried the risk and it was -- it was them
20 that caused the risk.

21 So I suppose Your Honor could -- could
22 take that approach. I feel like your question
23 sort of did assume we would lose on FISA in the
24 end, but, you know, I mean, our -- our -- our
25 view is that the Court could also affirm on

1 either of those two grounds, but I guess Your
2 Honor already knew that.

3 So I don't know. Have I answered your
4 question? I sense -- yeah?

5 CHIEF JUSTICE ROBERTS: Justice
6 Gorsuch.

7 JUSTICE GORSUCH: I just want to make
8 sure I understand your answer to the question.

9 So it might be possible, I -- I think
10 you're saying, to vacate and remand the case and
11 say it was premature for the Ninth Circuit to
12 determine that FISA displaced state secrets
13 without first asking what state secrets is and
14 how it applies to this case?

15 MR. ARULANANTHAM: Yes, Your Honor,
16 and we would say, as Justice Sotomayor had
17 suggested, particularly in light of General
18 Dynamics.

19 JUSTICE GORSUCH: Okay.

20 MR. ARULANANTHAM: And -- and there's
21 two -- if I -- if I -- if I may, Your Honor,
22 there's two aspects to that. One is whether
23 dismissal is available in light of General
24 Dynamics, and the other is the prematurity part,
25 whether you can do it on the pleadings or you

1 have to let the case play out.

2 JUSTICE GORSUCH: Got it. Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Kavanaugh.

5 JUSTICE KAVANAUGH: One follow-up on
6 the Article II discussion we were having earlier
7 -- I appreciate your answers on that -- just so
8 I'm clear about what I'm suggesting.

9 I agree with you there would be real
10 doubts about whether the executive's power,
11 Article II power, to conduct domestic
12 surveillance would be exclusive and preclusive
13 under Category 3 of the Jackson framework, so I
14 -- I agree that would be doubtful in my view,
15 although we haven't said that.

16 But, at a minimum, I think the
17 government is saying, in this separation of
18 powers back and forth between the executive and
19 Congress, what the executive is due is that
20 Congress speak clearly, directly, give some
21 clearer indication of an intent to intrude on
22 the state secrets privilege than we have here.

23 And the Chief Justice's questions
24 about a few words and Justice Alito's questions,
25 which I would certainly second, the district

1 court -- that this kind of information,
2 depending on what it is, is not the kind of
3 information you want floating around even in the
4 White House to people, much less floating around
5 the country, depending on what it is, of course.

6 So, on that question, that Article II
7 influences the reading is kind of what I'm
8 getting at with Article II, not the
9 exclusive/preclusive.

10 MR. ARULANANTHAM: Uh-huh. Yeah, I
11 think there are other statutes that have already
12 crossed this bridge. FOIA Exemption 1 and the
13 post EPA v. Mink congressional action on that is
14 one.

15 CIPA, even FISA, other provisions of
16 FISA which require very extremely sensitive
17 programs that the government is running to be
18 disclosed to this Court.

19 So, in that sense, I -- I don't think
20 there's a -- when -- when we're talking about
21 domestic electronic surveillance and only ex
22 parte review and all that, that's sort of the
23 answer I gave before.

24 JUSTICE KAVANAUGH: Yeah.

25 MR. ARULANANTHAM: The one other thing

1 I would say on it, Your Honor, is we're talking
2 here about rules for litigation, and all of this
3 is about when they file something in court and,
4 you know, all of that.

5 And it's very well recognized that
6 Congress has the power to set up a set of rules
7 for litigation, whether it be evidentiary rules
8 or other related procedures. Vance v. Terrazas,
9 you know, talks about this even in a context
10 where there may not be power over the original
11 -- I think, in there, it's the denaturalization
12 context. When you then talk about making the
13 evidentiary rules, Congress's power is even
14 heightened.

15 And so, here, we're not talking about
16 whether the government has the power in the
17 first place to do some thing. We're talking
18 about where they've already done it and now
19 we're setting remedies up.

20 1806(f) and 1810 are mechanisms, and
21 even if you believe them that it's about
22 government's use, the whole thing is about what
23 happens in court. And so I think there also
24 we're far afield from what I would think of as
25 potential core Article II concerns.

1 JUSTICE KAVANAUGH: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Barrett.

4 JUSTICE BARRETT: I do have a
5 question. It's a follow-up to something Justice
6 Alito asked you earlier. He said to posit, you
7 know, you have religion claims in the suit, and
8 the suit is about whether the surveillance
9 violated or discriminated on the basis of
10 religion. But review of the application and the
11 related documents shows that there was no
12 religious discrimination. It was based on, you
13 know, very good evidence that the targets were
14 terrorists.

15 You said in that circumstance, like,
16 okay, well, then they've asserted the state
17 secrets privilege, let the chips fall where they
18 may, that dismissal's not an appropriate remedy
19 under the state secrets privilege. Did I
20 misunderstand that?

21 MR. ARULANANTHAM: Yes, Your Honor. I
22 said there's two options. What you just
23 described is the traditional common law rule,
24 and it was the rule certainly in 1978.

25 JUSTICE BARRETT: You mean that it

1 proceeds forward just without the --

2 MR. ARULANANTHAM: Without the
3 privilege evidence --

4 JUSTICE BARRETT: Okay. But my
5 question is then, what happens to the individual
6 defendants? Let's say the evidence that they
7 can use to defend themselves against the claim
8 that they religiously discriminated is in this
9 body of evidence that's protected by the state
10 secrets doctrine. And you're saying dismissal's
11 not a remedy, so they just go in with their
12 hands behind their back and they just are
13 sitting ducks?

14 MR. ARULANANTHAM: Yes. So -- so two
15 thoughts, Your Honor. Under common law, that is
16 certainly the result, and there are --

17 JUSTICE BARRETT: Except, under common
18 law, if you have a privilege like
19 attorney-client and it's exclusively a common
20 law privilege, it can be pierced if it would
21 violate the due process rights, right? But,
22 if -- if the state secrets privilege is not
23 entirely common law, if it has a constitutional
24 element, I'm not sure that the due process
25 rights of the defendants could pierce it.

1 MR. ARULANANTHAM: Yes, I'm -- I'm --
2 I'm just thinking of common law cases that are
3 actually cited in Professor Donohue's brief.
4 Republic of China is one. Northrop v. McDonnell
5 Douglas, where the defendant wants the
6 information and they say the chips fall where
7 they may. But -- so -- so --

8 JUSTICE BARRETT: Can that happen if
9 there's a constitutional element to the
10 privilege?

11 MR. ARULANANTHAM: So, I mean, if
12 we're talking about Article II, no, but you're
13 asking about a due process element?

14 JUSTICE BARRETT: Well, I'm asking,
15 like, chips fall where they may, and you're --
16 you're saying that that's fine even if it
17 violates the due process rights of the
18 individual defendants?

19 MR. ARULANANTHAM: Well, I think --
20 so, again, there's another option, and I want to
21 make sure I get to talk about the other
22 option --

23 JUSTICE BARRETT: Okay.

24 MR. ARULANANTHAM: -- right, which is
25 Justice Scalia's -- or then Judge Scalia's

1 option, but -- but, yes, I think it's often
2 going to be true -- I mean, if -- if the Due
3 Process Clause requires that someone needs the
4 evidence, then, obviously, that would trump the
5 -- the common law. That -- that just seems --

6 JUSTICE BARRETT: So that assumes the
7 state secrets privilege is only common law?

8 MR. ARULANANTHAM: Yes, but if -- oh,
9 you're asking what if you have a conflict
10 between the Due Process Clause and the Article
11 II element of the state secrets privilege? I --
12 I don't -- I -- I don't know. I think, you
13 know, again, whatever the answer is, it would be
14 within the scope of the statute because it's in
15 accordance with the requirements of law. But --

16 JUSTICE BARRETT: It's just hard to
17 see letting the chips fall where they may if
18 it's then the individual defendants who are
19 deprived of access to information that they need
20 to defend themselves against the claim that they
21 discriminated on the basis of religion when
22 let's imagine, in Justice Alito's hypothetical,
23 it's utterly clear from all the materials that
24 there was no religious discrimination.

25 MR. ARULANANTHAM: Yes. So, again, I

1 still want to talk about the other option.

2 JUSTICE BARRETT: Yeah.

3 MR. ARULANANTHAM: But the -- the last
4 thing I'll say before I do that is -- and this
5 is discussed to some extent in Tenet and cases
6 like that -- the government can always
7 indemnify, right? I mean, that -- when we're
8 talking about people who are working for the
9 government, which is typically what's going to
10 happen in an 1810 case, you know, if you're
11 talking about the mirror image problem, do you
12 let the harm of the due process problem you're
13 talking about or the Seventh Amendment problem
14 you're talking about fall on this side of the
15 ledger or on our side of the ledger? You know,
16 we're out of luck even if they blatantly broke
17 the law, where they have --

18 JUSTICE BARRETT: The due process --

19 MR. ARULANANTHAM: -- the possibility
20 --

21 JUSTICE BARRETT: -- rights, as
22 Justice Alito pointed out, are not the same for
23 defendants and plaintiffs.

24 MR. ARULANANTHAM: Yes. The Seventh
25 Amendment rights are certainly the same. But

1 let me get to the --

2 JUSTICE BARRETT: Yeah. Please.

3 MR. ARULANANTHAM: -- let me get to
4 the other -- the other point. I mean, then
5 Judge Scalia and, actually, building even on a
6 prior case, Ellsberg, said that the court is --
7 and this has become an In re Sealed Case, the
8 D.C. Circuit's rule, and it is the rule adopted
9 by the decision below in this case -- is that in
10 that situation, the court can look at the
11 information, as Justice Alito had imagined,
12 decide that, yes, there is no basis for finding
13 that these people were discriminated against and
14 rule for the defendants.

15 And -- and that actually is what
16 happened in Molerio, where the person had a
17 claim that they thought -- a First Amendment
18 claim that they thought the court held would --
19 should survive summary judgment. But they said:
20 But we've seen the evidence and we know that
21 claim is wrong. And so they nonetheless ruled
22 for the defendant.

23 And I think that option would
24 certainly be available under the court of
25 appeals' decision in this case, so I think, if

1 you -- if you affirmed, that option would still
2 be --

3 JUSTICE BARRETT: Then you're okay
4 with that option?

5 MR. ARULANANTHAM: -- available to
6 them. Yes, we haven't challenged it -- we
7 haven't challenged it here. And -- but, you
8 know, the -- the very last thing I would say
9 about that is our clients, they may have had
10 real targets, but the instructions that the
11 informant says he got and what he did was he
12 went all over the place and he talked --

13 JUSTICE BARRETT: Well, I mean, I'm
14 not talking just about the facts of your case,
15 obviously, because how we interpret the statute
16 or what we might say or not say about the state
17 secrets privilege has ramifications beyond your
18 case.

19 MR. ARULANANTHAM: Understood, Your
20 Honor.

21 JUSTICE BARRETT: Thank you, counsel.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Rebuttal, Mr. Kneedler.

25

1 REBUTTAL ARGUMENT OF EDWIN S. KNEEDLER
2 ON BEHALF OF THE PETITIONERS

3 MR. KNEEDLER: Thank you, Mr. Chief
4 Justice. Several points.

5 First of all, we think it makes sense
6 the proper disposition of the case is to review
7 what the Ninth Circuit did decide, not what it
8 did not decide. The Ninth Circuit did not
9 decide whether the district court's dismissal of
10 only the First Amendment claim was proper on the
11 basis of the state secrets privilege because it
12 said the state's privilege was -- state secrets
13 privilege was displaced by FISA.

14 And there's no doubt the privilege
15 existed clearly under Reynolds at the time that
16 FISA was enacted. So there is certainly no
17 reason to think that FISA displaced that
18 well-established privilege.

19 The question of what the consequence
20 of that privilege is not the privilege itself;
21 it's what happens if the privilege is validly
22 asserted and the evidence is removed from the
23 case. So I think, Justice Gorsuch, the question
24 is what Congress would have thought about the
25 state secrets privilege itself, not the

1 consequences of a successful assertion of it.

2 And as to whether 1806(f) displaces
3 the state secrets privilege, I think, for a
4 number of reasons, it clearly does not. For
5 example, it provides for the attorney general to
6 control things, not the head of the agency,
7 which is the -- who invokes the state secrets
8 privilege.

9 And, true, FISA was enacted to address
10 abuses of domestic surveillance, but other
11 provisions of FISA addressed that with the --
12 with the FISC and the applications for
13 approvals. But what -- what Congress did in
14 1806(f) and -- and the related provisions was to
15 codify in statute a procedure that had been
16 developed at common law or by courts for the
17 suppression of evidence that was -- that was
18 obtained by electronic surveillance. And that
19 would arise only if the attorney general decided
20 to -- to put forward the evidence, as Justice
21 Alito described.

22 And there are many other things that
23 make that clear. Subsection (f) refers to two
24 motion -- types of motion, a motion to suppress
25 or a motion to obtain discovery of either the

1 application and order or the materials or the
2 evidence in order to suppress. And then
3 subsection (g), when it says that the court
4 grants that motion, it doesn't say grant
5 judgment. It says grant the order to suppress
6 or otherwise grant the motion, which means the
7 motion to exclude the evidence may be suppressed
8 or it may be something less than suppressed,
9 something more than suppressed. So it's all
10 wrapped up in the -- in -- in the procedures for
11 suppression.

12 On the question of dismissal, we think
13 that -- that it is artificial to separate Totten
14 from Reynolds. Reynolds -- Reynolds itself had
15 a footnote about Totten after it discusses the
16 fact that national security information can be
17 excluded. It says: See Totten. And then it
18 describes Totten as a case where the -- the case
19 was -- was not permitted to go forward even at
20 the pleadings stage because it was obvious from
21 the face of the pleadings that the -- that the
22 case could not go forward because it concerned a
23 state -- a state secret.

24 But there are other situations in
25 which it is central to the case, a state secret,

1 such as here. They allege that plaintiffs --
2 that defendants violated their First Amendment
3 rights. But the evidence might well furnish a
4 basis for defending against that. That is
5 central to the case in the same way that the
6 contract in -- in Totten and in Tenet was
7 central to the case.

8 And General Dynamics, in fact,
9 contains a -- a number of passages that are
10 helpful, supportive of the idea that dismissal
11 can be an appropriate remedy.

12 For example, Respondents say that as
13 plaintiffs they're happy to make their case and
14 then let the chips fall where they may, putting
15 to one side the threat of blackmail, gray mail
16 against the government in that sort of
17 situation, forcing it to settle or maybe even
18 accept an injunction against us -- against it.

19 But General Dynamics says it seems to
20 be unrealistic to separate, as the Court of
21 Federal Claims did, the claims from the defense
22 and to allow the former to proceed while the
23 latter is barred. Claims and defenses together,
24 it -- it's those that establish the
25 justification or lack of justification for

1 judicial relief.

2 The point is, if the -- if the issue
3 cannot be fairly, soundly, safely adjudicated
4 without risking disclosure of national security
5 information, then it can be -- it can and should
6 be dismissed, whether this arises by the
7 government's assertion of a defense in rebuttal,
8 it's not even an affirmative defense, it is a
9 defense -- a factual defense, or whether it --
10 it goes to the plaintiff's -- to the plaintiff's
11 case.

12 And, in fact, in General Dynamics --
13 no, I think it's in Tenet versus Doe, the Court
14 also relies on Weinberger, where the case was
15 dismissed because the defense could not be
16 properly asserted due to state secrets
17 information.

18 CHIEF JUSTICE ROBERTS: Thank you, Mr.
19 Kneedler, counsel. The case is submitted.

20 (Whereupon, at 12:07 p.m., the case
21 was submitted.)

