No. 20-828

IN THE

Supreme Court of the United States

FEDERAL BUREAU OF INVESTIGATION, ET AL.,

Petitioners,

—v.—

YASSIR FAZAGA, ET AL.,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

This case challenges a domestic FBI surveillance program that, according to the FBI's own informant, targeted individuals for electronic surveillance because of their religion. The Government asserted the state secrets privilege and sought dismissal of Respondents' free exercise and religious discrimination claims on that basis. The court of appeals held that, with respect to electronic surveillance collected as part of the investigation, the Foreign Intelligence Surveillance Act provides for ex parte and in camera review of the lawfulness of the surveillance, and that procedure displaces, at least at the threshold, the rule permitting dismissal of a claim based on state secrets. The question presented is:

Whether the state secrets evidentiary privilege recognized in *Reynolds v. United States* authorizes the dismissal of claims challenging the lawfulness of electronic surveillance, particularly where Section 1806(f) of the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. 1801 *et seq.*, requires a district court to assess the lawfulness of electronic surveillance by considering sensitive evidence in camera and ex parte.

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INTRODUCTION

The Government's petition is premature. It asks this Court to decide whether Congress displaced the state secrets privilege by authorizing in camera ex parte review of sensitive evidence when it enacted FISA. But this case is still at the motion to dismiss stage. The district court may never have to apply FISA's ex parte in camera review procedures because, in the district court, the Government has now advanced a threshold objection: that Respondents have not shown they are "aggrieved parties," and therefore cannot invoke these procedures. The Government has won that argument in similar litigation, and if it prevails on it here, there will be no occasion to apply the ex parte in camera procedures Congress established in this case.

Furthermore, the court of appeals held only that, as a threshold matter, FISA's ex parte in camera judicial review procedures displace the dismissal remedy that sometimes accompanies the state secrets evidentiary privilege. It made clear that its holding did *not* authorize disclosure *to Respondents or the public*, but instead only ex parte in camera review *by the trial court*. If the district court were to order any disclosure of the assertedly secret information, the decision below permits the Government to invoke the state secrets privilege anew.

The state secrets issue may also disappear should the Government find that its secret evidence is unnecessary to answer Respondents' religious discrimination claims. Neither the courts below nor the Government have had the opportunity to assess whether the secret information is germane to those

claims because Respondents have not yet been permitted to move for summary judgment.

Even if the state secrets issue does not disappear, there is still no risk that the Government will be forced to turn over information it wishes to keep secret from the court, let alone Respondents. Respondents have repeatedly stated they will not seek discovery or even ex parte in camera review of secret evidence to prove their case, unless the Government relies on that evidence to defend itself. Thus, even if secret information might arguably be relevant, the Government will always have the option not to rely on it and therefore to withhold it entirely—even from the court, should it prefer to do so.

Thus, there is a substantial possibility this case will be resolved without use of FISA's procedures at all, and no risk that any secret information will be disclosed to Respondents without affording the Government an opportunity to assert the privilege again, with full opportunity for this Court's review.

There is also no circuit split. Every court to address the question has held that, in Section 1806(f), Congress displaced the state secrets privilege with respect to materials relating to electronic surveillance that, according to the Government, cannot be disclosed without harming national security.

As those cases confirm, the decision below is correct. Congress expressly provided for ex parte in camera review where the Government seeks to "use" secret information regarding electronic surveillance, or where any party seeks to obtain such information. Here, the Government wishes to "use" its secret evidence to dismiss Respondents' religion claims. And in their prayer for relief Respondents have sought, as

an alternative remedy, to obtain information derived from the illegal surveillance if they cannot have it expunged. On both these grounds, FISA requires ex parte in camera review to determine whether the surveillance was lawfully authorized and conducted. That procedure displaces, at least at the threshold, the dismissal remedy the Government sought by invoking state secrets.

Even if Congress did not displace the state secrets privilege by enacting FISA, the Government errs in asserting that it can obtain *dismissal*, rather than merely the exclusion of evidence, under *United States v. Reynolds*, 345 U.S. 1, 6–7 (1953). Should this Court grant review, Respondents will argue that *Reynolds* does not authorize dismissal as a remedy. Where the *Reynolds* privilege applies, it requires that "[t]he privileged information is excluded and the trial goes on without it." *General Dynamics Corp. v. United States*, 563 U.S. 478, 485 (2011).

STATEMENT OF THE CASE

A. Factual Background

This case arises from a highly publicized set of incidents in 2006 and 2007, when the FBI enlisted a paid informant, Craig Monteilh, to pose as a convert to Islam. The FBI directed Monteilh to infiltrate the Muslim community in Orange County, California, to gather information about Muslims. He did so for over a year, until his attempts to incite violence caused members of the Islamic community to report him to the FBI. They eventually won a restraining order against him. In separate federal court proceedings, the FBI revealed it had employed Monteilh as a confidential informant. Monteilh himself confirmed

this fact in court and to the press, which covered the issue extensively in national news, including on the national radio show *This American Life*.[1]

Respondents are Sheikh Yassir Fazaga, an imam at the Orange County Islamic Foundation, and Ali Uddin Malik and Yasser AbdelRahim, practicing Muslims who regularly attended services at the Islamic Center of Irvine, California. Fazaga and Malik are U.S. citizens; AbdelRahim is a lawful permanent resident. Monteilh met with and surveilled each of them. They filed a complaint in the Central District of California challenging the surveillance to which they were subjected.

Drawing from Monteilh's four sworn declarations in this case, *Fazaga v. FBI*, 884 F. Supp. 2d 1022 (C.D. Cal. 2012) (No. 8:11-cv-0031-CJC), ECF No. 66, and Respondents' direct interactions with him, the complaint paints a detailed picture of a 14-month-long FBI investigation that explicitly targeted Muslims *because of their religion*. The explicit purpose of this operation was to gather information on Muslims in Orange County—not terrorists, spies, or even ordinary criminals, but Muslims. *See, e.g.*, First Amended Complaint ("FAC") at ¶¶ 88, 89, *Fazaga*, No. 8:11-cv-0031-CJC, ECF No. 49. The FBI did not identify specific targets for Monteilh, but "repeatedly made clear that they were interested simply in Muslims" and "told him to gather as much information on as many people in the Muslim community as possible." *Id*. at ¶¶ 89, 90.

[1] *See The Convert*, THIS AMERICAN LIFE (Aug. 10, 2012), available at https://www.thisamericanlife.org/471/the-convert.

To the extent they told him to focus, he was to target Muslims who appeared more devout because they were "more suspicious." *Id.* at ¶ 110; *see also id.* at ¶¶ 89, 96, 104. They told him that "Islam is a threat to our national security." *Id.* at ¶¶ 121, 162.

The FBI agents overseeing Monteilh:

- gave him daily quotas for the number of Muslims he should get contact information from, *id.* at ¶ 131;
- told him to go to the gym with Muslims to get close to them and obtain information, *id.* at ¶ 114; and
- gave him a standing order to report on Muslims' charitable giving, travel plans, and fundraising activities, *id.* at ¶¶ 105–07, as well as any lectures, classes or any other events held at mosques, *id.* at ¶¶ 108–09, 133.

The complaint alleges that, through Monteilh, the Government gathered information on Muslims and their associates consisting of "hundreds of phone numbers and thousands of email addresses"; "background information on hundreds of individuals"; "hundreds of hours of video recordings that captured the interiors of mosques, homes, businesses, and the associations of hundreds of Muslims"; and "thousands of hours of audio recordings of conversations . . . as well as recordings of public discussion groups, classes, and lectures occurring in mosques and at other Muslim religious and cultural events." *Id.* at ¶ 137. The FBI discarded information Monteilh inadvertently gathered on non-Muslims. *Id.* at ¶ 120.

The complaint also alleges that Monteilh repeatedly recorded religious conversations to which he was *not* a party inside mosques by leaving behind a secret recording device hidden in his car keys. *Id.* at ¶ 124–126. He also planted audio-listening devices in Mr. Fazaga's office and Mr. AbdelRahim's house. *Id. at* ¶¶ 125, 129, 135, 201, 209. And he video-recorded sensitive locations, including mosques, homes, and businesses. *Id.* at ¶¶ 127–129, 202, 209.

The FBI's targeting of Muslims was consistent with the operative FBI practice at the time. Its investigative guidelines explicitly stated that religion could be a factor in determining whether to conduct surveillance. [2] And contemporaneous FBI training given by the agency treated Islam as inherently suspicious due to its alleged ties to terrorism. *Id.* at ¶¶ 38–39.

B. Statutory Framework

Congress enacted FISA in 1978 to establish comprehensive control over electronic surveillance conducted for national security purposes. A Senate Committee that investigated the Government's domestic surveillance activities uncovered massive, dragnet surveillance operations that, for decades, had surveilled innocent U.S. citizens "on the basis of their political beliefs, even when those beliefs posed no

[2] The 2008 FBI Domestic Investigations and Operations Guide stated that the FBI can consider "the role that religion may play in the membership or motivation of criminal or terrorist enterprise," and that religious behavior is relevant if practiced by a target group. *See* Fed. Bureau of Investigation, *Domestic Investigations and Operations Guide* Section 4.2(B) at 27–28 (2008), at https://tinyurl.com/rjknhcuc); *see also* FAC at ¶¶ 36–37, *Fazaga*, No. 8:11-cv-0031-CJC, ECF No. 49.

threat of violence or illegal acts on behalf of a hostile foreign power." S. SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, BOOK II: INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. REP. NO. 94-755, at 5 (1976). This included the use of secret informants to collect "vast amounts of information about the personal lives, views, and associations of American citizens." *Id.*

The Committee recommended legislation that would "make clear to the Executive branch that [Congress] will not condone . . . any theory of inherent or implied authority to violate the Constitution . . . or any other statutes," *id.* at 297, by enacting "a comprehensive legislative charter" that would "provide the exclusive legal authority for domestic security activities." *Id.* at 297. In particular, it urged the creation of civil remedies for unlawful surveillance, both to "afford effective redress to people who are injured by improper federal intelligence activity" and "to deter improper intelligence activity." *Id.* at 336. The Committee also believed it important for "courts . . . to fashion discovery procedures, including inspections of materials in chambers . . . to allow plaintiffs with substantial claims to uncover enough factual material to argue their case, while protecting the secrecy of governmental information in which there is a legitimate security interest." *Id.* at 337.