22

23

24

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Official - Subject to Final Review

1	<p>abrogate [4] 5:12 25:12 48:19 49:2</p> <p>absolutely [1] 93:1</p> <p>abuse [1] 117:16</p> <p>abuses [3] 83:17 108:24 135:10</p> <p>accept [3] 43:24 54:4 137:18</p> <p>acceptable [1] 107:12</p> <p>accepted [1] 54:24</p> <p>accepting [2] 43:12 54:7</p> <p>access [2] 17:15 130:19</p> <p>accordance [7] 25:1 87:20 88:5 89:1,3,4 130:15</p> <p>according [1] 81:18</p> <p>acknowledged [1] 84:18</p> <p>Act [1] 27:22</p> <p>acting [1] 84:3</p> <p>action [1] 125:13</p> <p>actions [1] 27:21</p> <p>actual [2] 11:18 122:13</p> <p>actually [29] 7:25 9:25 16:17 26:21 27:9 39:2 54:18 59:21 65:24 68:21 69:8 70:6 73:15 76:23,24 77:7,25 79:11 82:22 85:16 89:5,9 91:21 99:8 103:20,23 129:3 132:5,15</p> <p>add [1] 110:21</p> <p>address [7] 44:3 78:14 102:1 115:21 122:3,10 135:9</p> <p>addressed [6] 28:1,14 118:5 119:7 121:25 135:11</p> <p>adjudicate [3] 3:25 10:1 56:2</p> <p>adjudicated [3] 8:16 41:4 138:3</p> <p>adjudicating [1] 53:19</p> <p>adjudication [6] 7:2 8:8 22:8 55:1 60:14,19</p> <p>administration [1] 31:21</p> <p>admissibility [2] 53:9 110:22</p> <p>admissible [1] 59:14</p> <p>admission [1] 55:21</p> <p>adopt [2] 107:9 109:9</p> <p>adopted [5] 26:18 62:19 102:17 107:9 132:8</p> <p>adopting [2] 76:14,15</p> <p>adopts [2] 77:10 106:20</p> <p>advanced [1] 46:19</p> <p>adversarial [1] 109:8</p> <p>adversary [1] 79:15</p> <p>advisors [2] 96:14 97:9</p> <p>affect [1] 38:19</p> <p>affirm [5] 41:17,22 101:17 121:16 122:25</p> <p>affirmance [12] 45:1 46:20 76:9,10,12 77:10,12,20 78:3,8 101:15,16</p> <p>affirmative [2] 67:12 138:8</p> <p>affirmatively [1] 13:11</p> <p>affirmed [4] 41:9 61:4 78:25 133:1</p> <p>affording [1] 110:14</p> <p>afield [1] 126:24</p> <p>agency [3] 22:8 23:20 135:6</p> <p>Agent [3] 1:23 2:7 53:4</p> <p>agents [1] 61:22</p> <p>aggrieved [12] 4:8 13:12,24 14:3,13,23 15:6,11 29:20 36:23 55:23</p>	<p>86:10</p> <p>agree [16] 12:22 55:9 58:7,17 73:5 82:10,11,24 83:2 99:19,21 100:5 103:6 118:13 124:9,14</p> <p>agreed [2] 4:17 111:4</p> <p>agreeing [1] 38:4</p> <p>agreement [2] 7:22 104:9</p> <p>ahead [5] 24:8,10 42:22 93:25 109:15</p> <p>AHILAN [3] 1:24 2:9 63:13</p> <p>aid [1] 5:6</p> <p>AL [5] 1:4,7,25 2:11 63:14</p> <p>Alderman [1] 25:6</p> <p>ALITO [34] 25:25 26:2 27:5 28:10 35:14 71:22 72:7,11,15,25 84:4,13,20,25 85:4 86:5,9 87:1 88:25 106:1 111:8 112:1,2 113:14 114:12,15,18 116:14 117:6,10 127:6 131:22 132:11 135:21</p> <p>Alito's [2] 124:24 130:22</p> <p>alive [2] 49:17 50:7</p> <p>allege [1] 137:1</p> <p>alleging [1] 8:2</p> <p>allow [5] 57:17,23 60:13 105:7 137:22</p> <p>allowing [2] 58:2 68:14</p> <p>allows [2] 42:16 112:9</p> <p>almost [2] 79:22 80:2</p> <p>already [7] 33:18 40:16 64:16 117:6 123:2 125:11 126:18</p> <p>alteration [2] 46:1,21</p> <p>alternative [6] 45:1 46:20 78:7 79:5,6 121:16</p> <p>although [3] 66:12 88:10 124:15</p> <p>altogether [1] 9:20</p> <p>Amendment [23] 4:22 8:12 38:24 39:3 41:7 49:21 50:3 53:22 55:4,17 61:17 62:7 82:18,19,20 83:10 85:10 88:2 131:13,25 132:17 134:10 137:2</p> <p>Americans [2] 80:21 116:24</p> <p>among [1] 103:22</p> <p>analysis [2] 83:4 94:18</p> <p>Angeles [1] 1:24</p> <p>angle [1] 42:13</p> <p>anomalies [1] 26:17</p> <p>another [8] 17:17 21:14 50:5 59:2,6,17 79:10 129:20</p> <p>answer [14] 35:16 37:22 48:1 84:4 85:12,14 95:4,6 104:8 105:2 108:18 123:8 125:23 130:13</p> <p>answered [2] 104:13 123:3</p> <p>answering [3] 91:17,18 105:23</p> <p>answers [2] 105:14 124:7</p> <p>antecedent [1] 46:24</p> <p>anytime [1] 43:6</p> <p>anyway [3] 45:8 73:16 120:14</p> <p>apparent [1] 60:21</p> <p>appeal [3] 49:22 50:18 90:8</p> <p>appeals [11] 32:11 56:22 60:13 65:15 75:9 76:13 78:21,25 101:25 103:8 113:23</p> <p>appeals' [7] 35:1 46:7 53:24 54:23,25 62:9 132:25</p>	<p>appeals's [1] 62:12</p> <p>appear [1] 36:7</p> <p>APPEARANCES [1] 1:18</p> <p>application [5] 5:4 15:17 55:23 127:10 136:1</p> <p>applications [5] 13:25 15:12 25:19 113:19 135:12</p> <p>applied [3] 47:15 80:14,20</p> <p>applies [7] 12:15 31:19 34:13 51:25 52:17 64:16 123:14</p> <p>apply [8] 10:24 25:6 31:19 51:9 74:3 79:16 113:4 114:14</p> <p>appreciate [2] 97:25 124:7</p> <p>approach [1] 122:22</p> <p>appropriate [8] 39:12 47:5 118:3 120:25 121:3 122:10 127:18 137:11</p> <p>approvals [1] 135:13</p> <p>area [3] 95:7 96:5 117:17</p> <p>aren't [3] 21:13 58:17 60:7</p> <p>argue [7] 68:20 78:18 90:5 92:5 93:4 118:9 120:8</p> <p>argued [5] 4:17 6:25 38:23 78:20 119:8</p> <p>argues [1] 6:12</p> <p>arguing [1] 101:15</p> <p>argument [43] 1:15 2:2,5,8,12 3:6,10 5:17 13:20 20:19 24:4 26:3,12 30:12 44:17 53:3 54:5,8,20 63:13 68:8 70:11 79:11 81:11 83:14 84:5 87:8 90:20 98:4 101:11,12 102:1 110:1,10 111:10,19,20 112:3 113:10 119:14 120:5 121:22 134:11</p> <p>arguments [11] 13:8 26:8,15,16,20 35:22 73:5 79:9 111:17,17 112:25</p> <p>arise [8] 31:1 54:22 62:8 70:1 83:1 116:24,25 135:19</p> <p>arises [3] 43:23 44:7 138:6</p> <p>around [5] 45:20 103:13 116:17 125:3,4</p> <p>Article [12] 48:21 49:6 94:17,20 97:20 124:6,11 125:6,8 126:25 129:12 130:10</p> <p>artificial [1] 136:13</p> <p>ARULANANTHAM [95] 1:24 2:9 63:12,13,15 65:22 66:25 68:16 69:24 70:17 72:5,8,13,22 73:2 74:6 75:16 76:11 82:9 84:11,15,22 85:3,11 86:7,13 87:11 89:5 91:6,22 92:8,12,18 95:3,12,16,25 96:21,25 97:24 98:5,9,12 99:7 100:5 101:5,10,23 103:5 104:19,22 106:18 108:19 109:13,16 110:7,16 112:19 113:19 114:13,16 115:6 116:22 117:13 118:6,11,15,20 119:1,4,9,12,23 120:12,15 121:15 123:15,20 125:10,25 127:21 128:2,14 129:1,11,19,24 130:8,25 131:3,19,24 132:3 133:5,19</p> <p>ascribing [1] 108:13</p> <p>aside [5] 26:7 39:23 103:9,11 108:21</p>
2	<p>20 [1] 108:4</p> <p>20-828 [1] 3:7</p> <p>2021 [1] 1:12</p> <p>207a [1] 108:2</p> <p>21 [1] 96:10</p>		
3	<p>3 [2] 2:4 124:13</p>		
5	<p>53 [1] 2:7</p> <p>56 [1] 59:10</p>		
6	<p>6-5 [1] 118:21</p> <p>63 [1] 2:11</p>		
7	<p>716 [1] 96:10</p>		
8	<p>8 [3] 1:12 12:6 27:20</p>		
A	<p>a.m [2] 1:16 3:2</p> <p>abandon [1] 79:9</p> <p>Abdelrahim [1] 88:16</p> <p>ability [6] 9:1 56:2 88:22 90:5,14 92:5</p> <p>able [6] 11:21 47:17 57:12 84:17 86:3 113:16</p> <p>above-entitled [1] 1:14</p>		

Official - Subject to Final Review

<p>aspect [3] 71:11 81:3,6 aspects [1] 123:22 assert [1] 50:2 asserted [7] 47:24 56:21 60:15 102:24 127:16 134:22 138:16 assertion [7] 16:13 23:7 53:12 57: 18 61:10 135:1 138:7 assume [6] 11:20 30:22 45:8 119: 17 120:21 122:23 assumed [1] 45:7 assumes [1] 130:6 assuming [2] 10:12 11:6 assumption [1] 119:17 attention [1] 57:1 attorney [12] 18:7 47:22,23 79:13, 20 80:3,7 109:1,7 111:14 135:5, 19 attorney-client [4] 19:8 73:6 99:3 128:19 attorneys [1] 85:9 attorneys' [2] 11:19 35:19 attractive [1] 121:10 audio [1] 100:23 authority [2] 23:21 118:8 authorize [1] 75:24 authorized [5] 60:16 79:19 82:12 87:18 89:18 authorizes [2] 68:22 87:15 automatic [3] 16:14 75:12,12 available [11] 46:6 47:20 52:11 56: 17 61:9 78:19 89:13 100:24 123: 23 132:24 133:5 avoid [3] 95:19,22 113:6 avoidance [4] 54:20 62:13,15,23 away [4] 42:16 81:7 108:5 114:3</p>	<p>88:22 basis [24] 11:4 20:24 22:23 37:18 41:2,13 43:9 44:6 45:1,7 50:5 64: 7 70:12 71:23 72:15 78:7,7 79:6 114:4 127:9 130:21 132:12 134: 11 137:4 bearing [1] 115:4 beaten [2] 86:17,18 become [1] 132:7 becomes [3] 67:15,22 68:25 beginning [1] 69:1 begs [1] 45:17 behalf [11] 1:20,23,25 2:4,7,10,14 3:11 53:4 63:14 134:2 behind [1] 128:12 believe [6] 36:7,22 83:20,25 118:7 126:21 believing [1] 86:16 belong [1] 97:9 below [12] 35:6 63:23 67:17 77:9 81:1 100:24 106:19 107:8 110:15 118:9 119:19 132:9 besides [2] 29:4,4 better [3] 94:23 110:1 113:7 between [6] 56:9 67:2 96:13 120: 23 124:18 130:10 beyond [5] 9:24 74:25 87:6 92:3 133:17 big [1] 10:12 bind [1] 88:3 binding [1] 50:23 BIO [1] 118:12 bit [1] 6:11 Bivens [1] 88:8 blackmail [1] 137:15 blatant [1] 107:14 blatantly [1] 131:16 body [3] 23:21 24:1 128:9 books [3] 102:18 121:12,18 both [16] 15:23 16:2 41:1 43:13 55: 14 65:7 69:10 72:19 74:22 82:10, 10 86:14,17,18 89:15 94:20 bottom [5] 6:17 10:14 14:8 37:2, 19 bottom-line [2] 95:3,6 branch [1] 6:5 break [1] 83:22 breaking [1] 92:1 Breyer [26] 30:21,22 31:23 32:3,7, 18,21 33:7,11,15,20,24 34:2,10,17, 23 35:8,12 39:10 48:1 73:21 74:8 78:6 79:8 99:23 111:25 Breyer's [2] 38:14 99:17 bridge [1] 125:12 brief [13] 12:24 13:21 29:17 73:6, 22,24 78:16 83:11 101:13,15 103: 7,22 129:3 briefed [1] 118:18 briefing [2] 84:23 112:24 bring [4] 36:3 84:1 86:11,11 bringing [3] 10:3 23:25 58:1 brings [4] 52:6 60:6 91:8 115:7 broad [4] 64:19 66:6 98:22 110:25 broader [8] 45:24 55:13 56:18 60:</p>	<p>10 61:25 82:15,16,23 broke [3] 77:24 97:14 131:16 brought [4] 51:10,13 52:4,17 bug [1] 76:24 building [1] 132:5 Bumatay [2] 52:13 94:19 Bumatay's [1] 66:8 BUREAU [2] 1:3 3:7 buried [1] 48:23 burned [1] 93:14 burying [1] 108:17</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>c)'s [1] 24:19 California [1] 1:25 calls [1] 62:15 came [1] 1:14 camera [18] 9:16,21 53:20 54:15 55:1 57:23 64:13 79:16 80:12,24 81:4 84:7 85:6 96:7 97:18 109:10 115:2 117:7 cannot [10] 4:3 5:10 11:3 38:5 56: 15 70:13 71:21 99:2 101:17 138:3 canon [3] 62:13,15,23 capaciously [1] 60:12 capacity [1] 57:19 care [3] 74:10 75:20 90:24 cares [1] 82:7 Carney [3] 56:14 57:6 61:5 carried [1] 122:19 CARROLL [18] 1:22 2:6 53:2,3,5 54:7,11,21 58:21,25 59:3,8,21 60: 2 61:18,23 62:11,25 Carroll's [1] 84:5 Case [124] 3:7 4:16,21,21 7:2,4,4, 18,20,22,25 8:7,8 16:5,10 20:21 23:4 32:2,9,16,22 33:5,16 34:18 35:11 36:4 38:5,10 39:11,15,22 40:8,24 41:2 42:18 44:13 45:9,21 47:4 49:3 50:12 51:17 62:3 63:18 64:1 65:4,6,8,9,20 67:10 70:5,6,9, 21 71:7,11,15,17 73:9,19 74:2,25 75:11 76:8,16 77:7,11,19 78:20 80:7,23 84:10,12 87:16 88:9,14, 19 92:20 99:8 100:1,3,7,19,21 102:8,22 103:11 104:1,10 106:6,7 111:18 112:20 116:1,6 117:3,12 118:4 120:24 121:4 123:10,14 124:1 131:10 132:6,7,9,25 133:14, 18 134:6,23 136:18,18,22,25 137: 5,7,13 138:11,14,19,20 cases [23] 6:12 40:1,3,3 71:16 75: 25 78:25 80:20 81:4 83:7 92:19 102:25 103:9,10,15,21 104:2 110: 5 114:19 117:5,9 129:2 131:5 category [2] 40:1 124:13 CATHERINE [3] 1:22 2:6 53:3 caused [1] 122:20 central [11] 4:21 7:1,2,22 35:11 38: 6 41:1 100:1 136:25 137:5,7 certainly [12] 56:1 58:8 62:20,22 82:11,19 124:25 127:24 128:16 131:25 132:24 134:16 certified [1] 3:5</p>	<p>cetera [5] 8:10 24:16 39:6 52:21 86:21 challenge [5] 4:1 8:12 14:15 15:7 35:6 challenged [2] 133:6,7 challenges [1] 10:2 Chamber [1] 85:5 change [1] 45:3 CHIEF [40] 3:3,12 13:14,18 18:14 29:7,11,14 30:20 35:13 38:12 42: 9 46:11 51:6 52:25 53:5 62:10,24 63:3,4,10,16 67:24 69:2 70:10 107:24 109:12,14 110:6,9 111:23 117:21 120:19 123:5 124:3,23 127:2 133:22 134:3 138:18 China [1] 129:4 chips [7] 67:5 107:7 127:17 129:6, 15 130:17 137:14 choice [2] 42:20 43:11 choose [2] 115:9,13 chooses [2] 10:11 117:11 Church [4] 83:17 102:15,16 108: 25 CIPA [1] 125:15 Circuit [52] 3:17,22 8:24 9:24 33:1, 3,21,22 35:3 36:4 39:17,19 40:11, 14,19 41:9,17,23 43:18 44:4,11 45:22 46:2 47:17 50:11,13 52:14 54:13,14 61:1 62:20 67:17 89:9, 12 94:20 99:22 101:3,8 107:10,21 118:19,21 119:12 120:2,5 121:1,7, 17,23 123:11 134:7,8 Circuit's [10] 4:10,23 45:4 47:3 62: 21 76:16 89:7 106:20 121:13 132: 8 circumstance [4] 20:3,13 52:15 127:15 circumstances [4] 17:13,14 121: 21 122:7 cite [5] 97:1 99:2 103:7,12 104:2 cited [4] 78:24 83:11 103:15 129:3 cites [2] 22:21 96:25 civil [4] 16:10,14 30:10 51:18 claim [26] 4:22 7:6 10:20 12:25 25: 22 36:4,9 37:24 38:24,25 41:7 55: 15 61:13 73:12 78:22 85:25 88:9, 12 108:22 111:12 128:7 130:20 132:17,18,21 134:10 claiming [1] 12:1 claims [37] 37:4 49:17,19,21,23 50: 4,8,16 55:4,17,18 56:3 57:17 60: 18 62:6 63:20,24 66:19 67:10,14 69:18 70:7 71:19,20 88:23 94:10, 11 105:8 106:2 111:5,6 116:25 122:16 127:7 137:21,21,23 classic [2] 15:14 56:12 classified [7] 47:21 57:1,7 61:6,7 69:8,9 clause [6] 5:5 53:23 62:7 114:8 130:3,10 clear [13] 7:18 14:21 39:24 48:17, 18 63:23 66:20 75:19 103:19,24 124:8 130:23 135:23 clearer [1] 124:21</p>
---	---	---	--

Official - Subject to Final Review

<p>clearly ^[14] 22:16 25:16 44:23 45:12 48:23 61:2 91:16 92:21 102:21 109:6 114:1 124:20 134:15 135:4</p> <p>clerk ^[1] 3:5</p> <p>client ^[1] 61:14</p> <p>clients ^[7] 56:1 58:2 61:15 84:6,10 93:9 133:9</p> <p>clients' ^[1] 56:10</p> <p>close ^[1] 57:1</p> <p>clue ^[1] 24:12</p> <p>codification ^[1] 14:8</p> <p>codify ^[1] 135:15</p> <p>codifying ^[2] 16:2,3</p> <p>come ^[10] 42:12 56:15 62:23 66:12 70:7 71:4 78:5 79:1 90:14 99:25</p> <p>comes ^[3] 5:2 16:17 87:24</p> <p>Committee ^[4] 83:18 102:15,16 108:25</p> <p>common ^[24] 3:15 5:9,16,17,21 6:9 49:11 64:6 65:2,13 67:2,8 91:15 107:2,3 127:23 128:15,17,19,23 129:2 130:5,7 135:16</p> <p>communication ^[3] 97:8 99:3,4</p> <p>communications ^[2] 96:13,20</p> <p>compel ^[1] 54:1</p> <p>complaint ^[7] 8:1,2,6 11:21 27:19 70:23 93:21</p> <p>completely ^[3] 55:15 56:13 103:5</p> <p>compliance ^[1] 78:17</p> <p>comprehensive ^[3] 21:5,10 57:3</p> <p>concede ^[2] 51:9 118:2</p> <p>conceding ^[2] 91:1,3</p> <p>conceivable ^[1] 66:10</p> <p>concern ^[1] 8:9</p> <p>concerned ^[3] 7:21 71:7 136:22</p> <p>concerning ^[2] 3:19 4:18</p> <p>concerns ^[2] 54:2 126:25</p> <p>concisely ^[1] 13:22</p> <p>conclude ^[2] 91:2 99:19</p> <p>concluded ^[3] 33:25 47:14 57:6</p> <p>conclusion ^[3] 3:18 50:14 87:7</p> <p>conclusions ^[1] 42:5</p> <p>conclusive ^[1] 95:7</p> <p>conditions ^[1] 80:16</p> <p>conduct ^[3] 85:22,24 124:11</p> <p>conducted ^[8] 60:17,19 79:19 82:13 87:18 89:18 106:3 115:5</p> <p>conducting ^[1] 84:6</p> <p>confidential ^[1] 7:15</p> <p>confined ^[1] 52:15</p> <p>confines ^[1] 117:19</p> <p>confirmation ^[1] 19:21</p> <p>conflict ^[2] 44:7 130:9</p> <p>confused ^[3] 8:23 40:14 54:19</p> <p>congregants ^[1] 77:2</p> <p>congregation ^[1] 93:12</p> <p>Congress ^[28] 5:25 16:6 17:7 21:13 25:12 29:3 48:11,18 49:6 64:6,8 77:22 81:22 83:16 91:24 94:25 96:4 102:17 104:14 105:2,3 108:10 117:15 124:19,20 126:6 134:24 135:13</p> <p>Congress's ^[1] 126:13</p> <p>congressional ^[2] 5:11 125:13</p>	<p>connection ^[1] 18:3</p> <p>consensual ^[1] 114:6</p> <p>consequence ^[3] 13:6 68:11 134:19</p> <p>consequences ^[3] 108:8,13 135:1</p> <p>consider ^[4] 9:9 10:2 30:8 85:18</p> <p>considerations ^[1] 111:9</p> <p>considering ^[1] 85:16</p> <p>consistency ^[1] 102:12</p> <p>consistent ^[9] 13:19,23 43:1 85:2 89:7,15,20 91:14 110:12</p> <p>consists ^[1] 108:3</p> <p>constitutes ^[1] 26:6</p> <p>Constitution ^[1] 3:15</p> <p>constitutional ^[15] 5:9 10:2 48:7,14,14 54:16,20,22 60:18,23 62:6 85:17 116:5 128:23 129:9</p> <p>construction ^[1] 110:24</p> <p>construe ^[2] 85:13 88:21</p> <p>contains ^[1] 137:9</p> <p>contemplated ^[5] 45:5,6 46:3 103:16 105:2</p> <p>contemplating ^[1] 76:23</p> <p>contention ^[1] 7:7</p> <p>contest ^[2] 39:18 40:12</p> <p>context ^[11] 4:4 17:21 34:16 58:13 65:23 70:1 83:1 103:18 117:15 126:9,12</p> <p>contexts ^[1] 109:24</p> <p>continues ^[1] 102:22</p> <p>continuing ^[1] 50:16</p> <p>continuum ^[1] 118:23</p> <p>contract ^[2] 7:8 137:6</p> <p>contracting ^[2] 75:25 103:18</p> <p>contracts ^[1] 102:20</p> <p>contradict ^[1] 110:18</p> <p>control ^[1] 135:6</p> <p>conversations ^[1] 114:7</p> <p>cooperate ^[1] 97:3</p> <p>core ^[4] 7:3 49:25 116:5 126:25</p> <p>correct ^[6] 42:7 49:9 54:21 61:17,18 118:5</p> <p>couldn't ^[2] 22:19 92:15</p> <p>Counsel ^[11] 58:16 61:11 63:11 65:19 82:17 97:4 107:25 117:23 133:21,23 138:19</p> <p>counterintuitive ^[2] 66:23 68:6</p> <p>counterterrorism ^[1] 56:10</p> <p>country ^[3] 95:2 116:17 125:5</p> <p>counts ^[1] 71:12</p> <p>couple ^[1] 58:3</p> <p>course ^[6] 66:2 74:3,16,20 97:12 125:5</p> <p>COURT ^[173] 1:1,15 3:4,13,25 4:17 7:8,10,12,17,23 9:20 10:1,7,11 13:4 22:15,18 23:20 24:24 25:12 26:24 29:2 31:25 32:11,16 33:2,13,17,18 34:5,7,12,25,25 36:3 38:3,22 40:16,18,23,24 45:25 46:7,9,24,25 47:2,13,21 48:17 49:21 50:7,10,12 53:6,24 54:1,14,23,25 55:24 56:22,25 57:2,4,14 58:9,10,18 59:18 60:10,13 61:7 62:8,11,13</p>	<p>63:16 64:12 65:10,15,17,23,25 75:1,8,9,22,23 76:5,13,13 77:13,22 78:14,20,25 80:12,23 82:5 83:20 84:16 85:16 87:16,25 89:22 90:9 91:9,23 92:3 93:5,25 94:10,12 96:4,11,11 97:2,6,11 98:24 99:13 100:25 101:17,18,24,25 103:8 104:12 105:17,20,21 106:23 109:20 110:15 113:1,23 114:9,10,20 115:2,11,12,16,20,23 116:2,13,13,16 117:2 118:8 119:19 121:15,20,24,25 122:2,12,13,25 125:1,18 126:3,23 132:6,10,18,24 136:3 137:20 138:13</p> <p>court's ^[9] 3:18 7:5 25:6 35:4 41:18 54:3 78:17 105:20 134:9</p> <p>courthouses ^[1] 116:17</p> <p>courts ^[12] 6:1 57:15 83:8 84:2 91:25 97:18 103:1 115:7 116:19 117:6,18 135:16</p> <p>cover ^[3] 18:22 20:2,3</p> <p>covered ^[6] 4:2 16:11 35:5 55:11 64:23 106:15</p> <p>covers ^[2] 19:8 58:8</p> <p>cram ^[1] 110:23</p> <p>create ^[1] 116:18</p> <p>creates ^[2] 109:19 110:4</p> <p>criminal ^[7] 37:14,16 52:2 66:2 117:5,9,12</p> <p>critical ^[4] 3:16 48:20 73:20 78:2</p> <p>cross-petition ^[1] 46:10</p> <p>crossed ^[1] 125:12</p> <p>curious ^[3] 18:14,19 48:8</p>	<p>9 128:7 130:20</p> <p>defendant ^[4] 29:5 57:19 129:5 132:22</p> <p>defendants ^[17] 53:13 54:15 57:12 60:17 61:8 63:17 85:8 87:5 88:13 106:25 128:6,25 129:18 130:18 131:23 132:14 137:2</p> <p>defendants' ^[3] 53:20 55:6 82:17</p> <p>defending ^[2] 64:5 137:4</p> <p>defense ^[14] 36:20 53:14,14 57:20 61:8 76:19 102:7 107:20 137:21 138:7,8,9,9,15</p> <p>defenses ^[3] 55:18 56:2 137:23</p> <p>definition ^[1] 21:12</p> <p>definitively ^[1] 104:13</p> <p>degree ^[1] 56:8</p> <p>deliberately ^[1] 84:23</p> <p>delving ^[1] 41:4</p> <p>demonstrated ^[1] 8:8</p> <p>denaturalization ^[1] 126:11</p> <p>Department ^[2] 1:20 23:20</p> <p>depending ^[2] 125:2,5</p> <p>depends ^[4] 39:13,13 53:14 57:20</p> <p>deprivation ^[1] 61:22</p> <p>deprived ^[2] 92:10 130:19</p> <p>deprives ^[1] 53:13</p> <p>Deputy ^[1] 1:19</p> <p>derived ^[2] 14:11 28:2</p> <p>derogation ^[1] 49:11</p> <p>described ^[8] 57:2 75:7 98:6,10 99:23 111:15 127:23 135:21</p> <p>describes ^[2] 18:1 136:18</p> <p>describing ^[2] 31:20 40:16</p> <p>description ^[1] 21:5</p> <p>desperately ^[1] 119:16</p> <p>destroy ^[3] 5:1 88:22 93:7</p> <p>destroyed ^[2] 92:23 93:3</p> <p>detailed ^[1] 57:3</p> <p>determination ^[3] 12:8 35:4 56:24</p> <p>determine ^[19] 9:1,4 10:8 12:2 36:12 37:25 57:24 64:13 78:11 79:18 82:12 89:23 90:2 97:11,13 109:10 113:21,25 123:12</p> <p>determined ^[1] 87:17</p> <p>determines ^[2] 24:24 85:9</p> <p>determining ^[2] 82:24 90:10</p> <p>developed ^[1] 135:16</p> <p>deviation ^[1] 82:16</p> <p>device ^[2] 51:20,22</p> <p>devices ^[1] 114:3</p> <p>Diaz ^[1] 94:19</p> <p>difference ^[1] 93:8</p> <p>different ^[17] 28:13 30:25 31:15 42:12 64:21,22 71:15 78:21 81:25 86:7,14 96:19 101:21 103:4 107:2 111:20 117:3</p> <p>differently ^[1] 87:10</p> <p>difficult ^[1] 121:6</p> <p>dilemma ^[1] 75:7</p> <p>directed ^[1] 30:14</p> <p>directly ^[3] 35:17 85:15 124:20</p> <p>disagree ^[5] 3:17 40:20 68:17 101:24 108:21</p>
---	--	--	---

D

D.C ^[7] 1:11,20,22 76:15 106:20 107:10 132:8

dah ^[7] 33:8,8,8,8,8,8,9

damages ^[8] 10:25 11:18,18,19 35:19 36:17 51:15 60:18

dangerous ^[2] 82:7 93:17

day ^[2] 43:16 94:10

deal ^[3] 16:7 18:9 116:20

dealing ^[8] 7:17 16:12 17:23 25:15,23 48:24 116:15 117:2

debatable ^[1] 95:11

decide ^[29] 32:2,9 33:5 34:12 40:5,7 42:1 54:14 75:5 77:18,23 84:2

94:1,5,6,12,14 95:15 113:2,17,24 114:4,6 119:19 120:2 132:12 134:7,8,9

decided ^[3] 50:1 93:13 135:19

deciding ^[8] 46:1 53:9 81:16 89:17 95:19,22 116:3,9

decision ^[14] 7:5 25:6 67:17 76:13 77:9 80:25 106:19,21 107:8 118:22 121:1 122:2 132:9,25