Congress responded by enacting the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. 1801 *et seq.*, to bring "electronic surveillance" for national security purposes under judicial control. FISA established substantive rules to govern electronic surveillance conducted in the name of national

security, as well as a civil remedy and litigation procedures to ensure redress when those rules are violated.

FISA sets out comprehensive procedures for how courts should handle information gathered from electronic surveillance in litigation. *See* 50 U.S.C. 1806. Most relevant here, "[w]henever the Government intends to . . . use . . . in any . . . proceeding in or before any court . . . information obtained or derived from an electronic surveillance," it must notify the person surveilled and the court of its intent. 50 U.S.C. 1806(c). If "the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security," FISA mandates that the court "*shall, notwithstanding any other law*, . . . review in camera and ex parte the application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted." *Id.* at 1806(f) (emphasis added).

Section 1806(f)'s in camera review procedures are also triggered whenever "any motion or request is made by an aggrieved person pursuant to any other statute . . . to discover, obtain, or suppress evidence or information obtained or derived from electronic surveillance." *Id.*

Section 1806(g) provides that if "the United States district court pursuant to subsection (f) determines that the surveillance was not lawfully authorized or conducted, it shall [*inter alia*] grant the motion of the aggrieved person." 50 U.S.C. 1806(g). "If the court determines that the surveillance was lawfully authorized and conducted, it shall deny the

motion of the aggrieved person except to the extent that due process requires discovery or disclosure." *Id.*

Finally, FISA provides both criminal and civil enforcement mechanisms to ensure compliance with its rules. It criminalizes the intentional collection or sharing of electronic surveillance conducted outside the authority of FISA (and certain other statutes). 50 U.S.C. 1809(a). And it establishes a civil cause of action for any "aggrieved person . . . who has been subjected to an electronic surveillance or about whom information obtained by electronic surveillance of such person has been disclosed or used in violation of section 1809." 50 U.S.C. 1810. Victims of unlawful surveillance may recover damages, attorney's fees, and costs. *Id.* at 1810(a)–(c).

C. PROCEDURAL HISTORY

1. District Court

Respondents sued the United States, the FBI (collectively "the Government"), and several individual officers (the "Individual Capacity Respondents") responsible for Monteilh's actions. Respondents broadly alleged two types of unlawful conduct: unconstitutional searches ("search claims") and unlawful discrimination on the basis of religion or burden on religious practice ("religion claims"). Respondents sought damages, declaratory relief, and expungement or disclosure of the records of unlawful surveillance, under the First and Fourth Amendments, 42 U.S.C. 1985, 50 U.S.C. 1810 (FISA), the Religious Freedom Restoration Act, the Privacy Act, and several California state law torts brought under the Federal Tort Claims Act. FAC at ¶¶ 226–260, *Fazaga*, No. 8:11-cv-0031-CJC, ECF No. 49.

The Government moved to dismiss Respondents' claims on various grounds, and, relevant here, invoked the state secrets privilege to support dismissal of the religion claims. Motion to Dismiss Am. Compl. and for Summary Judgment, at 46–52, *Fazaga*, No. 8:11-cv-0031-CJC, ECF No. 55. The Government emphasized that its assertion of the privilege was "limited" in two ways. *Id.* at 3. First, it did *not* assert the privilege with respect to much of the evidence collected by its informant, noting that it had previously disclosed that Monteilh collected "audio and video information," had previously produced some of that information in other proceedings, and "expect[ed] that the majority of the audio and video will be available in connection with further proceedings" in this case. *Id.* at 4–5. It claimed the privilege only over three categories of information: (1) evidence identifying whether anyone "was or was not the subject of an FBI counterterrorism investigation," (2) the "reasons for" and "results" of any FBI counterterrorism investigation, and (3) information "that could tend to reveal whether particular sources and methods were used in a counterterrorism investigation." *Id.* at 43.

Second, the Government did not move to dismiss the entire case based on the state secrets privilege, but only the religion claims. Pet'r App. 15a. Invoking *United States v. Reynolds*, 345 U.S. 1, 6–7 (1953), it asserted, *inter alia*, that the privileged materials would provide a "valid defense" to the religion claims, and because it could not disclose those materials, the court should rule in its favor by dismissing those claims. Pet'r App. 15a; Mot. to Dismiss, at 50–51, *Fazaga*, No. 8:11-cv-0031-CJC, ECF No. 55 (citing *Mohamed v. Jeppesen*, 614 F.3d

1070, 1083 (9th Cir. 2010)). The Government did not seek dismissal of the entire case under *Totten v. United States*, 92 U.S. 105 (1875), for cases whose very subject matter is a state secret. It did not seek to dismiss the search claims based on privilege, representing that "[a]t least at this stage of the proceedings, sufficient non-privileged evidence may be available to litigate these claims should they otherwise survive motions to dismiss on non-privilege grounds." Mot. to Dismiss, at 4, *Fazaga*, No. 8:11-cv-0031-CJC, ECF No. 55.

The district court granted the Government's motion to dismiss the religion claims on state secrets, and went further, dismissing claims the Government had *not* moved to dismiss on grounds of secrecy. Pet'r App. 16a. After examining ex parte a classified memorandum and accompanying declarations, the district court concluded that this case "involves intelligence that, if disclosed, would significantly compromise national security," *id.*, and that because the Government would require that privileged information to defend itself, "litigation of this action would certainly require or, at the very least, greatly risk disclosure of secret information, such that dismissal at this stage of the proceeding is required," *id*. at 165a–66a. The court further held that dismissal was warranted because "privileged and nonprivileged information are inextricably intertwined, such that litigating the instant case to judgment on the merits would present an unacceptable risk of disclosing state secrets." *Id*. at 175a–76a. On that basis, the district court dismissed not only the religion claims, but every other claim except for Respondents' claim under Section 1810 of FISA.

2. The Court of Appeals

The court of appeals unanimously affirmed in part, reversed in part, and remanded. Of relevance here, the court held the district court erred in dismissing the search claims the Government had *not* sought to dismiss on state secrets grounds because only the Government can assert that privilege. Pet'r App. 42a–44a. And it reversed the district court's dismissal of Respondents' religion claims because it held that FISA displaced the state secrets privilege, at least at this preliminary stage. Pet'r App. 46a–67a.

The court held that, in cases involving secret information related to electronic surveillance, Congress displaced the "dismissal remedy" that sometimes accompanies the state secrets privilege with FISA's procedures for ex parte in camera review. *Id.* at 46a–55a. As the court of appeals explained, when the Attorney General asserts that disclosure of information related to electronic surveillance would threaten national security, FISA "speaks directly to the question otherwise answered by federal common law" concerning how a court should proceed. Instead of outright dismissal under the state secrets privilege without any consideration of the merits, FISA provides for in camera ex parte review so that the court can determine if the surveillance was lawfully authorized and conducted. *Id.* at 48a (internal quotations omitted). The court noted that FISA protects the same interests as the *Reynolds* privilege, with a comprehensive structure manifesting Congressional intent to replace outright dismissal with ex parte in camera judicial review where the legality of secret electronic surveillance is at issue. *Id.* at 50a–52a.

As applied here, the court of appeals pointed to two reasons why Section 1806(f) authorizes the district court to review secret information ex parte and in camera. First, the Government sought to "use" information related to electronic surveillance when it asserted that it needed the information to defend against Respondents' allegations and sought dismissal on that basis. *Id.* at 57a–58a. Second, Respondents' Prayer for Relief had sought the expungement or, alternatively, the return of the illegally-obtained surveillance records. The court of appeals held that Respondents' alternative request constitutes a "request . . . pursuant to any other statute or rule of the United States . . . to discover, obtain, or suppress evidence or information obtained or derived from electronic surveillance under this chapter." *Id.* at 58a–59a (citing 50 U.S.C. 1806(f)).

The court further held that the district court should utilize FISA's procedures to adjudicate the merits of Respondents' claims. Section 1806(f) authorizes use of its in camera ex parte review procedures "as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted." 50 U.S.C. 1806(f). The court noted that "all of [Respondents'] legal causes of action relate to electronic surveillance, at least for the most part, and in nearly all instances entirely, and thus require a determination as to the lawfulness of the surveillance." Pet'r App. 93a. Moreover, it continued, "1806(f) provides that the district court may consider 'other materials *relating* to the surveillance'" as necessary to determine if it "was lawfully authorized and conducted." *Id.* at 94a. And it concluded that "it is far from clear" that even the claims that might encompass more than electronic

surveillance would, "as actually litigated, . . . involve more than the electronic surveillance that is otherwise the focus of the lawsuit." *Id.*

The court therefore held that the district court may be able to assess the lawfulness of all of the conduct Respondents have challenged using Section 1806(f)'s in camera ex parte procedures. But the court expressly permitted the Government to reassert the state secrets privilege if Respondents sought to apply FISA's procedures to secret information not relating to electronic surveillance, or if such surveillance "drops out of consideration" from the case for any reason. *Id.* at 95a–96a.

The court denied the Government's request for rehearing en banc. In doing so, it again made clear that its decision required only ex parte in camera review, not disclosure to Respondents of any secret evidence. In fact, the panel members noted that "in the unprecedented event that a district court *does* order disclosure, nothing in the panel opinion prevents the government from invoking the state secrets privilege's dismissal remedy as a backstop at that juncture." *Id.* at 100a n.1 (Gould and Berzon, JJ., concurring in denial of rehearing en banc) (emphasis in original).

3. District Court Proceedings on Remand

After the court of appeals' mandate issued, the district court ordered the parties to address how proceedings should go forward. Resp't Supp. App. 1a.