declaration ^[8] 8:7 47:22 79:14,21 80:3,4,7 111:15

declarations ^[4] 69:9 71:6,9 76:6

declarative ^[1] 108:20

deem ^[1] 33:4

deep ^[1] 5:9

defend ^[7] 39:4 42:21 57:12 64:3,

Official - Subject to Final Review

<p>disclaim ^[1] 117:24</p> <p>disclose ^[16] 9:10,11 10:11 20:1, 11 21:4 22:22 23:17,18 24:14 31:16 42:20 59:22 89:22,25 92:2</p> <p>disclosed ^[7] 10:13 20:23 24:18 37:1,16 106:17 125:18</p> <p>disclosing ^[8] 7:3 20:15,21 58:19, 20 60:1,2 64:23</p> <p>disclosure ^[25] 7:14 9:9 10:5 21:9, 15 22:17 41:6 55:22 56:1 58:24 59:18,20 65:17 66:13 79:14,21 80:5,25 81:2 89:14 90:9 91:12 109:7 122:17 138:4</p> <p>disclosures ^[1] 37:13</p> <p>discover ^[7] 5:3 13:25 15:11 16:5 25:18 26:22,23</p> <p>discoverability ^[1] 53:10</p> <p>discoverable ^[1] 82:4</p> <p>discovering ^[2] 16:22 17:4</p> <p>discovery ^[21] 5:6 15:21,25 16:3,8, 10,15 25:14 26:25 27:4 51:19,22 63:24 70:25 73:3,7,13 81:23 99:14 100:15 135:25</p> <p>discriminated ^[4] 127:9 128:8 130:21 132:13</p> <p>discrimination ^[4] 56:3 107:15 127:12 130:24</p> <p>discriminatory ^[2] 106:4 114:4</p> <p>discussed ^[6] 55:19 76:3 79:12 106:22 119:24 131:5</p> <p>discusses ^[1] 136:15</p> <p>discussing ^[3] 28:7 29:18 95:5</p> <p>discussion ^[2] 121:7 124:6</p> <p>dismiss ^[28] 20:20 32:8 33:16 34:6 38:17 39:22 63:20,22 67:9,21 70:7 75:11 76:19 77:7 80:9 85:25 88:10,11 94:13,15 100:19 105:8 111:5,13,14 118:1,3 119:20</p> <p>dismissal ^[45] 13:5 20:24 22:23 33:23 35:7 38:3 39:11 41:14,20 42:6 44:12,21 46:5 47:1,4,6,7 64:2,7,24 65:10 67:13,19 68:22 69:18,21 72:4 75:12,13 78:19 81:8 94:9 101:11 103:16 105:12 107:18 111:6 120:25 121:3,23 122:11 123:23 134:9 136:12 137:10</p> <p>dismissal's ^[2] 127:18 128:10</p> <p>dismissals ^[2] 75:24 121:8</p> <p>dismissed ^[17] 4:22 7:4,25 32:10, 10,23 38:25 41:7 47:15 49:21 73:13 74:2 100:25 120:1,3 138:6,15</p> <p>dismissing ^[1] 43:9</p> <p>displace ^[10] 5:7 12:11 30:24 32:24,25 54:9 56:19 77:17 104:11 109:23</p> <p>displaced ^[8] 8:24 12:21 61:3 67:18 105:7 123:12 134:13,17</p> <p>displacement ^[7] 38:7 74:11 79:11 80:17 97:17 108:6 110:3</p> <p>displaces ^[11] 3:23 35:2 41:12 43:23 44:18 45:17 77:15 78:11 94:2 116:10 135:2</p> <p>displacing ^[1] 44:18</p> <p>disposed ^[2] 50:5,10</p>	<p>disposition ^[3] 34:22 49:3 134:6</p> <p>dispute ^[1] 56:22</p> <p>disputes ^[1] 5:25</p> <p>dissent ^[1] 83:12</p> <p>distinct ^[1] 75:21</p> <p>distinction ^[3] 71:23 72:16 73:20</p> <p>distinguished ^[1] 96:17</p> <p>distracted ^[1] 29:22</p> <p>district ^[5] 3:18,24 4:17 24:24 32:11 33:2,13,17,18 34:5,7,25 35:4 38:22 40:15,18,23 41:18 46:6 47:13 49:20 50:7,10,12 54:14 56:25 57:2 61:7 65:17 75:8 76:5 80:23 87:16 89:22 90:9 93:5 96:11 97:2 100:25 101:17,18 105:21 113:1 114:10 116:16,17,19 122:12,13 124:25 134:9</p> <p>divulging ^[2] 79:24 98:18</p> <p>doctrine ^[19] 6:16,18 7:7,8 30:24 43:5,20,25 44:5,9 74:12 95:5 102:21 104:12,14,15 105:5 113:4 128:10</p> <p>doctrines ^[3] 6:13,16 86:20</p> <p>document ^[1] 66:17</p> <p>documents ^[3] 27:13 66:19 127:11</p> <p>Doe ^[2] 7:6 138:13</p> <p>doing ^[9] 16:1 30:1 31:7 68:18 70:6 73:18 100:2 113:7 117:6</p> <p>domestic ^[8] 80:20 81:5 96:2 109:17 116:23 124:11 125:21 135:10 10 126:18</p> <p>Donohue's ^[3] 73:22 103:22 129:3</p> <p>doubt ^[3] 74:25 106:9 134:14</p> <p>doubtful ^[1] 124:14</p> <p>doubts ^[1] 124:10</p> <p>Douglas ^[1] 129:5</p> <p>down ^[2] 47:13 50:4</p> <p>dragnet ^[1] 57:8</p> <p>drawing ^[1] 72:16</p> <p>drive-by ^[2] 48:11 100:2</p> <p>ducks ^[1] 128:13</p> <p>Due ^[19] 53:22 55:7 62:7 84:21 85:2 86:2,11 87:3,4 124:19 128:21, 24 129:13,17 130:2,10 131:12,18 138:16</p> <p>duly ^[1] 3:4</p> <p>Dynamics ^[15] 39:25 42:14 57:15 65:2 78:19 98:6 118:4 119:2 120:7,11 123:18,24 137:8,19 138:12</p>	<p>effectively ^[1] 27:3</p> <p>effectuate ^[1] 67:13</p> <p>eight ^[1] 71:12</p> <p>either ^[12] 21:18 29:2 58:18 70:25 75:25 87:17 94:1 105:24 119:24, 25 123:1 135:25</p> <p>electronic ^[16] 14:2 25:20,24 36:25 45:10 80:21 81:5 96:3 106:3,9 109:18,25 114:1 116:23 125:21 135:18</p> <p>element ^[5] 96:8 128:24 129:9,13 130:11</p> <p>elephant ^[1] 108:17</p> <p>Ellsberg ^[1] 132:6</p> <p>embrace ^[1] 93:13</p> <p>embracing ^[1] 93:17</p> <p>emphasize ^[1] 65:14</p> <p>employed ^[1] 65:21</p> <p>employment ^[1] 106:7</p> <p>en ^[3] 83:13 118:21 120:4</p> <p>enables ^[1] 55:25</p> <p>enacted ^[3] 42:24 134:16 135:9</p> <p>end ^[5] 34:17 76:12 84:9,12 122:24</p> <p>endanger ^[1] 80:6</p> <p>endangering ^[1] 79:24</p> <p>ends ^[2] 103:12,12</p> <p>enforcement ^[2] 18:6 28:6</p> <p>engaged ^[2] 85:22,24</p> <p>England ^[2] 65:7 104:2</p> <p>enormous ^[1] 108:8</p> <p>ensure ^[1] 117:18</p> <p>enter ^[11] 19:25 20:10 21:3,3,9,17 23:16 24:13,13 64:17 66:13</p> <p>entered ^[3] 3:4 47:5 59:12</p> <p>entering ^[2] 58:12,18</p> <p>entire ^[2] 45:9 121:6</p> <p>entirely ^[3] 64:1 85:22 128:23</p> <p>entirety ^[1] 28:1</p> <p>entitled ^[3] 12:2 43:7 65:12</p> <p>entry ^[3] 22:17 58:6 59:19</p> <p>EPA ^[1] 125:13</p> <p>equal ^[2] 55:4,17</p> <p>equally ^[3] 4:24 60:24 96:6</p> <p>equivalent ^[1] 30:9</p> <p>erroneous ^[2] 4:24 35:1</p> <p>error ^[1] 121:8</p> <p>especially ^[1] 57:1</p> <p>ESQ ^[4] 2:3,6,9,13</p> <p>ESQUIRE ^[2] 1:22,24</p> <p>essence ^[1] 61:13</p> <p>essential ^[1] 57:7</p> <p>essentially ^[1] 76:17</p> <p>establish ^[1] 137:24</p> <p>established ^[2] 36:22 68:12</p> <p>ET ^[10] 1:4,7,25 2:11 8:10 24:16 39:5 52:21 63:14 86:21</p> <p>even ^[5] 7:19 10:19 12:12 22:13 25:17 30:1,13 46:5 52:2,2 53:24 56:15,16 57:21 58:10 60:10 61:25 65:24 66:6 67:10 68:23 70:5,7 73:14 75:20 80:13 83:19 90:14,15 91:1 93:6 94:5 97:19 100:17 103:11, 14 107:13 112:23 113:1 115:10 125:3,15 126:9,13,21 129:16 131:</p>	<p>16 132:5 136:19 137:17 138:8</p> <p>event ^[4] 46:22 59:24 90:6,12</p> <p>everybody ^[1] 86:10</p> <p>everyone ^[1] 93:7</p> <p>everything ^[2] 93:19 110:11</p> <p>evidence ^[121] 4:7 6:20,24,25 7:1, 20 10:18 14:11,13,17 16:23 18:2 19:25 20:10,14,16,22,23 21:3,6,9, 15,17 22:6,7,7,17,22,23,24 23:16, 24,25 24:14,16 25:2,16,21 27:2 28:24 29:1,9 30:11 35:4,10 36:12 40:6,8 42:6,16,18,20 43:8 44:20 47:4,14,19 48:24 51:17,25 52:21 53:15 56:4 57:8 58:6,12,18,19 59:13,14,19 60:8 61:21 64:1,17 65:16 66:14 67:11 69:22 70:5 71:14, 18,19 72:2 73:10,14 77:23 80:24 81:20 87:19 91:10 92:21 102:22 103:25 106:8,12 107:5,13 110:14 112:10 113:3,16,25 114:22,23,25 115:3,3 122:13 127:13 128:3,6,9 130:4 132:20 134:22 135:17,20 136:2,7 137:3</p> <p>evidentiary ^[3] 40:4 126:7,13</p> <p>evil ^[1] 113:5</p> <p>ex ^[20] 53:20 54:15 55:1 60:20 61:14 64:12 79:16 80:12,23 81:3 84:7 85:6 96:7,23 97:18 109:9 113:6 115:2 117:7 125:21</p> <p>exact ^[4] 85:19 98:16 106:24 119:13</p> <p>Exactly ^[7] 11:1 72:9 86:8 95:21 98:6 119:3 120:9</p> <p>example ^[10] 52:3 58:20 59:2,6 65:20,25 96:9 117:1 135:5 137:12</p> <p>examples ^[2] 59:19 66:7</p> <p>Except ^[1] 128:17</p> <p>excise ^[1] 96:14</p> <p>excised ^[1] 97:5</p> <p>excising ^[1] 16:21</p> <p>exclude ^[8] 29:1 63:17,22 67:3 72:10 97:12 102:22 136:7</p> <p>excluded ^[7] 6:24 30:7 40:6 65:4 67:12 103:25 136:17</p> <p>excluding ^[3] 66:24 70:3 72:2</p> <p>exclusion ^[4] 6:20 44:20 67:22 71:14</p> <p>exclusive ^[4] 15:5 95:7 110:4 124:12</p> <p>exclusive/preclusive ^[1] 125:9</p> <p>exclusively ^[1] 128:19</p> <p>excuse ^[4] 25:11 27:2 28:20 77:16</p> <p>executive ^[9] 5:18,20,23 6:2,4,14 95:8 124:18,19</p> <p>executive's ^[1] 124:10</p> <p>Exemption ^[1] 125:12</p> <p>exercise ^[3] 48:20 106:5 114:8</p> <p>exist ^[1] 18:18</p> <p>existed ^[2] 105:11 134:15</p> <p>existence ^[4] 7:21 8:2 20:22 22:21</p> <p>expect ^[3] 48:11 96:11 100:23</p> <p>explain ^[3] 9:22 71:22 122:14</p> <p>explained ^[1] 65:2</p>
--	--	--	---

Official - Subject to Final Review

<p>explanation [4] 22:2,3 24:6 98:1 expungement [2] 27:10,23 extensive [1] 108:24 extent [3] 36:24 113:17 131:5 extraordinarily [2] 90:12 111:11 extremely [2] 90:6 125:16</p> <hr/> <p style="text-align: center;">F</p> <p>face [5] 8:1,1,6 11:20 136:21 facie [1] 106:6 facilitate [1] 4:15 facilities [1] 116:20 fact [14] 7:5,9 41:2 53:11 60:6 70:3 98:20 105:6 106:10,12 121:13 136:16 137:8 138:12 facts [2] 57:5 133:14 factual [1] 138:9 fairly [1] 138:3 fairness [1] 40:9 faith [2] 93:13,18 fall [8] 67:5 107:7 127:17 129:6,15 130:17 131:14 137:14 falls [1] 3:20 famous [1] 7:11 far [3] 79:12 93:25 126:24 fashion [1] 20:17 favor [4] 60:24 100:7 108:19 111: 10 FAZAGA [6] 1:7,25 2:10 3:8 63:14 93:11 Fazaga's [1] 76:25 FBI [2] 5:1 107:17 features [2] 26:11 28:15 FEDERAL [4] 1:3 3:7 6:9 137:21 feel [3] 93:24 100:2 122:22 fees [2] 11:19 35:20 few [6] 5:15 35:23,23 83:11 108:5 124:24 field [1] 81:6 figure [3] 39:15 99:13,15 file [7] 24:18 26:25 63:20 70:24 71: 1,2 126:3 filed [7] 3:5 70:22,23 71:9 112:21, 22,22 files [2] 79:14,21 final [1] 6:10 find [5] 91:25 100:16 102:4 106:24 121:5 finding [4] 45:2 67:18 106:24 132: 12 finds [3] 84:16 87:25 109:7 fine [4] 19:6,19 114:10 129:16 finish [2] 8:21 62:9 finished [1] 8:20 firearms [1] 65:23 firmly [2] 3:14 5:21 first [34] 3:6 4:10,22 6:19 8:12 14: 18 36:18,21 38:24 39:3 40:5 41:6 46:15 48:5 53:8 55:4,16 71:12 75: 19,20 82:19,20 85:10,17 113:2 121:22 122:1,3 123:13 126:17 132:17 134:5,10 137:2 FISA [5] 3:23 25:7 42:24 43:1,21, 22 45:17 53:16,25 54:8,23 55:3, 14 56:16 57:22,25 60:16 61:3 64: 8 67:3 75:21 77:15,16 78:11 79:9 82:19 89:15 91:8 94:2 97:15 100: 12 101:25 102:17 103:3 104:11 105:7 108:8,22 114:2 115:7 116: 10 117:7 122:23 123:12 125:15, 16 134:13,16,17 135:9,11 FISA's [1] 65:13 FISC [2] 15:17 135:12 fit [3] 21:1 56:8 94:18 five [1] 25:14 fleshed [1] 99:25 floating [2] 125:3,4 focus [2] 82:1 100:1 focused [2] 25:22 57:11 focusing [1] 81:13 FOIA [1] 125:12 follow [4] 23:12 38:13 47:7 91:21 follow-up [2] 124:5 127:5 footnote [5] 96:9,10,25 103:7 136: 15 forbids [1] 7:12 forcing [1] 137:17 foreclosed [2] 119:10 120:5 foreign [7] 3:19 4:20 8:10 14:12 28:3 39:1 109:19 form [1] 59:13 formal [6] 21:18,19,23 22:5 26:24 27:1 former [1] 137:22 forth [2] 39:16 124:18 forward [12] 8:9 16:17 38:11 40:9, 25 57:20 68:24 71:21 128:1 135: 20 136:19,22 found [5] 9:8 36:2,3 38:22 56:14 foundational [1] 95:1 founding [2] 5:24 6:6 four [1] 25:14 Fourth [8] 36:4 49:21 50:3 62:20 82:18 83:10 94:19 107:20 framework [2] 95:22 124:13 frankly [2] 45:7 55:15 free [3] 42:17 106:5 114:7 free-floating [2] 51:19,22 freeze [1] 105:10 friends [1] 44:1 fruits [1] 55:21 full [2] 40:7 107:19 function [3] 112:21 113:9,12 fundamental [1] 27:20 furnish [1] 137:3 furnished [1] 28:5 further [7] 8:5 19:21 29:15 35:14 38:18 63:6 67:7</p> <hr/> <p style="text-align: center;">G</p> <p>gamut [1] 91:2 gave [3] 18:14 79:3 125:23 General [32] 1:19 15:21 18:8 39: 24 42:14 47:23,23 57:14 65:2 78: 18 79:13,21 80:3,7,19 98:6,25 109:1,7 111:14 116:10 118:4 119: 2 120:7,11 123:17,23 135:5,19 137:8,19 138:12</p>	<p>generally [3] 25:22 31:18 42:17 Georgetown [1] 73:22 gets [4] 43:13,13 76:12 86:15 getting [1] 125:8 give [12] 61:15 65:19 74:8 80:11 84:17 90:18 91:23 98:17 112:4 115:11,16 124:20 given [6] 5:8 34:3 59:20 61:5 117: 15 122:7 gives [4] 35:17 61:8 80:7 112:7 giving [4] 22:4 76:25 80:23 105:11 goals [1] 56:10 Gore [1] 104:3 GORSUCH [46] 18:13,23 19:1,4,9, 12,15,18,22 20:7,12 21:7,12,20,23 22:10,14 27:11,16 42:10,11 44:14, 25 45:12,14,21 46:16 58:4,16,23 59:1,5,15,25 63:6 64:15,20 69:20 102:9 104:4,20 123:6,7,19 124:2 134:23 Gorsuch's [2] 23:13 67:1 got [14] 19:22 21:8 22:16 28:10,14 29:21 31:13 76:21 90:8 93:5,10, 14 124:2 133:11 government [98] 4:7,11,13,16 9: 19,22 10:17,24 13:11 14:7,10,17, 22 16:15,17 17:10,11,16 18:2,19 20:9,14,20 22:21 23:2 24:24 25: 11 28:8 30:1,4,15 31:3,6,24 33:12, 18,19 37:4 38:21,22,23 39:21 40: 17 42:16 43:3 50:1,16 51:10,13, 16,24 52:1,3,5,7,7 61:20 65:1,18 66:7 74:16,21 76:17 77:6,24 80:8 81:19 84:2 90:5,13 91:25 92:5 93: 10 94:3 97:3 98:21 99:20,21 100: 16,21 102:24 103:18 106:16 110: 13 112:4,6,12 114:25 115:9 117:8, 11,25 124:17 125:17 126:16 131: 6,9 137:16 government's [24] 8:7 12:16 14: 19 15:3,7 17:23 18:10 20:25 28:2 38:15,16 42:19 49:1 53:12 54:5,8 57:18 60:24 61:12 62:18 74:11 93: 22 126:22 138:7 governs [2] 5:5 110:13 grant [9] 25:3,4 28:24,25 87:20 89: 1 136:4,5,6 grants [1] 136:4 grave [4] 54:2 60:22 62:16 77:5 gray [1] 137:15 ground [6] 46:20 61:5 76:2 100:11, 17 121:16 grounded [1] 3:15 grounds [2] 36:7 123:1 growing [1] 43:16 guess [13] 10:14 23:13 59:15,17 68:7 81:10 94:25 101:13,20 120:4 121:18,20 123:1 gun [1] 66:1</p> <hr/> <p style="text-align: center;">H</p> <p>Halkin [1] 83:13 hall [1] 114:3 hands [1] 128:12</p>	<p>hangs [1] 25:9 happen [8] 22:18 32:23 76:23 88: 24 89:8 116:1 129:8 131:10 happened [5] 88:8 90:7,7 117:16 132:16 happens [8] 6:23 90:13 106:1,14, 17 126:23 128:5 134:21 happy [2] 27:12 137:13 hard [3] 104:14 106:7 130:16 harm [6] 74:24 79:15,22 90:25 109: 8 131:12 harms [1] 39:15 Hawaii [1] 115:24 head [1] 135:6 hear [2] 3:6 13:21 heard [3] 66:12 88:10 101:21 hearing [4] 23:19 35:21 79:15 109: 8 heightened [1] 126:14 held [3] 3:22 40:18 132:18 Helms [1] 83:13 help [4] 19:24 60:4 102:9 104:21 helpful [2] 98:1 137:10 helps [1] 61:12 hiding [1] 108:22 high-level [2] 96:13 97:9 hinge [1] 110:10 history [1] 117:16 hold [6] 61:2 65:16 75:23 77:13 115:23 119:17 Holder [1] 47:23 holding [5] 45:23 54:13 89:8 119: 24 120:10 hole [3] 108:17,23 109:22 honest [2] 104:23 105:24 Honor [4] 58:10 65:22 66:10,25 68:17 69:25 70:17 72:8 74:7 75: 17 76:2 82:9 83:2 85:23 86:25 87: 12 89:6 96:7,22 98:10 100:6 103: 6 107:23 109:21 110:16 117:14 118:6 119:9,23 120:12,15,16 121: 19 122:21 123:2,15,21 126:1 127: 21 128:15 133:20 Honor's [1] 62:5 Honors [2] 65:15 102:4 hoped [1] 29:3 hopefully [1] 95:14 hoping [1] 104:7 House [1] 125:4 housemates [1] 88:17 however [1] 87:24 hurts [3] 61:14 107:4,4 hypothesizing [2] 86:15,16 hypothetical [1] 130:22 hypothetically [1] 107:19</p> <hr/> <p style="text-align: center;">I</p> <p>idea [1] 137:10 identical [2] 79:23 80:2 identified [1] 83:17 Il [12] 48:21 49:6 94:18,20 97:20 124:6,11 125:6,8 126:25 129:12 130:11 illegal [5] 17:11 31:14 81:20 82:6</p>
--	---	---

Official - Subject to Final Review

<p>84:8 illegally [2] 82:2 84:3 Im [1] 8:20 image [4] 85:18 86:23 87:2 131:11 imagine [2] 69:13 130:22 imagined [1] 132:11 imagining [1] 97:7 immunity [1] 86:20 impeach [1] 58:14 impeachment [2] 58:19,21 implausible [3] 83:15,25 116:7 implementation [1] 28:22 implicates [1] 103:3 implications [1] 70:20 important [15] 26:20 27:25 29:24 30:3 31:13 67:20 96:6,8 97:13 100:3 113:9,11,13 117:17 121:2 imports [1] 43:5 include [3] 22:20 89:3 102:5 including [1] 81:7 inconsistent [2] 43:20,21 incorporates [1] 82:19 incorporating [1] 104:24 incorrect [2] 121:2,13 incredible [1] 116:18 incursion [1] 48:12 Indeed [2] 4:16 17:24 indemnify [1] 131:7 indicated [2] 56:21 61:6 indicates [2] 7:24 59:10 indication [2] 48:18 124:21 indiscriminate [1] 57:9 individual [11] 53:13,19 55:6 56:11 57:12,19 60:17 82:17 128:5 129:18 130:18 inevitably [2] 7:13 122:17 influences [1] 125:7 informal [2] 22:8 30:6 informant [2] 37:15 133:11 information [124] 3:19 4:1,11,14, 18 5:2 6:2 7:3 9:2,23 10:6 11:22 12:19 13:12 14:19,24 15:8,14 16:11,18 17:25 18:10 27:6 28:2 29:5 30:5,16 32:13 33:4 34:4,11 37:17, 25 38:4,6 40:21,25 41:5 52:8 53:17 57:4,11,21 58:1,9,11,13 59:11 61:6,8 62:4 63:18,22 64:3,10,12, 17,24,25 65:4,9 67:23,25 68:2,4, 13,14,15,24 69:4,7,15 70:4,13,20 71:16 72:10,24 73:1,8 74:17,18, 19,23 76:4,6,21 79:24 80:5,12 83:5 89:17 90:18 91:23 92:22 94:4,8 96:14,18 97:4 98:18 106:23 109:8 112:5 113:2,6 114:5 115:10,12 116:4,16,20 117:8,12,24 122:18 125:1,3 129:6 130:19 132:11 136:16 138:5,17 informing [1] 57:4 inherently [1] 99:1 inheres [1] 5:18 injunction [3] 5:1 11:4 137:18 injunctive [1] 27:21 injured [1] 36:15 injustice [2] 76:22 77:5</p>	<p>inquiry [3] 38:18 82:6 83:4 insist [1] 48:17 instance [1] 6:19 instead [6] 3:22 43:11 61:4 63:21 71:4 84:24 instructed [1] 54:14 instruction [1] 77:1 instructions [1] 133:10 intelligence [7] 3:19 4:20 8:10 14:12 28:3 39:1 109:19 intend [1] 112:15 intended [4] 21:4 25:5 48:19 51:16 intends [8] 14:10,23 20:10 23:15 24:13 30:4,15 52:8 intensive [1] 77:1 intent [3] 5:11 17:23 124:21 intention [1] 12:16 interacts [1] 119:20 interest [1] 64:5 interested [3] 83:8,9 114:18 interests [2] 49:1 92:8 interpose [1] 117:17 interpret [1] 133:15 interpretation [12] 4:3 13:9 26:18 48:9 53:25 54:23 60:25 62:12,16, 19,21 100:12 interpretations [1] 62:14 interpreting [4] 28:12 87:9 94:22 95:23 interrupt [3] 101:3 104:5,6 introduce [6] 14:11 51:16,25 74:23 110:13 112:7 introduced [2] 24:17 68:15 introducing [2] 22:6 23:24 introduction [1] 52:21 intrude [1] 124:21 invest [1] 38:25 INVESTIGATION [14] 1:3 3:8,20 4:20 8:11 39:2,8,14 40:21 41:3 49:24 53:18 56:6,7 investigations [1] 57:9 invited [1] 96:4 invocation [5] 13:6,16 47:10 54:17 69:22 invoke [8] 10:16,16 18:19 72:10 112:13,14,16,17 invoked [9] 13:10,11 38:21 40:17 46:5 47:24 62:1,2 119:18 invokes [6] 4:12,13 9:19 23:2 31:25 135:7 invoking [5] 23:3 69:21 72:1,3,17 involve [2] 21:15 59:18 involved [1] 116:6 involves [2] 58:23 59:20 involving [3] 80:20 81:4 114:19 lqbal [1] 86:21 irrespective [1] 52:17 isn't [11] 15:19,22 20:14,15 21:7 31:12 67:22 84:20 87:8 108:12 114:20 issue [19] 3:20 44:12 48:6 49:6 53:15 55:16 67:23,25 74:9 80:22 85:15 88:6,7 95:14 99:22 100:3 101:</p>	<p>13 119:22 138:2 issue's [1] 46:17 issued [2] 102:16,16 issues [4] 54:22 99:24 102:7 122:8 item [1] 8:3 itself [10] 7:15,16 13:9 25:18 40:2 42:21 65:11 134:20,25 136:14</p> <hr/> <p style="text-align: center;">J</p> <p>Jabara [1] 83:12 Jackson [2] 95:21 124:13 jargon [1] 108:15 Jefferson [1] 118:22 judge [32] 9:1,16 12:2,25 31:7,10 32:11 36:11,13,15 52:13 56:14 57:6 61:5 66:8 70:14,15 74:21 76:17, 18 77:8,8 83:14 84:7 85:5 94:18, 19 106:22,22 113:15 129:25 132:5 judges [1] 74:16 judgment [18] 42:22,22 43:12,14 45:4,4 46:2,22 59:9,11 71:2 86:17, 18 87:24 88:18 122:15 132:19 136:5 judicial [4] 4:8 21:18 98:15 138:1 jurisprudence [1] 9:15 jury [7] 53:21 55:6 56:12 59:22 60:20 84:18 86:1 Justice [311] 1:20 3:3,12 5:14 6:10, 21 7:13 8:14,17,18,19,20,21 9:14 10:4 11:1,5,8,11,14,16 12:9,17,20 13:14,18 15:19,22 16:20,25 17:3, 6 18:13,14,23 19:1,4,9,12,15,18, 22 20:7,12 21:7,12,20,23 22:10,14 23:9,12,13 24:4,7,10 25:8,25 26:1, 2 27:5,11,16 28:10 29:7,11,14,14, 16 30:19,20,20,22 31:23 32:3,4,7, 18,21 33:7,11,15,20,24 34:2,10,17, 23 35:8,12,13,13,15,16 36:19 37:2, 9,22 38:12,12,13,14 39:7,9,10 41:19,21 42:1,4,9,9,11 44:14,25 45:12,14,21 46:11,11,13,16 47:8,12, 25 48:1,1,4,5 49:5,13,16 50:6,15, 19,23 51:1,5,6,6,8,14,21 52:9,12, 19,24,25 53:6 54:4,10,18 58:4,16, 23 59:1,5,15,25 61:11,19 62:10,24 63:1,2,4,5,6,8,8,9,10,16 64:11,15, 20 65:19 66:22 67:1,24 69:2,20 70:10 71:22 72:7,11,15,25 73:21 74:8 75:2 76:7 78:6 79:7 81:10 83:19 84:4,13,20,25 85:4 86:5,9 87:1 88:25 90:21,22 91:20 92:7,10,14 94:13,17 95:9,13,17 96:16,24 97:22,25 98:7,11 99:6,16,16,23,23 100:14 101:2,7,20 102:9 104:4,20 106:1 107:24 109:12,14 110:6,9 111:2,8,23,24,25 112:1,2 113:14 114:12,15,18 116:14 117:5,10,21, 21,23 118:10,13,17,24 119:3,6,11, 15,25 120:9,13,18,19,19,20 123:5, 5,7,16,19 124:2,3,3,5,24 125:24 127:1,2,2,4,5,25 128:4,17 129:8, 14,23,25 130:6,16,22 131:2,18,21,</p>	<p>22 132:2,11 133:3,13,21,22 134:4, 23 135:20 138:18 Justice's [1] 124:23 justification [2] 137:25,25</p> <hr/> <p style="text-align: center;">K</p> <p>KAGAN [22] 15:19,22 16:20,25 17:3,6 38:12,13 39:7,9 41:19,21 42:1, 4 48:2 76:7 81:10 90:22 94:14 99:23 120:19,20 Kavanaugh [35] 46:12,13 47:8,12, 25 48:4 49:5,13,16 50:6,15,19,23 51:1,5 94:17 95:9,13,17 96:16,24 97:22,25 98:7,11 99:6,16 101:2,7, 20 119:25 124:4,5 125:24 127:1 keep [13] 23:3 33:15 42:16,23,23 43:14 67:4 68:4,18 69:17 73:9 91:5 94:8 keeping [3] 43:12 67:12 73:19 keeps [2] 23:10 30:18 Keith [1] 96:4 Kelly [1] 83:12 kick [1] 91:4 kicks [1] 102:25 kind [9] 39:20 40:6 48:13 56:17 70:7 90:21 125:1,2,7 kinds [4] 16:7 31:1 99:24 112:25 kitchen [1] 99:11 KNEEDLER [143] 1:19 2:3,13 3:9, 10,12 5:14,19 6:17,22 8:14,15 9:9, 13,18 10:23 11:3,7,9,12,15 12:5, 13,18 13:3,14,16 14:4 15:20 16:9, 24 17:2,5,20 18:13,21,25 19:2,7, 10,14,17,20 20:4,8 21:2,11,16,21, 24,25 22:10,12,14 23:1,9,10 24:3, 5,9,11 25:9 26:3,19 27:8,15,17 28:17 29:8,12,13,16,23 31:20,24 32:6, 14,19 33:6,10,13,17,22,25 34:9,15, 20,24 35:10 36:18,21 37:6,11 38:2,20 39:8 40:13 41:20,25 42:3,8, 13 44:11,16 45:3,13,19 46:14,18 47:10,19 48:3,16 49:9,14,20 50:9, 17,20,25 51:3,8,12,15 52:5,10,16, 20 53:1 55:8 56:21 58:7 59:16 61:3 76:3,7 88:11 98:14 101:21 111:4 133:24 134:1,3 138:19 Kneedler's [1] 110:12 knotty [1] 12:23 knowing [1] 78:12 knows [2] 58:10 109:21</p> <hr/> <p style="text-align: center;">L</p> <p>lack [1] 137:25 language [26] 13:24 15:9 17:1 19:25 21:3 23:5 24:19,22 26:4,9,14 28:11,18,19 48:13 55:10 58:8 59:10 60:11 87:9 89:2 98:16 108:11, 14 110:11,19 largely [1] 54:24 larger [1] 43:16 Last [6] 49:16 78:2 96:9 117:2 131:3 133:8 Lastly [1] 65:14 later [1] 71:10</p>
---	---	--	---

Official - Subject to Final Review

<p>latter ^[2] 106:15 137:23</p> <p>law ^[43] 3:15 5:9,16,18,21 6:9 7:14 18:6 25:1 28:6 49:12 64:6 65:2,6, 13 67:2,8 77:24 80:15 83:23 87: 21 88:5 89:1,3 91:15 92:1 97:14 99:5 107:2,3 117:20 118:4 127:23 128:15,18,20,23 129:2 130:5,7,15 131:17 135:16</p> <p>lawful ^[10] 9:4,11 24:25 36:12 64: 14 82:25 85:22 109:11 113:18 115:15</p> <p>lawfully ^[7] 60:16 79:18 82:12 87: 18 89:18 90:23 115:5</p> <p>lawfulness ^[4] 55:2 57:24 89:24 90:2</p> <p>lawsuit ^[4] 22:24 38:19 40:2 64:25</p> <p>lead ^[3] 7:14 77:20 122:17</p> <p>leading ^[2] 88:16 93:12</p> <p>leads ^[1] 87:8</p> <p>leak ^[1] 115:12</p> <p>least ^[11] 5:8 7:1 26:3 41:5,15,15 59:20 68:7 93:9,14 96:19</p> <p>leave ^[2] 25:5 121:17</p> <p>leaves ^[2] 107:5 121:11</p> <p>leaving ^[4] 103:9,11 108:21 114:2</p> <p>ledger ^[2] 131:15,15</p> <p>left ^[1] 84:24</p> <p>legal ^[3] 18:11 81:17 82:6</p> <p>legality ^[1] 90:10</p> <p>legally ^[1] 31:14</p> <p>legislate ^[1] 96:5</p> <p>legitimate ^[2] 56:9 64:5</p> <p>less ^[3] 43:10 125:4 136:8</p> <p>letting ^[1] 130:17</p> <p>liability ^[2] 53:20 55:3</p> <p>liable ^[1] 60:18</p> <p>light ^[3] 120:10 123:17,23</p> <p>likely ^[1] 58:14</p> <p>likewise ^[1] 5:7</p> <p>limine ^[2] 70:22 71:3</p> <p>limited ^[6] 7:9 55:20 56:15 57:23 96:2 97:18</p> <p>line ^[3] 10:14 37:2,19</p> <p>lines ^[1] 108:4</p> <p>links ^[1] 24:19</p> <p>liquidated ^[1] 11:18</p> <p>list ^[2] 18:14,17</p> <p>listen ^[1] 91:2</p> <p>literal ^[2] 26:8,13</p> <p>literally ^[1] 27:6</p> <p>litigate ^[2] 88:22 110:5</p> <p>litigated ^[3] 88:6,7,12</p> <p>litigation ^[5] 88:8 97:12 100:24 126:2,7</p> <p>little ^[5] 8:23 69:4 101:21 108:18 116:9</p> <p>long ^[4] 78:24 88:14 103:7 115:16</p> <p>longer ^[1] 61:9</p> <p>look ^[40] 13:1 16:5 25:17 31:11,25 32:12,18,19 33:3 34:11 36:11 37: 25 39:5 73:21 74:1,5,17,21 76:21 81:12 87:14 93:6 96:8,9 97:11 98: 15 99:10 105:7 106:23 107:3 113: 1,5,16 114:21 118:19,21 120:8,10</p>	<p>122:12 132:10</p> <p>looked ^[6] 17:21 46:24 47:13 76:5, 5 83:16</p> <p>looking ^[9] 9:21 20:5 22:1,2 47:3 77:22 91:18 101:1 105:1</p> <p>looks ^[1] 75:9</p> <p>Los ^[1] 1:24</p> <p>lose ^[6] 70:16 88:18 92:14 119:16 120:21 122:23</p> <p>loses ^[1] 66:18</p> <p>lost ^[1] 113:10</p> <p>lot ^[4] 34:7 43:5 95:20 102:25</p> <p>lots ^[2] 95:4 103:20</p> <p>lower ^[2] 57:15 103:1</p> <p>luck ^[1] 131:16</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>M.A ^[3] 1:22 2:6 53:3</p> <p>made ^[13] 13:20 15:10 27:11 39:24 44:2 55:8 71:24 75:20 92:25 99: 11 106:24 117:25 118:1</p> <p>mail ^[1] 137:15</p> <p>main ^[2] 87:13 91:7</p> <p>maintained ^[1] 99:2</p> <p>maintenance ^[1] 7:12</p> <p>major ^[1] 49:6</p> <p>majority ^[2] 10:10 100:23</p> <p>Malik ^[1] 93:12</p> <p>man ^[1] 93:13</p> <p>manifestly ^[1] 57:16</p> <p>manner ^[1] 64:21</p> <p>many ^[5] 5:24 30:25 58:11,17 135: 22</p> <p>marital ^[1] 99:3</p> <p>massively ^[1] 100:3</p> <p>material ^[1] 57:7</p> <p>materials ^[21] 5:5 10:19 13:1 14:1 15:12 16:6 17:9,16 25:19 38:19 39:14 53:10 55:24 57:2 110:11 113:20,22 115:17 116:11 130:23 136:1</p> <p>matter ^[13] 1:14 6:8 40:1 43:10 61: 20 74:15 76:1 94:23 98:17,25 100: 20 112:23 113:3</p> <p>mattered ^[1] 81:22</p> <p>matters ^[4] 7:14 54:19 81:18 99:1</p> <p>McDonnell ^[1] 129:4</p> <p>mean ^[50] 13:19 15:23 16:22 17:6 21:17 28:12 31:11,18 32:4 34:8, 21 38:20 39:9,11 45:5 46:19 54: 19 58:5 70:13 73:16 78:10 81:14, 15 84:15 85:4,5 87:22 92:18 93:4, 9 96:4 97:21 100:7 102:6 103:14 104:2,4,19 109:19 110:23 111:9, 11 122:4,24 127:25 129:11 130:2 131:7 132:4 133:13</p> <p>meaning ^[3] 26:8 69:12 77:3</p> <p>means ^[9] 20:20 38:3 64:19,20 68: 13 90:4 93:3 103:2 136:6</p> <p>meant ^[2] 68:12 102:21</p> <p>mechanism ^[5] 4:6 12:7 16:12 53: 9 58:1</p> <p>mechanisms ^[1] 126:20</p> <p>memorandum ^[1] 69:9</p>	<p>mentioned ^[5] 27:25 62:6 64:16 89:2 99:24</p> <p>merely ^[1] 67:22</p> <p>merits ^[5] 3:25 10:1 32:2 56:2 78: 24</p> <p>met ^[1] 80:16</p> <p>method ^[1] 28:23</p> <p>methods ^[4] 4:19 8:10 39:5 56:9</p> <p>middle ^[1] 25:14</p> <p>might ^[22] 11:21 15:6 21:6 22:12, 20 23:23,24 26:25 31:1 43:20 47: 4 50:4 66:11 75:6 83:16 88:11,18 115:12 116:3 123:9 133:16 137:3</p> <p>mind ^[2] 73:23 104:15</p> <p>minimization ^[2] 18:3 28:4</p> <p>minimum ^[1] 124:16</p> <p>Mink ^[1] 125:13</p> <p>minorities ^[1] 82:21</p> <p>mirror ^[5] 85:18 86:8,22 87:2 131: 11</p> <p>misspoken ^[1] 72:6</p> <p>mistake ^[1] 88:20</p> <p>mistaken ^[2] 43:24 44:8</p> <p>Mister ^[1] 26:1</p> <p>misunderstand ^[1] 127:20</p> <p>misunderstanding ^[2] 23:14 24: 2</p> <p>misunderstood ^[2] 39:18 44:4</p> <p>MLK ^[1] 83:19</p> <p>Molerio ^[4] 76:18 77:9 106:21 132: 16</p> <p>moment ^[2] 51:2 75:4</p> <p>Monday ^[1] 1:12</p> <p>month ^[1] 117:2</p> <p>morning ^[1] 3:7</p> <p>most ^[9] 28:13 58:13 69:12 71:15 103:9 114:24,25 116:18,19</p> <p>mostly ^[1] 26:13</p> <p>motion ^[43] 5:3,6 14:9,15,25 15:4, 10 24:18,20 25:3,4 26:6,25 28:25 29:1 32:8 55:11 59:12 63:20 66: 17 69:5,14 70:22,25 71:1,2 87:20 89:1 110:19,22 112:21,22 117:25 118:1,3 119:20 135:24,24,24,25 136:4,6,7</p> <p>motivations ^[2] 56:7,11</p> <p>mouse ^[3] 108:17,23 109:22</p> <p>move ^[10] 10:17 30:5,7 33:12 67: 21 68:23 80:9 88:11 112:9 122:14</p> <p>moved ^[2] 33:19 88:10</p> <p>moving ^[2] 10:17 61:21</p> <p>Ms ^[16] 53:2,5 54:7,11,21 58:21,25 59:3,8,21 60:2 61:18,23 62:11,24 84:5</p> <p>much ^[7] 43:4 45:23,24 73:23 82: 20 102:18 125:4</p> <p>Muslims ^[3] 57:10 107:15,17</p> <p>must ^[5] 11:20 18:20 66:21 72:5 113:15</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>nail ^[1] 47:13</p> <p>namely ^[1] 74:20</p> <p>narrow ^[7] 18:11 53:9 94:25 96:23</p>	<p>97:17 98:3 110:24</p> <p>narrower ^[2] 76:2 100:18</p> <p>narrowest ^[4] 100:6,17 119:21 120:17</p> <p>narrowing ^[1] 110:24</p> <p>narrowly ^[1] 88:21</p> <p>nation's ^[1] 6:3</p> <p>national ^[24] 3:16 8:4 9:17 42:23 43:15 49:2 70:12,20 79:15,22,25 80:6 82:7 90:17,25 92:9 95:2 96: 17 97:8 99:9 108:9 109:9 136:16 138:4</p> <p>natural ^[2] 69:12 70:11</p> <p>naturally ^[1] 49:15</p> <p>nature ^[3] 34:3 38:18 42:5</p> <p>necessarily ^[1] 114:21</p> <p>necessary ^[11] 7:19 9:2,3 32:17 33:4 35:7 39:5 55:18 113:5,17,21</p> <p>necessity ^[1] 6:5</p> <p>need ^[17] 6:1 12:9 49:7 57:12 63: 19 64:2 71:16,18 73:14 93:7 97:5 99:14,18 100:13 104:20 114:6 130:19</p> <p>needed ^[2] 89:23 90:1</p> <p>needn't ^[1] 32:22</p> <p>needs ^[2] 38:24 130:3</p> <p>neither ^[2] 20:23 64:6</p> <p>never ^[4] 64:10 73:16 90:6 95:14</p> <p>New ^[1] 97:10</p> <p>next ^[2] 6:23 98:23</p> <p>Ninth ^[53] 3:17,22 4:10,23 8:24 9: 24 33:1,20,22 35:3 39:17,19 40: 10,14,19,19 41:9,17,23 43:18 44:4, 11 45:4,22 46:2 47:3,17 50:11,13 52:14 54:13,13 61:1 62:21 67:17 89:7,9,12 99:22 101:3,8 118:18, 20 120:2,5 121:1,7,12,17,22 123: 11 134:7,8</p> <p>Nixon ^[3] 96:9,10,16</p> <p>None ^[1] 55:25</p> <p>nonetheless ^[2] 107:18 132:21</p> <p>nor ^[2] 20:23 64:6</p> <p>normal ^[7] 14:15 31:21 32:15 73:3, 3 82:5 114:14</p> <p>normally ^[1] 71:8</p> <p>Northrop ^[1] 129:4</p> <p>note ^[2] 103:6 120:4</p> <p>nothing ^[5] 37:20 38:6 57:25 63:2 68:19</p> <p>notice ^[6] 79:3 112:4,7,12,15,21</p> <p>notification ^[1] 15:3</p> <p>notify ^[1] 14:23</p> <p>notwithstanding ^[1] 80:15</p> <p>novel ^[1] 4:3</p> <p>November ^[1] 1:12</p> <p>nowhere ^[1] 102:2</p> <p>nuclear ^[1] 115:24</p> <p>nullity ^[1] 10:15</p> <p>number ^[2] 135:4 137:9</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>object ^[1] 107:23</p> <p>oblique ^[1] 108:12</p> <p>obtain ^[13] 5:4 13:25 15:11 25:19</p>
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Official - Subject to Final Review