Respondents stated their intent to seek discovery on their search claims, which the Government had not sought to dismiss based on the *Reynolds* privilege. This discovery would include

audio and video recordings the informant had made of conversations to which he was not a party, and video recordings he had made in sensitive locations, including mosques and homes. *Id.* at 6a–8a. Respondents noted the Government had previously represented that "[t]he FBI expects that the majority of the audio and video [collected by their informant] will be available in connection with further proceedings." *Id.* at 7a (quoting Mot. to Dismiss, at 5, *Fazaga*, No. 8:11-cv-0031-CJC, ECF No. 55).

As to their religion claims, Respondents stated they would move for summary judgment without relying on any purportedly secret evidence, as they could prove their claims through publicly available information, including Monteilh's sworn statements. *Id.* at 14a.

The Government objected to further proceedings prior to resolution of any litigation in this Court, raising three principal arguments. First, it objected to Respondents' request to move for summary judgment on the religion claims, asserting that it wanted first to ask this Court to affirm the district court's authority to dismiss them outright. *Id.* at 32a–33a.

Second, the Government argued for the first time that Respondents must present non-privileged evidence that they are "aggrieved persons" within the meaning of FISA to obtain the benefit of its ex parte in camera procedures. *Id.* at 20a–21a, 35a–37a. It claimed that Respondents had not made that showing.

Third, the Government stated that it might assert the state secrets privilege as a basis to dismiss Respondents' search claims as well, although it had

not previously done so. *Compare* Pet'r App. 41a *with* Resp't Supp. App. 28a–32a.

The district court stayed all proceedings pending completion of litigation in this Court. *Fazaga*, No. 8:11-cv-0031-CJC (C.D. Cal. Sep. 29, 2020), ECF No. 168.

REASONS FOR DENYING THE PETITION

This Court should deny certiorari for four central reasons: the petition is premature; the decision below does not conflict with any other decision; there is no risk of public disclosure of secret information; and the decision below is correct.

I. CERTIORARI IS PREMATURE.

Certiorari is premature for four reasons. *First*, the Government has raised a threshold objection that, if successful, would obviate the need to resolve the Question Presented. In briefing to the district court concerning how the litigation should proceed on remand, the Government stated, "the first issue to be litigated on any remand – before any attempt to litigate any claims utilizing the FISA Section 1806(f) process – is whether [Respondents] can establish factually their 'aggrieved' status without privileged information." *See* Resp't Supp. App. 38a; *id*. at 19a–20a (arguing Respondents must first establish "their standing as 'aggrieved' persons for purposes of" Section 1806(f)). If the district court concludes that Respondents cannot invoke FISA's procedures, it will have no occasion to apply them to any secret information in this case.

The Government has prevailed on just this argument in two cases raising similar issues.

Wikimedia Found. v. Nat'l Sec. Agency/Cent. Sec. Serv., 427 F. Supp. 3d 582, 615 (D. Md. 2019), *appeal docketed* No. 20-1191 (4th Cir. Feb. 21, 2020); *Jewel v. Nat'l Sec. Agency*, No. C 08–04373, at *24 (N.D. Cal. April 25, 2019), *appeal docketed*, No. 19-16066 (9th Cir. May 21, 2019). If it also prevails here, no 1806(f) review will take place, obviating the need to address the Question Presented.

Second, the decision below addressed only the threshold question whether Congress displaced the "dismissal remedy" of the *Reynolds* privilege with the in camera ex parte review procedures enacted in FISA for review of sensitive information related to electronic surveillance. The court expressly permitted the Government to re-assert the privilege in at least three different scenarios: the Government may make a "specifically tailored" privilege assertion if the information relevant to Respondents' religion claims turns out not to overlap with information relating to electronic surveillance, Pet'r App. 95a; if the district court's in camera ex parte review establishes that no electronic surveillance of Respondents in fact occurred, *id.*; or if the district court orders disclosures to Respondents under FISA, *id.* at 100a n.1. *See also* Pet. at 13, 27. Thus, the decision below preserves the Government's ability to re-assert the state secrets privilege under several circumstances. Without further litigation, the extent to which the privilege may ultimately apply remains uncertain.

Third, it remains unclear what the scope of the Government's privilege assertions will be, as it has stated on remand that it will likely assert the state secrets privilege to dismiss the search claims as well, despite having previously stated that those claims could likely go forward. *Compare* Pet'r App. 41a; Mot.

to Dismiss, at 5, *Fazaga*, No. 8:11-cv-0031-CJC, ECF No. 55 *with* Resp't Supp. App. 28a–33a. Awaiting further proceedings in district court will therefore clarify the full scope of the privilege the Government intends to assert.

Fourth, it is too early to tell whether secret information will in fact be necessary—or even relevant—to litigate Respondents' religion claims. Respondents have repeatedly stated that they will prove a *prima facie* case of religious discrimination based entirely on publicly available evidence, including Monteilh's admissions. *See, e.g.*, Resp't Supp. App. 13a–16a.[3] They need not prove they were the "subjects" of the FBI's investigation to make a *prima facie* case on the religion claims in light of their evidence that the FBI instructed Monteilh to surveil people, including them, because of their religion. *Emp't Div. v. Smith*, 494 U.S. 872, 886 n.3 (1990) ("Just as we subject to the most exacting scrutiny laws that make classifications based on race, or on the content of speech, so too we strictly scrutinize governmental classifications based on religion.") (citations omitted). It would be premature for this Court to intervene before Respondents have even filed their motion for summary judgment. Without seeing that motion, the Government has no ability to accurately assess whether it needs to rely on secret information to respond.

In short, too many critical questions are unresolved to warrant this Court's review. It remains

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[3] *See also* Pls.' Br. at 37–41, *Fazaga v. FBI*, 965 F.3d 1015 (9th Cir. 2020) (No. 12-56867, No. 12-56874, No. 13-55017), ECF No. 32-2; Pls.' Reply Br. at 13, *Fazaga*, 965 F.3d 1015 (9th Cir. 2020) (No. 12-56867, No. 12-56874, No. 13-55017), ECF No. 85-2.

to be seen whether the district court will permit Respondents to invoke FISA's procedures at all; whether, once Respondents seek summary judgment, the Government will even need its privileged information to respond; whether the Government will reassert the privilege, as the decision below expressly permits; and whether the Government will expand its invocation of the privilege to cover Respondents' search claims. For all these reasons, the Court should allow the case to proceed on remand. The Government can seek review of the Question Presented if and when it actually becomes necessary to decide, and on a more complete record. *See* 50 U.S.C. 1806(h) (defining certain orders under Section 1806 as final for purposes of appellate review); *U.S. v. Daoud*, 755 F.3d 479, 481 (7th Cir. 2014) (exercising appellate authority under Section 1806(h)).

II. THERE IS NO CONFLICT WITH THIS COURT'S PRECEDENT OR ANY OTHER DECISION.

Certiorari should also be denied because the decision below creates no conflict with this Court's precedent or with any other decision.

The Government errs in contending the decision below conflicts with *Reynolds*, 345 U.S. at 6–7. Pet. 14–15. *Reynolds* made clear that the state secrets privilege is a common-law privilege "in the law of evidence." 345 U.S. at 6–7. "*Reynolds* was about the admission of evidence. It decided a purely evidentiary dispute by applying evidentiary rules . . . ." *General Dynamics Corp. v. United States*, 563 U.S. 478, 485 (2011). Congress has authority to displace federal common law by statute, as it did in Section 1806(f). *See, e.g.*, *Usery v. Turner Elkhorn Mining Co.*, 428

U.S. 1, 31 (1976); Fed. R. Evid. 501. *Reynolds* did not address, much less resolve, the extent to which Congress displaced the dismissal remedy that sometimes follows from assertion of the privilege when it enacted Section 1806(f) two decades after *Reynolds*.

The Government conflates the evidentiary rule recognized in *Reynolds* with a distinct strand of state secrets doctrine that recognizes a justiciability bar requiring dismissal of lawsuits "where the very subject matter of the action … [i]s a matter of state secret," *Tenet v. Doe*, 544 U.S. 1, 9 (2005) (discussing *Totten*) (internal citations omitted). This Court has described that bar as arising from the federal courts' "common-law authority to fashion contractual remedies in Government-contracting disputes" involving certain subjects, including but not limited to "alleged contracts to spy." *General Dynamics*, 563 U.S. 485–86. Where the *Totten* bar applies, it requires the dismissal of the whole lawsuit. But the Government did *not* invoke *Totten* here.[4]

Nor does the decision below conflict with the decision of any other court. The only other courts to consider the question presented have agreed that FISA preempts the state secrets privilege in national security cases involving electronic surveillance against aggrieved persons. *Jewel v. Nat'l Sec. Agency*, 965 F. Supp. 2d 1090, 1105–06 (N.D. Cal. 2013); *In re*

[4] Should this Court grant review, Respondents will argue that *Reynolds* does not authorize the dismissal remedy because, where the *Reynolds* privilege applies, it requires that "[t]he privileged information is excluded and the trial goes on without it." *General Dynamics*, 563 U.S. at 485.

NSA Telecomms. Records Litig. (In re NSA), 564 F. Supp. 2d 1109, 1117–24 (N.D. Cal. 2008). The issue is also presented in *Wikimedia Foundation v. Nat'l Sec. Agency*, No. 20-1191 (4th Cir. Feb. 21, 2020), a pending appeal in the Fourth Circuit.[5]

Because the decision below conflicts with no holding of this Court or any other, certiorari is unwarranted.

III. THE DECISION BELOW WILL NOT LEAD TO PUBLIC DISCLOSURE OF SECRET INFORMATION.

Denying review now would preserve the Government's opportunity for review at a later point if necessary, while also posing no risk of disclosure of secret information to Respondents or the public in the meantime. Even assuming the Government chooses to submit secret information to the district court pursuant to FISA rather than simply foregoing its use, doing so would not result in disclosure to Respondents or the public. The decision below expressly permits the Government to reassert the state secrets privilege in the unlikely event that the district court orders any such disclosure.

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[5] While the Government claims the decision below has already resulted in litigants seeking to circumvent the state secrets privilege, Pet. at 30–31, it cites only *Jewel v. National Security Agency*, No. 19-16066 (9th Cir.) (filed Oct. 7, 2019), a case that pre-dates the decision below. Moreover, the pending appeal in *Jewel* concerns in part whether the district court appropriately decided the threshold question whether the plaintiffs are "aggrieved persons" who may avail themselves of Section 1806(f)—the same argument the Government intends to raise on remand here.

The court of appeals made clear that Respondents should not expect to see any secret evidence. Pet'r App. 39a. Although Section 1806(f) in theory permits disclosure of FISA materials to a litigant, pursuant to a protective order, where "necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted," no plaintiff or defendant has *ever* obtained such disclosure.[6] And as noted above, in the unlikely event that the district court were to order disclosure to Respondents, the Government may reassert the state secrets privilege at that time. Pet'r App. 100a n.1.

Thus, the only possible risk of "disclosure" now concerns information provided *to the federal courts ex parte and in camera*. But there is no reason to believe that federal courts cannot consider such information securely. Congress has expressly provided for in camera ex parte review under FISA, and courts routinely conduct it. *See, e.g.*, *United States v. Squillacote*, 221 F.3d 542, 554 (4th Cir. 2000) (concerning East German and Russian espionage); *United States v. Abu-Jihaad*, 630 F.3d 102, 129 (2d Cir. 2010) (concerning military deployment information abroad). Courts use analogous procedures in other sensitive contexts, including in criminal cases pursuant to the Classified Information Procedures Act, *see* 18 U.S.C. App. 3 § 1 *et seq.*, *see, e.g.*, *In re*

[6] Courts have recognized that even in the criminal context, the "due process exceptions of §§ 1806(g) and 1825(h) limit permissible discovery to that which is constitutionally mandated, such as the obligations articulated in *Brady v. Maryland*, 373 U.S. 83 (1963)." *United States v. Aziz*, 228 F. Supp. 3d 363, 370 (M.D. Pa. 2017); *see United States v. Amawi*, 531 F. Supp. 2d 832, 837 (N.D. Ohio 2008) (recognizing same).

Terrorist Bombings of U.S. Embassies in E. Africa, 552 F.3d 93, 115–130 (2d Cir. 2008); *United States v. Lee*, 2000 U.S. App. LEXIS 3082, at *5–6 (10th Cir. Feb. 29, 2000) (utilizing CIPA procedures to protect nuclear weapons codes, the disclosure of which "represent[ed] the gravest possible security risk to the United States"); and civil habeas proceedings concerning alleged enemy combatants, *see, e.g.*, *Parhat v. Gates*, 532 F.3d 834, 837 n.1 (D.C. Cir. 2008). Even before FISA's passage, courts used FISA-like procedures to adjudicate civil litigation involving secret military records, *see, e.g.*, *Halpern v. United States*, 258 F.2d 36 (2d Cir. 1958), and sensitive information about electronic surveillance, *see, e.g.*, *Jabara v. Webster*, 691 F.2d 272 (6th Cir. 1982). The Government's unfounded concerns about in camera review of secret information ignore both Congress's judgment and the federal courts' collective experience.

The risk of providing the courts below with sensitive information utilizing FISA's ex parte in camera review procedures must also be assessed in light of the information the Government has already submitted to several courts in this case. It made ex parte in camera submissions to the courts below to support its privilege assertion and, presumably, to the FISA court to obtain the orders that authorized at least some of the electronic surveillance at issue. *See* Pet'r App. 165a (district court); Order, *Fazaga v. FBI*, 965 F.3d 1015 (9th Cir. 2020) (No. 12-56867, No. 12-56874, No. 13-55017), ECF No. 104. Moreover, *Reynolds* itself requires exacting judicial review of the privilege assertion, including of potentially secret information, to satisfy the "skeptical" and "critical" review the privilege requires. *Reynolds*, 345 U.S. at 10. *See Al-Haramain Islamic Found., Inc. v. Bush*, 507

F.3d 1190, 1203 (9th Cir. 2007) (noting judicial "obligation to review the [secret] documents with a very careful, indeed a skeptical, eye, and not to accept at face value the government's claim or justification of privilege"); *Ellsberg v. Mitchell*, 709 F.2d 51, 58 (D.C. Cir. 1983) ("it is essential that the courts continue critically to examine" assertions of the privilege). There is little if any additional risk from utilizing FISA's in camera ex parte procedures, given the submissions that have already occurred in this case about a 15-year-old surveillance operation.

Finally, whatever rule this Court may eventually establish in other FISA cases, there is absolutely no risk of disclosure against the Government's wishes in this case. Respondents have stated they will not seek even ex parte in camera review of secret evidence to prove their affirmative case. Resp't Supp. App. 14a. It is the Government, not Respondents, who seek to use privileged information here. The Government can always forgo such use if it believes it too risky even to submit the privileged information to the court for in camera ex parte review. And if Respondents win on the merits, their prayer for relief gives the Government the option to expunge rather than disclose the records at issue. Thus, because the secret information is needed, if at all, only for the Government's defense, the Government retains complete control over whether it will rely on privileged information in this case.[7]

[7] In that respect, Respondents' position comports with the traditional understanding of how evidentiary privileges function. If the Government prefers not to share its privileged information even with the Court, it remains entirely free to do so, and the case will go on without it.

IV. THE DECISION BELOW IS CORRECT.

The court of appeals correctly held that Congress displaced the dismissal remedy of the state secrets privilege with respect to electronic surveillance covered by FISA. FISA's text and structure unambiguously require that result. To escape FISA's plain language, the Government proposes various limitations that are not only unsupported by the statutory text, but actually contravene it. And even if Congress had to provide a "clear statement," rather than merely "speak directly," to displace the privilege, FISA's unambiguous language would satisfy the higher standard.

A. FISA Establishes Mandatory Procedures for Courts to Utilize When Litigation Involves Secret Information Relating to Electronic Surveillance.

Through FISA, Congress established procedures for the district court to utilize when litigation involves secret information relating to electronic surveillance. FISA requires a court to use Section 1806(f)'s procedures in three situations: (1) when the government intends "to enter into evidence or otherwise use or disclose" electronic surveillance information pursuant to sections 1806(c) and (d); (2) when a person against whom evidence was "obtained or derived" from electronic surveillance moves "to suppress the evidence" pursuant to section 1806(e); or (3) "whenever any motion or request is made by an aggrieved person pursuant to any other statute or rule of the United States" to "discover or obtain . . . materials relating to" or "information obtained or

derived from" electronic surveillance "in any trial, hearing, or other proceeding."

If any one of these conditions is satisfied, and the Government asserts that "disclosure or an adversary hearing would harm the national security," Section 1806(f) requires that the court "shall . . . review in camera and ex parte the application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted." The court of appeals correctly determined that both the first and the third conditions apply here, requiring the use of Section 1806(f)'s procedures rather than the *Reynolds* privilege's dismissal remedy.

The Government's assertion of the *Reynolds* privilege to seek dismissal of Respondents' religion claims constitutes the "use" of secret surveillance information to defend itself against those claims. Pet'r App. 57a–58a. The Government objects that it seeks only to protect the confidentiality of information, not to "use" it, Pet. at 19, but that is inaccurate. The Government has argued that the existence of the privileged information requires that the district court dismiss Respondents' religion claims. It seeks not merely to *exclude* evidence, but to win *dismissal* of the religion claims because, *inter alia*, it asserts the need to rely on secret information in its defense. This constitutes a "use" of the privileged information.[8]

[8] In contrast, Respondents have *not* sought to use the secret information to win this case. They have not sought it in discovery and have disclaimed any intent to introduce it in the first instance. Resp't Supp. App. 9a–10a, 14a–15a. *See also supra* n.3.

The ordinary meaning of "use" is broad, and includes "to put into action or service," or "to carry out a purpose or actions by means of." *Use*, Merriam-Webster (2021), https://tinyurl.com/4d94ywbu. By relying on secret information to support its motion to dismiss, the Government "uses" that information. It "puts [it] into service" in order to "carry out" the Government's "purpose" of winning dismissal.

That Section 1806(c) adds the word "otherwise" before "use" further demonstrates that Congress intended "use" to be interpreted capaciously. "Otherwise" operates as a catch-all, enlarging the actions to which "use" refers. *Otherwise*, Merriam-Webster (2021), https://tinyurl.com/6epn2c2 (defining "other-wise" as including "a different way or manner," "in different circumstances," and "in other respects").

Accordingly, the court of appeals correctly determined that where the Government seeks to *dismiss* claims it "use[s]" the secret information, thereby triggering FISA's procedures. Pet'r App. 57a–58a.

The Government argues that FISA's ex parte in camera review procedures were intended to apply only to suppression motions or where the Government itself seeks to introduce secret information as evidence. Pet. at 17–18, 20–21, 23–25. But those limitations are found nowhere in the text, and contravene its plain meaning. FISA's review procedures apply not only when the Government wants to "enter into evidence" secret information, but also whenever it wants to "otherwise use" it "against an aggrieved person" "in any trial, hearing, or other proceeding in or before any court, department, officer,

agency, regulatory body, or other authority." 50 U.S.C. 1806(c); *see id.* 1806(f); H.R. Rep. No. 95-1720, at 32 (1978) (Conf. Rep.) (Section 1806(f) to be used in "both criminal and civil cases").

The court of appeals also correctly concluded that this case satisfies an independent requirement for triggering Section 1806(f), because Respondents' prayer for relief seeking "destr[uction] or return [of] any information gathered through the unlawful surveillance program" constitutes a "request" under Section 1806(f) to "obtain" electronic surveillance information. Pet'r App. 58a.

The Government responds by proposing yet another limitation on Section 1806(f) found nowhere in its text. It contends that the statute's reference to "any motion or request . . . by an aggrieved person" applies only to "procedural motions." Pet. at 21. But the text contains no such limitation. Similarly, under Section 1806(g), "[i]f the . . . court pursuant to subsection (f) determines that the surveillance was not lawfully authorized or conducted, it shall . . . suppress the evidence which was unlawfully obtained or derived from electronic surveillance of the aggrieved person or *otherwise grant the motion of the aggrieved person*." (Emphasis added). That broad language—"otherwise grant the motion"—confirms that the phrase "any motion" in neighboring 1806(f) applies to any motion that requests disclosure of "information obtained or derived from electronic surveillance," including a motion for permanent injunctive relief that Respondents could seek if they prevailed, regardless of whether such a motion could be characterized as substantive rather than procedural.