<p>26:22 27:2,2,6,13 93:1 94:6 111:18 135:25</p> <p>obtained [14] 14:11,17 24:16 25:3 33:8 34:4 38:1 82:2 90:24 91:3 92:16,22 106:8 135:18</p> <p>obtaining [3] 16:23 17:4 29:10</p> <p>obvious [2] 12:16 136:20</p> <p>obviously [12] 15:24 64:25 85:19 99:15 105:4 109:21 111:19 113:10 115:21 117:5 130:4 133:15</p> <p>occupies [1] 81:6</p> <p>occurs [1] 17:19</p> <p>odd [2] 69:4 94:24</p> <p>offensive [1] 22:25</p> <p>office [1] 76:25</p> <p>officer [1] 23:20</p> <p>officially [1] 59:12</p> <p>officials [1] 31:3</p> <p>often [3] 83:3 107:5 130:1</p> <p>Okay [22] 18:24 19:1,9,12,22,22 28:10 31:5 32:21 34:23 35:13 42:24 48:4 52:19 63:10 98:7 105:9 123:19 127:16 128:4 129:23 133:3</p> <p>old [1] 116:1</p> <p>old-fashioned [1] 39:20</p> <p>once [6] 36:20 37:23 69:16 77:6 87:16 90:7</p> <p>One [42] 6:10,16,18 12:6 16:5 17:12 24:6,12,12 26:3 29:17 31:2,12 48:10 59:4,7,7 61:20 66:7,13 72:20 88:10 93:2 97:22 98:2 100:9 104:15,16,25 105:24 107:1,4 110:19 113:14 115:24 121:8 123:22 124:5 125:14,25 129:4 137:15</p> <p>one's [1] 119:18</p> <p>ones [1] 111:12</p> <p>only [37] 8:24 9:9,11 10:5,25 12:15 13:11 18:3 36:1 39:12,25 43:23 44:7 51:15 53:8 66:5 67:3,17,18 71:6 75:8 78:6 82:18 83:3 85:6 90:1 96:7 100:9 102:23 110:3 116:23 117:4,10 125:21 130:7 134:10 135:19</p> <p>open [1] 25:5</p> <p>opening [1] 5:15</p> <p>operate [2] 15:2 105:10</p> <p>operated [1] 43:19</p> <p>opinion [5] 32:4 45:6 75:3 121:11,17</p> <p>opinions [1] 108:16</p> <p>opportunity [5] 14:14 61:16 65:12 86:1 92:11</p> <p>oppose [1] 50:16</p> <p>opposed [2] 68:6,10</p> <p>opposite [1] 107:14</p> <p>opposition [1] 78:16</p> <p>option [7] 129:20,22 130:1 131:1 132:23 133:1,4</p> <p>options [5] 80:8 81:7 106:19 107:11 127:22</p> <p>oral [7] 1:15 2:2,5,8 3:10 53:3 63:13</p> <p>order [8] 70:2 71:17 101:9,17,18 136:1,2,5</p>	<p>ordered [2] 65:10 90:9</p> <p>orders [10] 3:3 5:4 14:1 15:12 25:19 55:24 65:17 90:1,15 113:20</p> <p>ordinary [2] 14:6 39:22</p> <p>original [1] 126:10</p> <p>orthogonal [1] 55:16</p> <p>other [69] 4:9,23 13:8 14:1,3,16 15:5,12 17:14 20:15,16,19 21:14 23:19,21 24:12,12 25:19 26:8,15 28:7,15 37:7,10,12,14 41:11 42:18 44:2 45:20 58:15 66:11,18 68:22 72:21 78:5 80:15 81:7 86:20,24 97:22 98:2 103:22 104:18 107:5,22 109:24 110:11,20 112:9 113:14,20,22 115:17,25 116:11 122:9 123:24 125:11,15,25 126:8 129:21 131:1 132:4,4 135:10,22 136:24</p> <p>Others [1] 59:7</p> <p>otherwise [30] 18:18 19:24 20:1,2,10 21:4,8 22:15,20 23:16,18 24:14,17 25:3,4 28:21,25 35:19 48:23 58:5 64:18,20 65:24 66:5 69:12 87:19 94:7 100:8,10 136:6</p> <p>out [30] 7:18 19:24 23:4,10 28:12 30:18 33:16 34:19 56:15 58:2 68:18 69:17 70:5,6,21 73:9,19 88:13 91:5,21,25 97:9 99:13,15,25 101:9 107:5 124:1 131:16,22</p> <p>outright [1] 81:7</p> <p>outside [4] 27:1 58:9 75:25 103:17</p> <p>over [8] 18:6 29:4 50:3 99:10 102:19 116:12 126:10 133:12</p> <p>overcome [1] 49:15</p> <p>override [1] 25:12</p> <p>overused [1] 108:18</p> <p>own [4] 63:25 67:11 71:19 109:3</p>	<p>passage [4] 7:11 98:14,19,20</p> <p>passages [1] 137:9</p> <p>passed [2] 101:4 108:24</p> <p>path [1] 79:6</p> <p>paths [2] 75:21 94:2</p> <p>people [5] 31:8 35:24 125:4 131:8 132:13</p> <p>perfectly [7] 21:1 43:1 66:20 70:11 91:14 104:23 105:24</p> <p>perhaps [9] 32:11 71:24 93:20 94:14 100:17 101:14 109:2 120:8 121:24</p> <p>permit [3] 12:25 64:6 82:15</p> <p>permits [2] 10:5 64:9</p> <p>permitted [2] 92:6 136:19</p> <p>persecution [1] 82:21</p> <p>person [16] 4:8 11:14,17 13:24 14:3 17:10 19:10 23:6 24:15 29:20 30:16 35:17 37:3 52:22 100:22 132:16</p> <p>persons [1] 96:3</p> <p>pertaining [1] 6:2</p> <p>pertinent [1] 26:21</p> <p>Petitioners [7] 1:5,21 2:4,14 3:11 10:20 134:2</p> <p>phrase [5] 24:13 26:21 29:19 48:23 58:5</p> <p>phrasing [1] 17:21</p> <p>pick [2] 99:16 111:12</p> <p>picked [1] 98:20</p> <p>picking [1] 48:5</p> <p>picture [1] 91:9</p> <p>piece [1] 115:10</p> <p>pierce [1] 128:25</p> <p>pierced [1] 128:20</p> <p>place [4] 5:15 16:7 126:17 133:12</p> <p>places [1] 103:22</p> <p>plain [2] 27:12 110:19</p> <p>plainly [2] 60:21,23</p> <p>plaintiff [9] 16:15 17:15 31:2 51:18 52:6 81:24 103:10 106:2,12</p> <p>plaintiffs [4] 106:5,11 138:10,10</p> <p>plaintiffs [21] 10:3 11:21 16:4 35:25 36:2,6 65:8 68:23 70:8 71:16 87:4 89:14,23,25 90:11 91:12 92:3 100:15 131:23 137:1,13</p> <p>plaintiffs' [5] 3:25 4:25 8:12 25:22 85:10</p> <p>plausible [8] 53:25 60:11,25 62:14,20,22 100:11 107:11</p> <p>play [5] 48:15 62:23 91:21 117:18 124:1</p> <p>plays [1] 48:9</p> <p>pleadings [11] 38:17 71:6,10 76:4,20 100:19 120:1,3 123:25 136:20,21</p> <p>please [4] 3:13 53:6 63:16 132:2</p> <p>point [35] 6:1 9:8 11:9 27:5,20,24 28:11 34:10,16 39:18,19 40:15 44:2 45:25 48:10 50:2 55:13 61:25 62:5 65:7 66:9 67:1,15 68:3 75:20 88:2 96:23 98:19 104:9 110:12 111:1 120:4 121:18 132:4 138:2</p> <p>pointed [2] 7:17 131:22</p>	<p>points [5] 12:6 53:7 55:9 58:3 134:4</p> <p>policy [1] 7:11</p> <p>portion [1] 77:19</p> <p>portions [1] 91:11</p> <p>posit [1] 127:6</p> <p>position [9] 18:16 23:15 38:15,16 50:18 51:23 52:13 115:7 118:15</p> <p>possesses [1] 115:1</p> <p>possession [1] 43:8</p> <p>possibility [3] 71:8 88:23 131:19</p> <p>possible [2] 92:19 123:9</p> <p>possibly [1] 85:1</p> <p>post [1] 125:13</p> <p>potential [4] 48:14 87:3,5 126:25</p> <p>potentially [1] 55:22</p> <p>power [11] 5:18,20,23 43:17 95:8 124:10,11 126:6,10,13,16</p> <p>powerful [2] 80:17 87:8</p> <p>powers [3] 6:14 48:21 124:18</p> <p>practice [1] 83:3</p> <p>prayer [7] 4:25 26:5 27:9 88:17 92:20 93:12 114:3</p> <p>pre-FISA [1] 83:3</p> <p>precedent [1] 119:13</p> <p>preceding [1] 14:20</p> <p>precise [1] 24:3</p> <p>precisely [1] 24:5</p> <p>preclusive [1] 124:12</p> <p>predicated [1] 57:10</p> <p>predicates [2] 53:17 56:8</p> <p>predicted [2] 113:23,24</p> <p>preliminary [1] 112:23</p> <p>premature [8] 86:16 94:13,15 101:12 115:22 121:23 122:11 123:11</p> <p>prematurity [2] 102:1 123:24</p> <p>premised [2] 121:2,7</p> <p>prepared [1] 63:25</p> <p>prerogative [1] 6:4</p> <p>presence [2] 85:7,8</p> <p>present [1] 39:15</p> <p>presented [8] 47:22 78:9 79:2,3 102:4 104:24 105:19 118:7</p> <p>preserve [1] 93:22</p> <p>preserved [1] 78:22</p> <p>preserving [1] 18:17</p> <p>president [3] 96:13 97:13 116:6</p> <p>president's [2] 48:20 97:7</p> <p>presidential [2] 6:4 96:19</p> <p>pressed [2] 42:25 107:21</p> <p>presumably [1] 50:13</p> <p>presumption [1] 48:22</p> <p>presumptively [1] 113:8</p> <p>pretty [5] 20:18 21:23 25:15 102:18,21</p> <p>prevent [3] 4:14 68:9,9</p> <p>prevents [1] 57:19</p> <p>prima [1] 106:6</p> <p>primary [1] 101:12</p> <p>prior [3] 103:25 112:12 132:6</p> <p>Privacy [1] 27:22</p> <p>privilege [128] 3:14,21,24 4:2,13,14 5:7,10,13,16 6:19 7:17 8:25 9:20 13:7 16:12,13,16 19:8 23:3,7</p>
---	--	--	--

Official - Subject to Final Review

<p>25:13 30:17 31:22 35:2,5 37:20 38:8,21 40:4,18 41:13,14 42:15 44:19 46:4 47:11,15,24 48:8,12, 15,19 49:3,25 50:3 53:13 54:9 56: 14,19,20 57:18 60:14 61:2,10 65: 3,3,18 68:1,6,12,21,23 69:3,5,21, 23 72:2,3,17,18,19,23 75:24 78:12, 13 80:10,18,19 81:1,9 83:4 89:4, 13 90:19,23 91:4,15 92:17 93:23 94:3,21 95:1 99:5 107:3 108:7 109:24 111:7 112:13,14,16,17 114:17,20 116:10 120:6 124:22 127:17,19 128:3,18,20,22 129:10 130:7,11 133:17 134:11,12,13,14, 18,20,20,21,25 135:3,8 privileged [15] 9:23 38:4,23 40:22 53:16 57:5,21,25 62:4 65:4,9,16 68:24 73:8 96:15 privileges [3] 18:18 73:3,4 probably [4] 43:21 100:7 107:6 109:4 problem [16] 39:12 43:3 44:4 62:2 74:10,18 86:8,20,23 87:2 102:10 104:7 116:18 131:11,12,13 procedure [10] 14:9 15:1,5 16:3,4, 7 30:2 55:20 60:20 135:15 procedures [10] 17:18 18:4 24:22 79:17 80:14 90:1 110:4,5 126:8 136:10 proceed [5] 36:9 38:5 63:25 105: 22 137:22 proceeded [1] 40:23 proceeding [29] 4:9,9 6:22 14:24 18:12 21:18,19,21,24 22:5 23:6, 11,19 24:2 29:2 30:7,17,18 37:16, 18 52:18 53:16 56:16 57:23,24 58: 9 59:9 68:9 81:21 proceedings [7] 26:24 27:1 28:9 30:11 46:3 60:7 76:14 proceeds [1] 128:1 process [23] 29:18 41:11 53:22 55: 7 62:7 84:21 85:2 86:2,11 87:3,4, 23 89:16 109:10 115:8 128:21,24 129:13,17 130:3,10 131:12,18 Professor [3] 73:22 103:21 129:3 programs [1] 125:17 promise [1] 99:10 proper [4] 34:21 75:8 134:6,10 properly [8] 8:15 40:24 46:8 56:21 57:10 60:15 118:18 138:16 prosecution [2] 37:14 52:3 protect [2] 6:2 90:17 protected [3] 8:4 92:16 128:9 protection [2] 55:4,17 protective [4] 48:25 49:1 90:1,15 protestors [1] 83:19 prove [4] 11:22 36:16 42:18 103: 16 proved [2] 37:7,9 proven [1] 36:20 proves [1] 74:25 provide [3] 4:6 27:20,22 provided [1] 57:7 provides [3] 14:25 53:8 135:5</p>	<p>providing [1] 57:3 provision [8] 16:1 68:3 87:15 108: 1,12 109:1 112:3,4 provisions [5] 28:7 54:17 125:15 135:11,14 public [2] 7:11 92:4 punitive [2] 11:18 35:19 purported [1] 57:8 purpose [6] 4:4,5 12:16 72:2,4 82: 11 purposes [3] 18:7 28:6 114:2 put [11] 18:2 20:23 22:22 43:11 61: 7 64:19 71:6 108:11 109:4 118:11 135:20 putting [5] 20:14 26:7 39:22 57:20 137:14</p> <hr/> <p style="text-align: center;">Q</p> <p>question [87] 6:10,19,23 7:20 12: 12,14,23 13:5 23:13 25:5 33:23 35:17 37:23 38:14 41:10,24 42:2, 12 43:22,23 44:7 45:16,18 46:23 47:1,5 48:5 49:16 54:12 59:15 60: 10 66:15,16 69:2 78:6,8,10 79:2,3, 8 82:3 84:16,18 85:12,14,17 91: 18,19 94:5 95:18,19,24 97:20,23 98:2 99:17 100:14 102:4,11,13 103:4 104:18,24 105:3,14,18,19, 22 113:14 115:21 118:7 120:20, 22,24,25 122:1,3,10,22 123:4,8 125:6 127:5 128:5 134:19,23 136: 12 questions [12] 35:9,12 46:14 54:3 56:12,13 60:23 62:17 120:23 121: 6 124:23,24 quick [1] 58:3 quite [9] 6:11 28:13 43:16 47:21 103:19 115:22 116:7,14 121:6 quoting [2] 7:10 74:16</p> <hr/> <p style="text-align: center;">R</p> <p>raise [2] 60:22 62:16 raises [2] 54:2 102:13 ramifications [3] 45:23 95:20 133: 17 rather [1] 5:18 rationale [4] 4:10,23 99:9 105:23 re [3] 76:16 77:10 132:7 reach [10] 12:10,12,23,24 33:23 41: 10,23 44:12 47:1 50:14 read [12] 5:11 11:6 14:20 49:2,15 56:19 60:11 73:22 87:22,22 101: 13,14 reading [10] 48:22 54:2,25 57:22 60:12 61:12 68:7 94:23 108:7 125: 7 reaffirmed [1] 42:15 real [4] 62:2 104:7 124:9 133:10 realize [1] 17:8 really [15] 6:8 27:18 42:19 66:14 69:13 70:18 71:8 74:10 88:15 101: 4 102:25 110:10,18,21 119:7 reason [15] 18:20 31:7 41:2 50:21 56:18 57:22 75:10 78:2 81:22 85: 13 87:9,14 113:13 122:1 134:17 reasonable [2] 11:19 36:7 reasonably [1] 80:6 reasons [11] 4:18 6:8,8 49:24 85: 23 86:15 87:13 89:10 106:4 122:9 135:4 reassert [2] 65:18 81:1 REBUTTAL [5] 2:12 101:22 133: 24 134:1 138:7 receive [2] 27:10 71:17 received [1] 22:7 recent [1] 102:24 recently [1] 62:19 recognize [1] 64:4 recognized [4] 6:7 57:14,16 126:5 recollection [4] 59:4,6,23 60:5 record [1] 47:20 recording [1] 114:2 recordings [1] 55:22 records [1] 93:10 recover [2] 86:12 92:17 recovery [1] 37:5 refer [2] 66:17 69:15 reference [2] 5:3 15:9 references [1] 15:25 69:6 referred [4] 5:16 7:24 28:20 48:6 referring [2] 66:1 69:16 refers [2] 15:10 135:23 reflect [1] 5:11 reflection [1] 5:22 refresh [1] 58:25 refreshing [3] 59:3,6,23 regarding [2] 26:4 55:10 regardless [2] 49:17 62:1 regards [1] 7:15 regular [2] 14:8 99:4 regulatory [2] 23:20 24:1 rehearing [1] 83:13 reject [3] 34:24 43:13 54:1 rejected [1] 7:6 rejecting [1] 62:15 related [6] 5:5 102:10 109:24 126: 8 127:11 135:14 relates [1] 61:24 relating [5] 14:1 15:13 25:20 115: 17 116:11 relationship [2] 67:2 120:22 relatively [1] 102:23 relevance [2] 33:5,7 relevant [4] 32:25 67:16 104:16,16 relied [3] 9:25 45:22 61:5 relief [10] 4:25 26:5 27:9 87:16 89: 6,19 91:6 92:11,21 138:1 relies [3] 65:6 98:21 138:14 religion [20] 49:23 63:20,24 66:18 67:9,14 69:18 71:11,19,20 84:8 94:10,11 106:6,11 114:5 122:16 127:7,10 130:21 religious [7] 49:19 56:3 77:1 82: 21 107:14 127:12 130:24 religiously [1] 128:8 rely [5] 26:10,11 28:16 58:2 115:9 relying [3] 26:17 64:24 108:6 remained [1] 117:19</p>	<p>remains [1] 88:12 remand [5] 44:5 46:3,7 76:15 123: 10 remarks [1] 5:15 remedies [1] 126:19 remedy [11] 13:5 39:12 44:21 46:5 67:19 78:19 103:17 105:12 127: 18 128:11 137:11 remember [3] 60:5 98:13,16 removed [1] 134:22 rendering [1] 10:15 repeatedly [1] 63:23 replied [1] 78:23 reply [2] 78:23 103:7 report [1] 102:17 Republic [1] 129:4 request [9] 5:3 15:10 16:10 26:6 55:11 92:25 94:5 110:20 111:18 requests [2] 16:8 81:23 require [5] 46:1,21 91:12 112:11 125:16 required [3] 5:12 42:6 89:14 requirements [4] 25:1 87:21 88:5 130:15 requires [5] 3:24 14:22 64:12 112: 4 130:3 requiring [1] 5:1 requisites [2] 38:2,10 research [1] 36:1 reservation [1] 18:7 resolves [1] 54:12 resolving [1] 76:8 respect [10] 6:14 8:25 13:20 44:17, 19 45:20 46:16 67:19 81:19,23 respectfully [1] 96:22 Respondent [3] 6:11 35:5 45:2 Respondents [10] 1:8,23,25 2:7, 10 26:10 40:19 53:4 63:14 137:12 response [4] 14:5 62:9 70:23 110: 22 rest [1] 86:2 resting [1] 99:8 result [8] 15:3 26:17 55:19 71:13 77:21 80:2 87:7 128:16 resulted [1] 107:6 return [2] 5:2 93:1 returned [2] 92:23 93:3 revealed [1] 40:2 revelation [1] 55:25 reverse [1] 44:5 reversed [1] 90:8 review [18] 9:16 34:5 35:3 47:17 61:14 64:12 80:24 81:4 84:7 96:7, 23 97:18 98:17 109:10 117:7 125: 22 127:10 134:6 reviewable [1] 113:25 reviewing [1] 9:2 reviews [1] 115:2 Reynolds [2] 6:12 7:16 20:25 42: 14 65:3,6,11 74:5 79:23 96:15 97: 1,5 102:17 112:25 118:3,23 120:6 134:15 136:14,14,14 rights [14] 39:3 55:7,7 84:5,21 85: 10 87:3,5 128:21,25 129:17 131:</p>
---	---	--

Official - Subject to Final Review

<p>21,25 137:3 rise ^[1] 98:18 risk ^[5] 7:3 41:5 79:24 122:19,20 risking ^[1] 138:4 road ^[1] 50:4 ROBERTS ^[32] 3:3 13:14,18 29:7,11,14 30:20 35:13 38:12 42:9 46:11 51:6 52:25 62:10,24 63:4,10 67:24 70:10 107:24 109:12,14 110:6,9 111:23 117:21 120:19 123:5 124:3 127:2 133:22 138:18 role ^[1] 117:18 rooted ^[2] 5:20,21 roots ^[2] 5:9 94:21 routine ^[1] 43:10 Rule ^[17] 59:10 67:9 76:16,19 78:17 79:1 80:1 103:25 106:25 107:9,9 110:20 127:23,24 132:8,8,14 ruled ^[3] 4:24 118:22 132:21 Rules ^[7] 22:6 60:8 65:13 126:2,6,7,13 ruling ^[2] 100:6 119:21 run ^[2] 91:1 103:1 running ^[1] 125:17</p> <hr/> <p style="text-align: center;">S</p> <p>safe ^[1] 42:23 safeguard ^[1] 15:4 safeguarding ^[1] 3:16 safely ^[1] 138:3 same ^[23] 6:8 24:13,21 27:3 28:25 42:12 49:10 50:14 61:22 66:9 80:3 83:25 84:17 85:19 87:4 90:20 96:1 98:20 111:14 114:5 131:22,25 137:5 satisfactorily ^[1] 105:14 satisfied ^[1] 38:3 satisfies ^[1] 80:4 saying ^[26] 9:7 10:15,22 23:22 31:25 32:15 36:5 37:3 41:12,23 44:24 64:21 70:19,19 71:20 76:19 90:22 95:21 99:9 101:19 105:6 122:6 123:10 124:17 128:10 129:16 says ^[43] 16:17 17:18 18:5 20:9 21:13 24:15,23 26:22 31:3,6 36:13,15 37:19 39:21 43:6 56:25 74:21 76:7,13,15 79:13 80:5,13 81:1 84:7 87:19 89:24 90:23 92:21 96:11 97:1,3 98:24 106:16 109:1,6 112:15 116:11 133:11 136:3,5,17 137:19 Scalia ^[2] 77:9 132:5 Scalia's ^[6] 32:4 75:3 76:18 106:22 129:25,25 schemes ^[1] 57:9 SCIF ^[1] 90:16 scope ^[8] 49:24 53:18 93:21 97:16 113:22,24 120:6 130:14 Sealed ^[3] 76:16 77:11 132:7 search ^[3] 49:17 50:7,16 Second ^[6] 53:19 79:8 89:11 96:8 111:1 124:25 secret ^[30] 8:3 10:19 12:13 20:22 22:21 30:24 37:5,24 40:2 42:15</p>	<p>43:7,13,14 63:18 64:2,17 69:7 74:24 76:1 77:24 83:6,9,22 98:18 99:2 100:21 114:24,25 136:23,25 secrets ^[118] 3:14,24 4:12 5:10 6:14 8:25 9:20 12:11,21 13:6 16:13 23:3,7 25:13 30:17 31:22 32:16 35:2 36:10 37:20 38:8,21 39:21 40:18 41:13,14 43:2,5,20,25 44:3,5,8,19 45:17,18 46:4 47:14,24 48:7,12,15 49:25 50:3 53:12 68:21 71:15 72:1 74:12 75:24 77:19 78:12,13 80:10,18,19 81:9 82:5 83:4 89:4 90:19,23 91:4,15 92:17 93:23 94:2,15,21,25 98:3 102:2,5,13,13,21 103:2,17,21 104:12,13,15 105:5,18,22 106:15 108:7,9 109:24 111:6,13 112:13,14,16,17 113:3 114:16,20 117:3 119:20 121:4,8 123:12,13 124:22 127:17,19 128:10,22 130:7,11 133:17 134:11,12,25 135:3,7 138:16 Section ^[10] 3:23 4:5 5:10 12:6 17:24 53:8 60:12 64:15 87:14 109:3 section's ^[1] 4:5 sections ^[2] 14:20 109:4 security ^[27] 3:17 6:3 8:4 9:17 42:23 43:15 49:2 70:12,20 79:15,22,25 80:6 82:8 89:25 90:17,25 92:9 95:2 96:17 97:8 99:9 108:9 109:9 116:18 136:16 138:4 see ^[16] 15:15 31:11 64:10 65:16 68:14 74:22 75:22 76:22 87:2 91:9 101:1 104:22,22 109:22 130:17 136:17 seeing ^[1] 83:16 seek ^[8] 15:6 35:18 49:22 52:1 63:17,21,24 64:17 seeking ^[5] 4:25 67:3 72:4 94:3 98:3 seeks ^[2] 4:7 27:9 seem ^[5] 10:14 46:23 99:18 101:9 121:9 seemed ^[1] 52:14 seems ^[21] 6:11 17:6 20:13 26:2 39:17,19 40:10 43:18 66:20,22 68:1 70:2 72:16 73:24 74:9 78:13 103:3 115:1 116:7 130:5 137:19 seen ^[1] 132:20 sees ^[1] 75:10 seize ^[1] 10:19 seized ^[1] 10:6 seizure ^[5] 9:4,8,10 10:12 13:1 send ^[9] 33:1 34:6 45:15 47:16 77:14,18 99:22 112:15 119:18 sense ^[12] 68:5 69:6,14 105:9 110:2,3 112:6,11,18 123:4 125:19 134:5 sensitive ^[6] 16:6 17:9 57:5 106:17 114:23 125:16 sensitivity ^[1] 116:21 sentence ^[3] 25:13 108:3 109:3 sentences ^[2] 108:3,20 separate ^[7] 6:13,15 9:6 35:9 114:14 136:13 137:20</p>	<p>separately ^[1] 10:10 separation ^[1] 124:17 serious ^[1] 97:20 served ^[3] 112:20 113:9,11 service ^[1] 64:19 set ^[6] 17:12,14 78:24 116:4 126:6,6 sets ^[1] 18:15 setting ^[1] 126:19 settle ^[1] 137:17 Seventh ^[6] 53:22 61:16 62:7 88:2 131:13,24 several ^[4] 10:23 46:14 103:23 134:4 shall ^[4] 24:25 79:16 80:14 89:22 she's ^[1] 73:25 short ^[1] 108:20 shouldn't ^[8] 16:1 30:12 31:10 48:11 74:4 102:6 118:5 120:1 show ^[4] 93:6 107:13,14 115:15 showing ^[1] 57:8 shown ^[2] 38:10 86:19 shows ^[3] 29:24 106:9 127:11 side ^[12] 20:15,19 44:2 66:18 89:6,19 107:4,5,22 131:14,15 137:15 sides ^[3] 86:14,17,18 significance ^[1] 122:8 significant ^[2] 15:23 108:11 similar ^[1] 77:21 simply ^[7] 7:8 12:7 23:17 74:19 83:8 107:15,17 since ^[1] 102:23 single ^[1] 65:8 sir ^[1] 12:17 sitting ^[1] 128:13 situation ^[12] 6:25 14:5,6 18:11 57:17 73:7 86:14,22 106:2,14 132:10 137:17 situations ^[6] 23:23 30:25 72:20 75:6 114:22 136:24 slight ^[1] 82:15 slightly ^[1] 78:21 small ^[1] 39:25 solely ^[1] 39:2 Solicitor ^[1] 1:19 solution ^[1] 121:10 solve ^[1] 74:18 somebody ^[1] 30:5 somehow ^[2] 116:5 122:17 someone ^[3] 33:11 73:7 130:3 sometimes ^[2] 107:4,4 sorry ^[15] 8:19 10:4 23:11 24:9,10 29:13 51:14 72:6,11 89:9 95:10 97:23 101:3 104:5 109:14 sort ^[7] 22:9 48:17 99:1 106:21 122:23 125:22 137:16 SOTOMAYOR ^[40] 8:14,18,21 9:14 10:4 11:1,5,8,11,14,16 12:9,17,20 35:15,16 36:19 37:2,9,22 61:11,19 63:5 64:11 100:14 111:2 117:22,23 118:10,13,17,24 119:3,6,11,15 120:9,13,18 123:16 sought ^[1] 73:13 soundly ^[1] 138:3</p>	<p>sounds ^[2] 14:2 85:23 sources ^[3] 4:19 8:9 39:5 sovereign ^[1] 86:19 special ^[2] 4:6 75:10 specifically ^[1] 25:23 spies ^[1] 102:20 spot ^[2] 88:14 93:5 spy ^[3] 7:21 93:15 102:19 spying ^[1] 88:16 squared ^[1] 4:4 squirreled ^[1] 108:5 stage ^[3] 91:7 94:16 136:20 standard ^[6] 75:9 79:20,23 81:20 84:1 96:1 standing ^[3] 11:23 35:22,23 36:2,3,8 50:20 86:19 Star ^[1] 85:5 started ^[1] 94:20 state ^[131] 3:14,23 4:12 5:10 6:14 8:25 9:19 10:16,19 12:11,13,21 13:6 16:13 23:2,7 25:13 30:17,24 31:22 32:16 35:2 36:9 37:20,24 38:8,21 39:21 40:2,17 41:12,12,14 42:15 43:2,4,15,19,24 44:3,5,8,19 45:17,18 46:4 47:14,24 48:7,12,15 49:25 50:2 53:12 68:21 71:15 72:1 74:12 75:23 77:19 78:12,13 80:9,18,19 81:8 82:5 83:4 89:4 90:19,23 91:4,15 92:17 93:22 94:2,15,21,25 98:3 100:21 102:1,5,12,13,20 103:2,17,21 104:11,13,15 105:4,18,22 106:15 108:7,8 109:23 111:6,13 112:13,14,16,17 113:3 114:16,19 117:3 119:19 121:4,8 123:12,13 124:22 127:16,19 128:9,22 130:7,11 133:16 134:11,12,25 135:3,7 136:23,23,25 138:16 state's ^[1] 134:12 statement ^[1] 48:18 STATES ^[5] 1:1,16 23:21 27:22 66:1 status ^[2] 36:23 48:7 statute ^[29] 13:25 16:21,22 17:18 25:15 30:23 34:13,16 39:23 48:23,25 49:10,15 55:13 56:18 60:25 62:14 64:23 66:4 80:13 85:13 88:21 89:21 95:23 109:17 110:20 130:14 133:15 135:15 statutes ^[1] 125:11 statutory ^[9] 14:7 45:22 46:23 48:6,9 54:16 68:3 87:9 100:11 step ^[3] 81:12,15 89:10 sticking ^[1] 66:9 Still ^[19] 30:25 31:11 49:17 50:6 65:10 71:20 78:4 86:21 88:12 89:13 91:4 93:7,9 100:25 107:18 121:17 122:16 131:1 133:1 stop ^[1] 95:10 stress ^[1] 79:10 strictly ^[1] 26:15 strikes ^[1] 81:11 string ^[2] 103:7,12 strong ^[2] 48:22 111:11 stronger ^[1] 43:4</p>
---	--	---	---