The Government also maintains that Section 1806(f) procedures can be used to determine whether surveillance was lawful only for purposes of *admissibility*, and not to decide the *merits* of a claim challenging illegal surveillance, even if brought under Section 1810. Pet. at 21–22. But again, the text contains no such limitation. It broadly requires courts to determine "whether the surveillance of the aggrieved person *was lawfully authorized and conducted*." 50 U.S.C. 1806(f) (emphasis added). Such determinations may go to admissibility, but they may also go to the merits. The statute nowhere restricts the use of its procedures to the former.

The Government's counter-textual reading of 1806(f) would also effectively nullify Section 1810. That provision permits an aggrieved person to sue any individual who violates FISA's electronic surveillance provisions for compensatory and punitive damages. Virtually every Section 1810 claim will implicate sensitive information about the Government's surveillance. As the decision below recognized,

> It would make no sense for Congress to pass a comprehensive law concerning foreign intelligence surveillance, expressly enable aggrieved persons to sue for damages when that surveillance is unauthorized, *see id.* § 1810, and provide procedures deemed adequate for the review of national security-related evidence, *see id.* § 1806(f), but not intend for those very procedures to be used when an aggrieved person sues for damages under FISA's civil enforcement mechanism.

Pet'r App. 61a. And, although the Government has not (yet) moved to dismiss Respondents' Section 1810 claim under *Reynolds*, on its theory it could dismiss this and virtually every other Section 1810 lawsuit by invoking state secrets.

B. Section 1806(f) Displaces the Dismissal Remedy of the State Secrets Privilege.

The court of appeals also correctly concluded that the procedures Congress established for invoking Section 1806(f) displace the dismissal remedy of the state secrets privilege.

Congress abrogates a common-law doctrine, such as the judicially created state secrets privilege, if it "'speak[s] directly' to the question addressed by the common law." *United States v. Texas*, 507 U.S. 529, 534 (1993). Congress has authority to regulate surveillance affecting U.S. persons undertaken in the name of national security, and that authority necessarily includes the lesser power to set procedural rules in civil litigation challenging such surveillance. *See also* 50 U.S.C. 1804, 1881(a)–(c) (requiring disclosure of FISA information to courts in other proceedings).

As explained above, when it enacted FISA's unambiguous text, Congress spoke clearly and directly enough to displace the privilege's dismissal remedy in cases involving sensitive information relating to electronic surveillance. Section 1806(f) mandates use of its procedures "[w]henever" a court is notified pursuant to Section 1806(c), or "whenever *any* motion or request is made . . . pursuant to *any* statute or rule of the United States" to discover or obtain such information. 50 U.S.C. 1806(f) (emphases added).

Those provisions clearly govern this case. Moreover, as the decision below observed, the procedures in Section 1806(f) are "triggered by a process—the filing of an affidavit under oath by the Attorney General—nearly identical to the process that triggers application of the state secrets privilege, a formal assertion by the head of the relevant department." Pet'r App. 51a. Rather than allowing the executive branch to exclude evidence and obtain dismissal at the threshold, the statute directs that the court "shall, *notwithstanding any other law*," utilize FISA's in camera ex parte review procedures "to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted." 50 U.S.C. 1806(f) (emphasis added). Thus, "notwithstanding [the] law" of state secrets, Congress specified an alternative procedure to provide redress for unlawful electronic surveillance. Because Section 1806(f) speaks directly to the circumstances in which the dismissal remedy of the state secrets privilege might otherwise apply, and because it explicitly controls "notwithstanding any other law," it displaces the privilege.

The Government contends that a "much clearer statement" should be required to displace the dismissal remedy, because, in its view, the state secrets privilege is "constitutionally based." Pet. at 29. But this argument conflates the *Reynolds* privilege, which is a common-law rule of evidence over which Congress undoubtedly has authority, with the *Totten* bar, which the Government has *not* invoked. *See, e.g.*, Pet. at 2, 28; Pet'r App. 15a, 42a–45a, 47a n.25. As this Court explained in *General Dynamics*, while the justiciability bar in *Totten* forecloses all litigation "where the very subject matter of the action … [is] a matter of state secret," *Reynolds* is only "about the

admission of evidence," and "decided a purely evidentiary dispute by applying evidentiary rules." *General Dynamics*, 563 U.S. at 485.

In any event, for the reasons explained above, FISA's text and structure speak clearly enough to satisfy any applicable standard.

C. The Individual Capacity Respondents' Seventh Amendment and Due Process Concerns are Premature and Lack Merit.

The Individual Capacity Respondents have not petitioned for certiorari, but attempt to raise Seventh Amendment and Due Process arguments in support of the Government's petition. They argue that these concerns are relevant, notwithstanding their absence from the Question Presented, because they should guide the purely statutory question raised here. That is wrong for several reasons.

First, the constitutional concerns they raise are not relevant to the question of statutory interpretation presented. They do not argue that the court of appeals' interpretation renders Section 1806(f) *facially* unconstitutional. They object only to its possible application in this case. But such concerns are properly addressed through "as applied" challenges, and do not support interpreting the statute against its clear text.

The prematurity objection to the Individual Capacity Respondents' arguments has particular force here, where nothing in the decision below forecloses a jury trial on whatever portions of the claims must be tried to a jury under the Seventh Amendment. The court of appeals' ruling requires only that the district court use FISA's procedures to address the

information related to electronic surveillance as to which the Government asserts the state secrets privilege. It does not determine how the trial court might, at a later stage, present factual issues to a jury. The Individual Capacity Respondents cite no case suggesting FISA's procedures could not be tailored to satisfy the Seventh Amendment. The Seventh Amendment permits district courts to grant summary judgment, *Fidelity & Deposit Co. of Maryland v. United States*, 187 U.S. 315, 319–21 (1902), and to direct verdicts, *Galloway v. United States*, 319 U.S. 372, 388–93 (1943). No court has held that the valid assertion of the state secrets privilege violates a *plaintiff's* Seventh Amendment right, even though it leads to the exclusion of evidence and, sometimes, the dismissal of claims that would otherwise go to a jury. *See, e.g.*, *Reynolds*, 345 U.S. at 10; *Jeppesen*, 614 F.3d at 1076.

If and when this case nears trial, the Individual Capacity Respondents will be free to raise a Seventh Amendment objection if they object to the district court's plan for conducting the trial. Pet'r App. 65a.

Second, FISA's in camera ex parte review procedures have repeatedly been upheld against constitutional challenge in criminal cases. Courts routinely reject due process challenges to the use of Section 1806(f) procedures to adjudicate the legality of electronic surveillance. *See, e.g.*, *Abu-Jihaad*, 630 F.3d at 129 (rejecting due process challenge to *in camera* and *ex parte* review of legality of electronic surveillance); *United States v. Damrah*, 412 F.3d 618, 624 (6th Cir. 2005) (use of Section 1806 procedures without adversary process to review "the legality of the FISA surveillance" does not violate due process).

Accordingly, to the extent the application of FISA might raise constitutional concerns in a particular case, those concerns are appropriately addressed through as-applied challenges to the trial of specific claims, based on the particular evidence and procedures at issue, and upon a complete record. The speculative character of the Individual Defendants' arguments only underscores that the Government has sought this Court's intervention prematurely.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be denied.

Respectfully Submitted,

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Date: April 21, 2021

APPENDIX

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

YASSIR FAZAGA, et al., *Plaintiffs*,

v.

FEDERAL BUREAU OF INVESTIGATION et al., *Defendants*.

CASE NO.: 8:11-cv-00301-CJC-VBK

JOINT STATUS REPORT

Pursuant to this Court's order issued at the status conference held on August 18, 2020, the Parties submit the following joint status report describing their proposals for how to proceed.

I. PLAINTIFFS' STATEMENT

The Ninth Circuit's amended opinion and order affirmed the dismissal of four of Plaintiffs' eleven claims, remanded the other seven claims for further proceedings, and denied Defendants' petition for rehearing *en banc*. *See Fazaga v. Fed. Bureau of Investigation*, 965 F.3d 1015 (9th Cir. 2020). The Defendants have represented that they have not decided whether or not to file a petition for writ of *certiorari* to the Supreme Court.

Because significant portions of this case would be unaffected by any proceedings in the Supreme Court, and because the delay during the pendency of those proceedings could be substantial, Plaintiffs propose that some aspects of this litigation continue

while Defendants decide whether to seek *certiorari*, and if they do so, during the time the parties will be briefing the petition for *certiorari* before the Supreme Court.[1]

Further proceedings should include, at a minimum, discovery for information over which the Government has *not* asserted the state secrets privilege. In particular, the Ninth Circuit's decision reinstates Plaintiffs' claims arising from two categories of information over which the Government has not asserted the privilege: the informant Craig Monteilh's recordings of conversations to which he was not a party, and his video recordings of certain private spaces. *See Fazaga*, 965 F.3d at 1032, 1034–38, 1053–55 (describing three categories of information, one of which is "recordings made by Monteilh of conversations to which he was not a party" and holding that Plaintiffs have stated claim against the Government as to those recordings); *id*. at 1038, 1035 n.16 (describing allegation that agents "instructed Monteilh to use a video camera hidden in a shirt button to record the interior of OCIF" as among allegations stating a claim under Fourth Amendment). The Government has not asserted state secrets over these categories of information, and there is no other remaining basis for dismissing the claims arising from them.

Defendants propose staying litigation on these and other issues while the process for *certiorari* goes forward, but that will involve substantial additional delay. The deadline to file the petition for *certiorari* is

[1] Nothing in this motion discusses how Plaintiffs may wish to proceed after any petition for *certiorari* is either granted or denied.

December 17, 2020. *See infra* at 17. Given the effect of the holidays on Plaintiffs' response time, the Supreme Court would likely decide the petition no sooner than the spring of 2021. If the Court grants the petition, argument would presumably be set no earlier than October of 2021, meaning a decision would be unlikely before December of 2021, and could come as late as June 2022.

Therefore, in order to efficiently use what could easily be more than six months before anyone knows whether or not the Supreme Court will grant *certiorari*, and to prevent further suspension in an already long-delayed case, Plaintiffs request the Court allow the parties to brief the remaining pleading disputes, begin discovery of information not covered by the Government's existing state secrets assertion, and allow further motion practice on those claims which the Government did move to dismiss under the *Reynolds* state secrets privilege.

To be clear, Plaintiffs do *not* propose that the Court consider any evidence over which the Government has asserted that privilege, even through the FISA process that governs under the Ninth Circuit's decision.

A. Status of Plaintiffs' claims

Plaintiffs pled eleven claims. They can be broadly divided between those alleging unlawful religious discrimination, those alleging unlawful search and seizure, and the hybrid claims under the Federal Tort Claims Act (FTCA). The Government sought dismissal under the *Reynolds* state secrets privilege of the discrimination claims but not the search claims. Under the Ninth Circuit's decision,

seven of Plaintiffs ' original eleven claims survive, as follows:

Claim	Harm	Defendants	Status	Panel Opinion Result
1st COA (1st – A Establishment; *Bivens*)	Religious Discrimination	All individual capacity Defendants.	Survives in part.	Assess Bivens on remand under *Ziglar v. Abassi*; consider qualified immunity.
1st COA (1st A – Establishment; Injunctive)	Religious Discrimination	All individual capacity Defendants.	Survives.	*Reynolds* privilege displaced by FISA, 50 U.S.C. § 1806(f); expungement remedy available.
2nd COA (§1985 – Establishment)	Religious Discrimination	All individual capacity Defendants.	Dismissed.	Held QI re: intra-corporate conspiracy rule applies against Agent Defendants.
3rd COA (1st A –Free Exercise; *Bivens*)	Religious Discrimination	All individual capacity Defendants.	Survives in part.	Assess *Bivens* on remand under *Ziglar v. Abassi*; consider qualified immunity.
3rd COA (1st A –Free Exercise)	Religious Discrimination	All official capacity Defendants.	Survives.	*Reynolds* privilege displaced by FISA, 50 U.S.C. § 1806(f); expungement remedy available.

4th COA (§ 1985 – Establishment)	Religious Discrimination	All individual capacity Defendants.	Dismissed.	Held QI re: intra-corporate conspiracy rule applies against Agent Defendants.
5th COA; RFRA	Religious Discrimination	All Defendants.	Survives in part.	Dismissed on QI as to Agent Defendants; Survives as to Government Defendants
6th COA: EP (*Bivens*)	Religious Discrimination	All individual capacity Defendants.	Survives in part.	Assess *Bivens* on remand under *Ziglar v. Abassi*; consider qualified immunity.
6th COA: EP (Injunctive)	Religious Discrimination	All official capacity Defendants.	Survives.	*Reynolds* privilege displaced by FISA, 50 U.S.C. § 1806(f); expungement remedy available.
7th COA: § 1985 (EP)	Religious Discrimination	All individual capacity Defendants.	Dismissed.	Held QI re: intra-corporate conspiracy rule applies against Agent Defendants.
8th COA: Privacy Act	Religious Discrimination	FBI	Dismissed.	Dismissed.
9th COA: 4th A (*Bivens*)	Unlawful Search	All individual capacity Defendants.	Survives in part.	Dismissed on QI and *Iqbal* grounds, except against Allen & Armstrong as to potions of Fazaga's and AbdelRahim's claims.

9th COA: 4th A (Inj.)	Unlawful Search	All official capacity Defendants.	Survives.	*Reynolds* privilege displaced by FISA, 50 U.S.C. § 1806(f); expungement remedy available.
10th COA: FISA	Unlawful Search	As Filed – All Defendants	Survives in Part.	Dismissed on QI and Iqbal grouns, and sovereign immunity grounds, except against Allen & Armstrong as to portions of Fazaga's and AbdelRahim's claims.
11th COA: FTCA	Unlawful Search and Religious Discrimination	United States	Survives.	Remanded for application of discretionary function exception after merits determination.

B. Plaintiffs' Proposal for How to Proceed

Plaintiffs request the Court allow certain limited litigation to continue during the pendency of any Supreme Court briefing on *certiorari,* as follows:

1. *Search Claims*

The Court should permit the parties to proceed with some litigation on the search claims (the Ninth, Tenth, and part of the Eleventh Cause of Action). Any petition for writ of *certiorari* is likely to focus on the Ninth Circuit's holding that FISA preempts the

Reynolds state secrets privilege. *See Fazaga,* 965 F.3d 1015, 1073 (9th Cir. 2020) (Bumatay, J., dissenting). Significant aspects of the surviving unlawful search claims will not be affected by resolution of that question. The Government did not assert the *Reynolds* state secrets privilege as to the search claims, and has never argued-including to the Ninth Circuit- that those claims should be dismissed. *Id.* at 1041 ("[T]he Government Defendants requested dismissal of Plaintiffs' religion claims in toto-but not the Fourth Amendment and FISA claims- at the pleading stage"). On the contrary, the Government stated "[t]he FBI expects that the majority of the audio and video [collected by their informant Craig Monteilh] will be available in connection with further proceedings." *See* Dkt. 55 at 22.[2]

That audio and video will bear on at least two aspects of the Fourth Amendment claims that will go forward against the Government (and possibly also against some Individual Defendants) regardless of what happens at the Supreme Court: *first*, Monteilh's audio and visual recordings of conversations to which he was not a party, including, but not limited to, audio recordings of prayer hall conversations. *Fazaga*, 965 F.3d at 1034–38. *See* Dkt. 66 at 14, ¶ 30; *id.* at 26, ¶ 65; *id.* at 45, ¶ 17; *id.* at 51, ¶ 17 (declarations of Craig Monteilh describing leaving audio recording devices in

[2] Although the Government asserts that Supreme Court review could result in this Court's prior order "being affirmed," *see infra* at 20, the Government did not defend this Court's decision to dismiss the search claims under the state secrets privilege before the Ninth Circuit. *See* Reply Br. of Pls.-Appellants, at 42–43, *Fed. Bureau of Investigation*, No. 12-56867 (9th Cir. July 7, 2015), ECF 73.

prayer halls)[3]; *id.* at 26, ¶ 66 (leaving audio recording device in mosque offices); *id.* at 26, ¶ 65 (leaving audio recording devices in restaurants and cafes); and *second*, Monteilh's *video* recording of certain sensitive locations, including the interiors of mosques and houses. *See id.* at 8, ¶ 11; *id.* at 13, ¶ 23; *id.* at 37, ¶¶ 7–8 (the internal layout of mosques and homes); *id.* at 15–16, ¶ 33; *id.* at 37, ¶ 5 (speeches and sermons at mosques and fundraising events); *id.* at 15, ¶ 32; *id.* at 39, ¶ 16 (mosque fundraising booths and events).[4]

Because claims arising from these categories of evidence are no longer subject to any pleading challenge or dismissal based on the Government's state secrets assertion, discovery on them should proceed.

a. The Government's Objections

The Government objects to proceeding on the search claims because *other* information at issue—concerning "planted devices" that Monteilh learned about through Defendants Allen and Armstrong, *see Fazaga*, 965 F.3d at 1038—could implicate their state secrets assertion. *See infra* at 25. But even if this is true, Plaintiffs have stated they will not proceed as to

[3] In support of their Oppositions to the various Defendants' Motions to Dismiss, Plaintiffs filed four declarations of Craig Monteilh, one supporting Plaintiffs' general allegations in the Complaint, and three detailing the Government's targeting of each named Plaintiff. *See* Dkt. 66. As these declarations were joined together in one filing, Plaintiffs refer to them here by their ECF page number and the relevant paragraph number contained therein.

[4] The Ninth Circuit dismissed claims against the Individual Defendants as to recordings inside mosques, but allowed all of them to proceed against the Government. *Fazaga*, 965 F.3d at 1053-55.

any portion of their claims that implicates information covered by the Government's privilege assertion before Supreme Court *certiorari* litigation is resolved. As both sides agree that *some* portions of the search claim are not governed by the existing state secrets assertion, there is no reason to stay discovery and subsequent litigation on those portions.[5]

The Government raises an independent argument against allowing Plaintiffs to proceed with discovery, asserting that no discovery should occur until "plaintiffs can establish as a factual matter, with non-privileged evidence, their standing as 'aggrieved' persons, . . ." But Plaintiffs' proposal renders this added procedural hurdle irrelevant. While the Government decides whether to seek *certiorari* review of the Ninth Circuit's decision, Plaintiffs propose litigating only those claims that can proceed without evidence the Government sought to withhold as state secrets - a process that need not utilize FISA

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[5] The Government appears to assert that the information pertaining to the "planted devices" aspect of the search claims is covered by its *existing* state secrets assertion, a claim it has not made previously. It argues this claim is not new, claiming that this "category of alleged electronic surveillance that is at the very heart of the [Ninth Circuit's] FISA displacement theory." *See infra* at 25. This dispute is irrelevant at this juncture because Plaintiffs have stated they do not intend to litigate over any information that comes within the Government's existing privilege assertion. But in any event, the Government is incorrect. The Ninth Circuit concluded, in keeping with the D.C. Circuit's view, that FISA procedures should be applied as to any privileged information arising in Plaintiffs' challenges to the legality of electronic surveillance. *Fazaga*, 965 F.3d at 1052 ("We are not the first to hold that § 1806(f)'s procedures may be used to adjudicate claims beyond those arising under § 1810. The D.C. Circuit expressly so held in *ACLU Foundation of Southern California v. Barr*, 952 F.2d 457 (D.C. Cir. 1991)").

procedures at all. As explained above, the Government previously represented that it "expects that the majority of the audio and video" Monteilh collected for the FBI "will be available in connection with further proceedings" in this case. *Fazaga*, 965 F.3d at 1043. There is no need to use FISA's *ex parte* procedures to begin discovery as to those recordings. Therefore, no predicate showing of "aggrieved person" status is required.