Official - Subject to Final Review

<p>strongest ^[1] 111:17 strongly ^[2] 5:20 107:22 struck ^[1] 64:8 structural ^[7] 26:11,16 27:24 28:15,18 111:9,10 structure ^[1] 26:13 struggled ^[1] 69:25 struggling ^[2] 102:11 104:10 stuck ^[2] 42:13 108:11 stuff ^[1] 43:6 subject ^[7] 40:1 56:13 60:8 76:1 89:25 100:20 105:16 subjects ^[1] 4:19 submission ^[3] 9:18,22 69:8 submit ^[1] 14:5 submitted ^[2] 138:19,21 Subsection ^[11] 14:22 18:1,5 20:6,9 26:4,9,14 29:18 135:23 136:3 subsections ^[3] 17:22 18:15 25:15 substantive ^[2] 80:1 84:1 Substantively ^[1] 80:1 success ^[1] 75:22 successful ^[2] 47:7 135:1 successfully ^[1] 23:8 sue ^[2] 11:17 99:10 sues ^[1] 31:3 suffering ^[1] 61:22 suggested ^[7] 9:15 13:4 44:2 61:4 64:11 82:17 123:17 suggesting ^[4] 39:10 65:21 94:14 124:8 suggests ^[2] 21:18 38:7 suing ^[1] 11:24 suit ^[13] 7:12 10:25 11:4 40:8 43:10 51:9 52:6 64:9 86:11,12 99:15 127:7,8 suits ^[1] 99:1 summary ^[10] 59:9,11 71:1 86:17,18 87:24 88:18 122:15,15 132:19 super-secret ^[1] 116:16 support ^[3] 18:16 59:11 69:22 supportive ^[1] 137:10 suppose ^[9] 66:10 74:14 77:14 84:6 120:21,23 121:5,20 122:21 supposed ^[2] 70:15 75:1 suppress ^[14] 10:18 14:25 24:18,20 25:2 28:24 29:2 30:3,6 87:19 112:9 135:24 136:2,5 suppressed ^[4] 30:13 136:7,8,9 suppressing ^[2] 16:23 17:3 suppression ^[22] 4:6 5:6 12:7 14:6,9,15 15:1,15,18,24 16:2 24:23 25:16 28:21,23 29:6,9 30:15 48:24 55:20 135:17 136:11 SUPREME ^[2] 1:1,15 surprising ^[1] 25:10 surveil ^[1] 107:17 surveillance ^[55] 5:4 14:2,12,16 15:13 24:25 25:20,24 28:3 36:25 37:13 39:1 45:10 53:10,15 55:2,21 56:4 58:13 60:16 64:14 77:25 79:18 80:21 81:5,17 82:25 83:18 87:17,25 89:24 90:3,10 96:3 106:</p>	<p>3,9,10 109:11,18,20,25 110:8 113:18 114:1 115:4,15,18 116:12,24 117:19 124:12 125:21 127:8 135:10,18 surveilled ^[8] 11:17,24 12:3 19:11 35:18,24 36:8 37:4 surveying ^[1] 31:4 survive ^[1] 132:19 system ^[1] 22:9</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>talked ^[1] 133:12 talks ^[7] 18:17 25:18 28:4,5,24 29:8 126:9 target ^[2] 56:5 57:10 targets ^[3] 53:17 127:13 133:10 technical ^[1] 112:2 Tenet ^[6] 7:6 98:10,21 131:5 137:6 138:13 termed ^[1] 17:25 terms ^[4] 10:5 13:9 33:4 45:9 Terrazas ^[1] 126:8 terrorist ^[1] 106:13 terrorists ^[1] 127:14 testimony ^[1] 37:15 text ^[4] 4:4 58:4 94:23 110:25 textual ^[3] 26:3,15,20 themselves ^[5] 57:13 64:3,5 128:7 130:20 theory ^[1] 78:21 there's ^[27] 12:14 20:18 21:13,14 30:12 37:24 38:6 41:13 55:12 75:10 81:2 83:12 86:19 97:19 103:14,14,20 105:23 106:19 110:17 123:20,22 125:20 127:22 129:9,20 134:14 therefore ^[4] 38:24 41:6,13 88:4 they've ^[13] 11:23 12:3 35:24 36:20 71:4,5,5,10 79:1 80:10 85:24 126:18 127:16 thinking ^[4] 60:9 74:1 105:4 129:2 thinks ^[2] 105:17,21 THOMAS ^[17] 5:14 6:10,21 8:17,19,20 29:15,16 30:19 54:4,10,18 63:1,2 65:19 66:22 111:24 Thomas's ^[1] 48:5 though ^[10] 17:7 54:5 58:17 59:16 67:10 70:5,8 73:14 80:13 99:17 thoughts ^[3] 75:17 95:4 128:15 threat ^[1] 137:15 threatened ^[1] 9:16 Three ^[4] 31:13 75:17,17 109:4 threshold ^[2] 12:14 113:2 throw ^[1] 18:23 tie ^[2] 26:23 27:18 ties ^[1] 28:21 title ^[1] 28:4 titled ^[1] 17:25 today ^[2] 79:12 103:3 Today's ^[2] 3:3 104:25 together ^[3] 14:21 25:10 137:23 took ^[1] 52:13 tort ^[3] 42:22 43:12,14 Totten ^[21] 6:12 7:7,9,11,18,24 20:</p>	<p>25 43:6 74:3 98:3,14,24 102:19,25 112:25 118:23 136:13,15,17,18 137:6 Totten-like ^[1] 39:20 touch ^[1] 102:6 toward ^[1] 30:14 traditional ^[2] 67:8 127:23 transaction ^[1] 66:2 transforms ^[1] 67:11 tremendous ^[1] 104:9 trial ^[8] 7:13 23:17,18 55:7 84:14 86:1 112:7,8 tricky ^[1] 85:15 tried ^[2] 49:7 112:24 tries ^[2] 28:8 73:7 trigger ^[1] 95:23 triggered ^[3] 12:15 14:18 29:25 triggers ^[1] 52:23 true ^[17] 31:19 39:25 49:10 60:3 63:19 66:21 76:24 77:4,7 84:24 85:20,21 101:11 114:20 117:14 130:2 135:9 trump ^[1] 130:4 trying ^[5] 10:8 68:18 91:20 109:23 117:8 turn ^[2] 56:4,5 turned ^[2] 18:6 116:12 turning ^[1] 29:4 two ^[29] 6:12,13,15 12:5 17:7 26:14,21 31:12 45:5 53:7 62:14 69:8 75:21 80:8 87:12 89:10 94:1 106:19 107:10 108:3 110:17 111:16 120:23 123:1,21,22 127:22 128:14 135:23 types ^[1] 135:24 typically ^[1] 131:9</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>U.S ^[2] 65:7 96:3 ultimate ^[1] 55:3 unavailability ^[1] 62:3 unbelievable ^[1] 74:24 unconstitutional ^[1] 113:8 uncovered ^[1] 108:25 under ^[41] 9:5 10:20 12:25 15:4 20:24 21:21 25:7,7 37:5 41:14 51:10,11 54:25 55:3 56:6 57:24 62:6,12 65:12,13 75:8 78:18 80:9 81:8 96:15 97:5 103:17 106:19 110:20 113:15 118:3 119:12 121:21 122:4,7 124:13 127:19 128:15,17 132:24 134:15 underlying ^[3] 73:12 76:6 122:13 undermine ^[1] 49:4 underneath ^[1] 101:16 understand ^[13] 13:20 16:1 21:5 26:12 40:11 44:15 51:21,23 71:23,25 86:4 95:20 123:8 understanding ^[6] 43:2,19 44:8 91:17 104:25 121:3 understood ^[5] 22:2 23:14,22 38:15 133:19 undisputed ^[3] 54:24 55:5 60:22 unfair ^[1] 57:16</p>	<p>uniformly ^[1] 57:15 UNITED ^[5] 1:1,16 23:21 27:21 66:1 unlawful ^[12] 9:5,8,12 10:13 13:2 36:13,14,15 77:25 85:24 88:1 92:22 unlawfully ^[14] 10:6,20 11:17,23 12:3 25:2 31:4 35:18 37:3 38:1 90:24 91:3 92:15,22 Unless ^[3] 37:6 122:18,18 unlike ^[1] 68:22 unlikely ^[3] 88:24 90:6,12 unrealistic ^[1] 137:20 until ^[1] 75:7 unusual ^[1] 31:2 up ^[12] 23:12 38:13 45:9 48:5 66:12 87:24 98:21 99:16 108:2 126:6,19 136:10 usable ^[1] 82:5 useful ^[1] 112:20 uses ^[4] 4:11 18:1 24:21 66:8 using ^[31] 4:1 14:3 20:20 22:24 23:25 42:18 64:9,22,25 66:2 67:13 68:1,2,5,10,15 69:3,3,5,10 70:15 72:17,19,23,23,25 73:10 94:6,7 100:16 111:14 utterly ^[1] 130:23</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>vacate ^[3] 77:18 122:1 123:10 valid ^[4] 53:14 61:8 76:18 102:6 validity ^[1] 14:16 validly ^[1] 134:21 Vance ^[1] 126:8 various ^[1] 18:15 vault ^[2] 67:4 94:9 vehicle ^[2] 32:1 110:14 version ^[1] 104:15 versus ^[5] 3:8 7:6 104:25 112:25 138:13 victory ^[2] 79:7 107:6 video ^[1] 100:23 Vietnam ^[1] 83:18 view ^[36] 13:10 20:25 35:1 41:9 43:4,24 44:18 46:7,16 47:3 48:20 52:14 76:18 80:2 88:22 98:9 105:15,20,25 106:2,20,23 107:1,2,3,12,21,21 110:18 111:3,11 117:14 121:13 122:5,25 124:14 violate ^[4] 53:22 55:6 88:2 128:21 violated ^[5] 54:16 83:10 85:9 127:9 137:2 violates ^[1] 129:17 violation ^[4] 11:24 84:21 106:4 114:7 violations ^[1] 62:8 vis-à-vis ^[1] 16:16 vis-a-vis ^[1] 5:25</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>wait ^[1] 99:14 waited ^[2] 70:24 71:9 wake ^[1] 108:24 walking ^[1] 114:3</p>
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Official - Subject to Final Review

<p>wanted ^[5] 16:6 17:7 73:16 77:22 91:24</p> <p>wanting ^[1] 117:24</p> <p>wants ^[7] 17:15,16 51:24 110:13 112:6 117:11 129:5</p> <p>War ^[1] 83:18</p> <p>warrant ^[4] 15:16 77:3 88:15,17</p> <p>warranted ^[1] 77:2</p> <p>Washington ^[3] 1:11,20,22</p> <p>way ^[36] 5:23 6:5 7:23 11:6 14:16 15:6 17:17 21:6,14 24:1,21 25:10 27:3 34:11 35:24 37:7,10,14,24 39:20 45:20 46:22,24 50:9 64:22 65:21 76:8 78:14 79:9 81:20 90:17 94:24 108:12 119:7 121:2 137:5</p> <p>ways ^[5] 31:16 45:5 58:11,15,17</p> <p>weapon ^[1] 22:25</p> <p>weapons ^[1] 115:24</p> <p>Weinberger ^[1] 138:14</p> <p>welcome ^[1] 54:3</p> <p>well-established ^[1] 134:18</p> <p>whatever ^[11] 30:8,8 31:5 74:13 81:21 82:25 90:15,16 93:10 122:9 130:13</p> <p>whenever ^[2] 20:9 80:15</p> <p>whereas ^[1] 30:17</p> <p>Whereupon ^[1] 138:20</p> <p>whether ^[67] 9:1,4 12:3,24 15:2,2 25:5 26:5 28:18 31:15,19 32:9 34:5,12 35:6 36:12,23,23,24 37:25 40:8 42:4,5 45:10,16 54:15 60:14,15,17 65:12 66:16 74:10 81:16,19 82:3,4,25 83:5,8,10,21 84:23 87:23 89:17 100:15 101:1 103:3 104:24 113:3,17 114:1 115:4 116:3 118:2 122:5,6,10 123:22,25 124:10 126:7,16 127:8 134:9 135:2 138:6,9</p> <p>White ^[1] 125:4</p> <p>who's ^[3] 11:17 35:17 37:3</p> <p>whole ^[12] 17:24 56:18 68:2 71:11,11 75:11 100:7,25 108:2,22 109:18 126:22</p> <p>whom ^[3] 14:13 24:16 36:24</p> <p>widows ^[1] 65:11</p> <p>wife ^[1] 99:10</p> <p>will ^[17] 3:6 13:12 17:10,11 20:23 24:17 34:4 47:17 63:24 64:10 67:4 74:17,22 88:19 90:13 97:2 100:24</p> <p>willing ^[1] 22:22</p> <p>win ^[10] 64:24 66:18 69:18,21 70:2 78:6 94:9 107:18 111:5,21</p> <p>wiretapping ^[2] 31:4,8</p> <p>within ^[7] 3:20 93:21 105:18 115:17 117:19 118:7 130:14</p> <p>without ^[32] 11:22 18:7 20:21 38:18 40:25 41:4 43:8 46:9,9 58:11,18 60:19 65:5,9,24 68:24 69:6,7 70:9 78:12 85:6,7,8,25 88:17 101:1 104:1 106:9 123:13 128:1,2 138:4</p> <p>witness ^[3] 58:14 60:1,3</p>	<p>witness's ^[2] 59:4,23</p> <p>wonder ^[1] 108:10</p> <p>wondered ^[2] 19:4,15</p> <p>word ^[6] 22:3 30:3 65:24 69:12 81:14,14</p> <p>words ^[4] 16:21 108:5 110:21 124:24</p> <p>work ^[2] 70:7 77:5</p> <p>worked ^[1] 100:22</p> <p>working ^[1] 131:8</p> <p>world ^[2] 43:15 105:10</p> <p>worried ^[1] 115:11</p> <p>wrapped ^[2] 45:9 136:10</p> <p>writings ^[1] 9:7</p> <p>written ^[3] 98:4,8 109:2</p> <p>wrote ^[1] 10:10</p> <p>Wyatt ^[1] 104:3</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>YASSIR ^[1] 1:7</p> <p>years ^[2] 65:6 116:1</p> <p>York ^[1] 97:10</p> <p>young ^[1] 93:13</p>
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