Although the Court need not address it now given Plaintiffs' stipulation to limit discovery to non-privileged information, the Government errs in arguing Plaintiffs must do more to establish their "aggrieved status" under FISA. Monteilh's declarations constitute admissible evidence on that point, and the Ninth Circuit's decision holds that his surveillance gives rise to the search claims that this Court should resolve using FISA's procedures if necessary. *Fazaga*, 965 F.3d at 1053 ("Plaintiffs are properly considered aggrieved persons as to those categories of surveillance"); *id.* at 1065 ("the district court should, using § 1806(f)'s *ex parte* and *in camera* procedures, review any materials relating to the surveillance as may be necessary . . . to determine whether the electronic surveillance was lawfully authorized and conducted"). Thus, Plaintiffs have made any separate standing showing FISA requires to trigger the procedures under Section 1806(f). Monteilh's declarations offer the "specifics based on non-classified evidence to establish [Plaintiffs'] 'aggrieved person' status under FISA." *In re Nat'l Sec. Agency Telecommunications Records Litig.*, 564 F. Supp. 2d 1109, 1135 (N.D. Cal. 2008). This case is therefore different from those on which the Government relies, as none of the plaintiffs in them

had admissible evidence that they had actually been surveilled. Compare *Jewel v. NSA*, Civ. 08-4373 (N.D. Cal. April 25, 2019) (Dkt. 462) (Plaintiffs had no non-privileged evidence that they had been surveilled); *Wikimedia v. Nat'l Sec. Agency,* 427 F. Supp. 3d 582 (D. Md. 2019) (same); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 412 n.4 (2013) (same, in non-FISA case).

The Government also raises the possibility it could invoke a *new* state secrets claim addressing some of the evidence arising from Monteilh's recordings. *See infra* at 26. This hypothetical cannot justify staying litigation over information that no one has argued is covered by the privilege. On the contrary, if the Government actually intends to assert the privilege more broadly than it has before, it would be far better for all sides to know that *now*, as that assertion would be highly pertinent to any Supreme Court litigation as well as future proceedings in this Court.

b. Individual Defendants' Objections

Defendants Tidwell, Walls, and Rose raise a separate argument against Plaintiffs' request to proceed. They claim that any discovery propounded on the Government while they litigate their pleading challenges impermissibly burdens *them*, even if they are "not yet themselves subject to discovery orders." *See infra* at 40 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 685–86 (2009)). They therefore request *all* proceedings be halted—including those solely between Plaintiffs and the Government—until *they* exhaust their pleading challenges. The Court should reject this argument for three reasons.

First, *Iqbal* concerned the protection of two very high-ranking defendants from the burdens of litigation, then-Director of the FBI Robert Mueller, and former Attorney General John Ashcroft. *Iqbal*, 556 U.S. at 666. The "burdens of discovery" that Mueller and Ashcroft faced were unique to their status as "highlevel officials who must be neither deterred nor detracted from the vigorous performance of their duties," *id.* at 686, a concern wholly absent where, as here, the defendants are comparatively low-ranking officials whom Plaintiffs allege personally participated in the challenged conduct. Unlike Mueller and Ashcroft Tidwell, Walls, and Rose cannot explain why *they* would be burdened by Plaintiffs propounded discovery upon the Government over matters already in the public record and for which the Government has not asserted the state secrets privilege.

Second, *Iqbal* does not apply for an entirely different reason: because any burden the Individual Defendants will bear due to discovery targeting the Government will continue to exist whether or not they win their motion to dismiss. The Government itself was not a defendant in *Iqbal*. Success on their motion to dismiss rendered Attorney General Ashcroft and FBI Director Mueller entirely free from the litigation, as they faced only "conclusory" and "implausible" allegations of misconduct. *Iqbal*, 556 U.S. at 681–82. Here, in contrast, Tidwell, Walls, and Rose are percipient witnesses to at least some of the conduct at issue in the claims against the Government, and can expect to be deposed or subpoenaed on any of Plaintiffs' surviving claims—as third parties if not as defendants. Thus, halting discovery pending the *Bivens* motions will merely *postpone* their personal

involvement, it cannot stop it. Nothing in *Iqbal* suggests that rationale would suffice to disturb the ordinary presumption against staying discovery while a pending Rule 12 motion is decided. *Skellerup Indus. Ltd. v. City of Los Angeles*, 163 F.R.D. 598, 600–01 (C.D. Cal. 1995) ("Had the Federal Rules contemplated that a motion to dismiss under Fed. R. Civ. P. 12(b)(6) would stay discovery, the Rules would contain a provision for that effect. In fact, such a notion is directly at odds with the need for expeditious resolution of litigation").

Third, even if this objection might have merit as to some discovery requests, it surely does not as to much of the discovery Plaintiffs contemplate, which will not burden these Defendants in any way. Agents Tidwell, Walls, and Rose were not party to the conversations Monteilh surreptitiously recorded in mosques and elsewhere, and were not present when he videotaped without others' knowledge. They presumably would not be personally involved in reviewing recordings for discovery production in this case. While the same may not be true for other discovery requests (including of course these Defendants' depositions), Plaintiffs can defer any such burdensome requests until after the pleading litigation has concluded. Should Defendants believe any given request too burdensome before that time, they could of course seek this Court's intervention.

Plaintiffs therefore respectfully request the Court permit the Parties to initiate motion practice and discovery on the search claims as described above.

2. *Religion Claims*

Plaintiffs also request the Court restart proceedings on the surviving religious discrimination

claims for two limited purposes. *First*, as to those claims brought against the Agent Defendants under *Bivens* (the First, Third, and Sixth Causes of Action as against the Agent Defendants), this Court should consider the Individual Defendants' motion to dismiss under *Ziglar v. Abbasi*, 137 S.Ct. 1843 (2017) and perhaps other grounds.[6]

Second, as to the surviving religious discrimination claims against the Government (the First, Third, Fifth, Sixth and portions of the Eleventh Causes of Action as against the Government), while Plaintiffs would not seek discovery during the pendency of any potential Supreme Court litigation, Plaintiffs nonetheless request the Court permit them to move for summary judgment. Plaintiffs maintain they can litigate these claims without the use of any evidence designated as a state secret, and therefore that any assertion of the privilege is premature until Plaintiffs have been permitted to move for summary judgment. *See* Br. of Pls.-Appellants, at 25–26, *Fed. Bureau of Investigation*, No. 13-55017 (9th Cir. Nov. 17, 2014), ECF 32-2.[7] During the meet and confer process, the Government reiterated its position that even if Plaintiffs can file a summary judgment motion, "responding to the motion for summary judgment" would require invocation of the privilege because "all the responsive evidence" Defendants would offer is subject to the privilege assertion. *See also*

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[6] The Individual Defendants have indicated their intention to move to dismiss on grounds beyond *Abbasi*. To the extent such claims are preserved, Plaintiffs agree that the Court should consider them at this juncture.

[7] The Ninth Circuit did not consider this argument because it adopted Plaintiffs' alternative argument that FISA displaces the privilege. *Fazaga*, 965 F.3d at 1039.

Superseding Br. of Federal Appellees, at 18, 23, *Fed. Bureau of Investigation*, No. 13-55017 (9th Cir. June 25, 2015), ECF 73 (endorsing this Court's conclusion that Defendants needed to use the privileged information "to defend" against religious discrimination claims). As Plaintiffs argued previously, Defendants' prediction may prove correct, but one cannot know "with certainty," *Jeppesen*, 614 F.3d at 1081, until Plaintiffs file their summary judgment motion on the religion claims. If Defendants then invoke the privilege, further litigation could cease pending the Supreme Court *certiorari* process.

The Government suggests that Plaintiffs' position concerning the use of FISA procedures—that it should govern all information over which Defendants have asserted the state secrets privilege, including that not otherwise covered by FISA—somehow conflicts with Plaintiffs' request to move for summary judgment on the religion claims, but this is wrong. Plaintiffs' position throughout has been that they need not rely on any privileged information to prevail on their religious discrimination claims. Mr. Monteilh's declarations establish crystal-clear violations of the Constitution's prohibition on religious discrimination. *See, e.g.*, Dkt. 66 at 10, ¶ 17 (Allen and Armstrong "did not give me any specific targets, but instead told me to gather as much information on as many people in the Muslim community as possible"), *id.* at 20, ¶ 46 (they told him to focus on Muslims who appeared more devout because they were more suspicious).

If Defendants choose to respond using information over which they simultaneously assert the state secrets privilege, only then would FISA come into play. Thus, any request for a stay out of concern

for the use of FISA would be premature until Defendants have responded to the summary judgment motion.[8]

3. *FTCA Claims*

As to Plaintiffs' Federal Tort Claims Act ("FTCA") claims, Plaintiffs agree that the Government may seek to dismiss the various FTCA claims on grounds other than the discretionary function exception while *certiorari* proceedings are pending before the Supreme Court. Although the application of the discretionary function exception turns on the merits of Plaintiffs' other claims against the Government, *Fazaga*, 965 F.3d at 1065, the Ninth Circuit did not have occasion to entertain other grounds for dismissal raised by the Government in its original motion to dismiss. If *certiorari* proceedings remain on-going after that litigation concludes, Plaintiffs request the Court allow discovery on the same terms described above – *i.e.*, permit it where relevant to the FTCA claim and not covered by any state secrets privilege.

C. The Government's Requested Stay

Plaintiffs will respond to the Government's request for a stay in due course. At this stage, only a

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[8] The Government suggests an alternative approach where Plaintiffs could file their summary judgment motion but the Court would then stay further proceedings, before the Government has responded. *See infra* at 29. But this would not give the Court "certainty" that the Government's response would require disclosure of privileged information, as *Jeppesen* requires. The only way to obtain that certainty is for the Government to review the evidence it would actually need to respond to Plaintiffs' motion, and then to invoke the privilege if it deems it necessary.

few points bear mention. *First*, Plaintiffs agree that no litigation should go forward if it requires the disclosure of information over which the Government has asserted state secrets privilege, *even through FISA*. Thus, no one advocates proceeding "under a statutory framework that should not [in the government's view] apply." *See infra* at 21.

Second, the Government has not disputed that its requested stay would, if granted, stop litigation over information as to which the Government has *not* asserted the privilege. As to that information, the only issue is whether it will be litigated now, or instead after months or years of further delay. The stay at issue will at a minimum run through December 17, 2020, and (if the Government seeks *certiorari)* could easily run into the spring of 2021.

Finally, the Government inappropriately minimizes the harm that Plaintiffs suffer by knowing that it continues to maintain vast amounts of information about their entirely lawful activities and associations. If that information was obtained in violation of the Fourth Amendment, its maintenance "impair[s] fundamental rights" and constitutes "irreparable injury." *Fazaga,* 965 F.3d atl055. This Court should not countenance unnecessary delay when it could instead, finally, give Plaintiffs their day in court on at least some of the harm Monteilh caused at Defendants' behest.

D. Plaintiffs' proposed timeline

Consistent with the request above, Plaintiffs propose the following schedule for reinstituting proceedings in this Court:

Deadline	**Date**
Last date to hear Government motion to stay proceedings pending writ proceedings.	September 25, 2020
Last date for the parties to conduct Rule 26(f) conference on all claims.	September 25, 2020
Last date to hear Agent Defendants' motion to dismiss surviving *Bivens* claims.[9]	November 13, 2020
Non-expert discovery cut-off.	August 27, 2021[10]
Expert discovery cut-off.	September 24, 2021
Deadline for filing dispositive motions.	October 11, 2021
Pre-trial conference.	November 22, 2021
Trial (Plaintiffs estimate a 10-day trial).	December 6, 2021

[9] Plaintiffs may move to amend the complaint after the Court's disposition of these motions.

[10] This and all subsequent dates are subject to change pending the Supreme Court's disposition of any petition for writ of *certiorari*.

II. GOVERNMENT DEFENDANTS' STATEMENTS

A. Government Defendants Sued in their Official Capacity

Plaintiffs have raised claims against the Federal Bureau of Investigation and the Director of the FBI, Christopher Wray, sued solely in his official capacity, and John F. Bennett, Acting Assistant Director in Charge, FBI Los Angeles Field office, sued solely in his official capacity. Plaintiffs also seek damages against the United States pursuant to the Federal Tort Claims Act. As set forth further below, the Government proposes the following next steps for further proceedings in this case.

First, the Court should stay further proceedings in this case pending: (1) a decision by the United States on whether to petition the Supreme Court for a writ of *certiorari*; (2) a decision by the Supreme Court on the writ of *certiorari*, if a petition is filed; and (3) resolution of proceedings in the Supreme Court, if a writ of *certiorari* is granted. The Government's request for a stay does not extend to briefing in connection with the individual capacity defendants' renewed motions to dismiss *Bivens* claims against them, including in light of the Supreme Court's intervening decision in *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), or on other grounds those defendants may raise.

Plaintiffs oppose a stay of any length – not even to determine if the Government will seek certiorari, which would be known by no later than December 17, if not earlier, or until the Supreme Court decides whether to grant any petition for certiorari, which plaintiffs recognize could occur by early 2021. They

profess they would not seek to pursue matters that implicate whether the state secrets privilege has been displaced by FISA procedures, but propose to proceed on what they assert are "significant portions" of the case that could steer clear of state secrets issues. While the Government appreciates plaintiffs' apparent concession that state secrets issues should be avoided until any further review is resolved, significant portions of this case are still impacted by state-secrets privilege and FISA-displacement issues, and plaintiffs' proposal for piecemeal adjudication of purportedly non-privileged matters still would put the state secrets privilege at issue. As an initial matter, if certiorari were sought and granted, and this Court's 2012 decision upholding the state secrets privilege was affirmed, that would at least provide important guidance on how any remaining claims should proceed. While awaiting the possibility of Supreme Court review would entail further delay, this remains an avenue properly available to the Government. At the very least, the Court should wait until a decision is reached on seeking certiorari – and, if so, whether certiorari is granted – which will be only a matter of months. In the meantime the parties could proceed to fill that time with motions to dismiss the remaining *Bivens* claims.

If certiorari is not sought by the Government or if any petition for certiorari is not granted by the Supreme Court, the Government believes that further steps in this Court should proceed incrementally, starting with (i) motions practice concerning whether Plaintiffs' *Bivens* claims against the individual capacity defendants may proceed and thereafter (ii) motions practice concerning whether Plaintiffs can establish as a factual matter, with non-privileged

evidence, their standing as "aggrieved" persons for purposes of any Section 1806(f) proceedings. This issue should be resolved before any proceedings under Section 1806(f). If the FISA displacement issue were to drop out of the case, then further proceedings on the search and religion claims would be resolved in accordance with the state secrets privilege. Accordingly, while some aspects of the Fourth Amendment and FISA search claims implicate non-privileged evidence of the audio or video allegedly collected by the informant, piecemeal litigation of this limited aspect of the search claims would still risk or require the disclosure of privileged information and should not proceed until after the question of seeking certiorari on FISA displacement of the state secrets privilege is resolved. The Government's positions are described in more detail below.

1. *Stay of Proceedings*

The Government is preparing a separate motion to stay proceedings. For the Court's convenience, the pertinent arguments in support of a stay are summarized herein.

As this Court has previously recognized, a court may stay proceedings as part of its inherent power "'to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.'" *Billon, Inc. v Slatin*, No. SACV 16-00788-CJC, 2017 WL 2719980 (C.D. Cal. Jan. 26, 2017) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)); *see also Clinton v. Jones*, 520 U.S. 681, 706 (1997) ("The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket.") (citing *Landis*). This inherent power includes the authority to order a stay "'pending

resolution of independent proceedings which bear upon the case.'" *Billon*, 2017 WL 2719980, at *1 (quoting *Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 863 (9th Cir. 1979)). Where a stay is considered pending the resolution of another action, "the court need not find that two cases possess identical issues; a finding that the issues are substantially similar is sufficient to support a stay." *Id.* (citing *Landis*, 299 U.S. at 254).

In determining whether to stay a case, "the competing interests which will be affected . . . must be weighed." *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005) (citing *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962)). These interests include: "(1) the possible damage which may result from the granting of a stay, (2) the hardship or inequity which a party may suffer in being required to go forward, and (3) the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay." *Id.*; *see also Chen v. St. Jude Med., LLC*, No. SACV 17-00143-CJC, 2017 WL 8220441 (C.D. Cal. June 5, 2017); *Freeman Expositions, Inc. v. Global Experience Specialists, Inc.*, No. SACV 17-00364-CJC, 2017 WL 6940557 (C.D. Cal. June 27, 2017); *Grivas v. Metagenics, Inc.*, No. SACV 15-01838-CJC, 2016 WL 11266835 (C.D. Cal. Mar. 31, 2016).

Courts routinely stay proceedings pending resolution of related cases in an appellate court, including pending a decision by the Supreme Court. *See, e.g.*, *Sensibaugh v. EF Education First, Inc.*, No. CV 20-1068-MWF, 2020 WL 3455641 (C.D. Cal. May 7, 2020) (granting stay of proceedings pending resolution of an issue before the Supreme Court); *Rossano v. Fashion Mktg. & Merch. Grp. Inc.,* No. CV

19-10523-MWF, 2020 WL 4288059 (C.D. Cal. May 4, 2020) (granting stay of proceedings pending ruling by Supreme Court in a case raising a related issue). The grant of a stay pending a decision by the Supreme Court on a petition for a writ of certiorari is also appropriate. *Walker v. Monsanto Co. Pension Plan*, 472 F. Supp. 2d 1053, 1054-55 (S.D. Ill. 2006) (staying certain counts pending a writ of certiorari to the Supreme Court in another case concerning claims "substantially identical" to the claims before the district court, and observing that "[s]uch stays are entered quite routinely").

The Government seeks a stay of proceedings in this action for the straightforward reason that it is presently considering whether to seek review of the Ninth Circuit panel decision in the Supreme Court. This avenue of further review remains available to the Government and could result in this Court's prior decision on the state secrets privilege being affirmed, or some other outcome that would significantly impact further proceedings in this Court. Accordingly, the Government seeks an opportunity to complete deliberations on whether to seek certiorari before further relevant proceedings commence, and a further stay of proceedings if certiorari is sought and then if granted by the Supreme Court.

The balance of interests supports a stay of proceedings in these circumstances. On the one hand, it is not apparent what damage may result to plaintiffs from the granting of a stay. This case admittedly has been pending for a long time, but the challenged investigative activities occurred well over a decade ago, and Plaintiffs seek only retrospective relief in the form of the expungement of records or damages. Also, any harm caused by the delay in this

case resulted from the nearly eight years in which this case was pending on appeal. By comparison, the time it would take for the Government to decide on whether to seek certiorari, and for the Supreme Court to rule on that petition, would be a matter of months at the longest. *See Leyva*, 593 F.2d at 864 (recognizing that a stay is appropriate where it "appears likely the other proceedings will be concluded within a reasonable time in relation to the urgency of the claims presented to the court").

On the other hand, further proceedings in accord with the Ninth Circuit panel decision would risk significant harm to the Government's interests. At issue in this case is how litigation that implicates the disclosure of national security information should proceed. The Government contends that the Ninth Circuit panel has imposed a process that does not apply as a matter of law to review of information subject to the state secrets privilege in this case, or to resolution of the claims on that basis. Proceeding, before any further review, under a statutory framework that should not apply would not only perpetuate that error of law but could itself risk the disclosure of the very information that the state secrets privilege seeks to protect in this case. Notably, the privilege was asserted here to protect information that has not previously been disclosed, including the subjects of Operation Flex, the reasons for the investigations, and the sources and methods that were used, including alleged electronic surveillance. As the Supreme Court has pointed out, where the very question of whether the Government has undertaken investigative actions involving particular persons is protected, attempting to address the merits of any claims would inherently risk or require disclosure of

that very evidence. *Clapper v. Amnesty Int'l, USA*, 568 U.S. 398, 412 n.4 (2013) (condemning *in camera* proceedings that would reveal subjects of Government surveillance as contrary to national security interests). While Plaintiffs assert that they seek to avoid issues that implicate the state secrets privilege and FISA displacement issues, in fact their proposal for proceeding would still put directly at issue information subject to the state secrets privilege. *See infra* (section titled "*Plaintiffs' Proposal for Proceeding*").

The remaining factors also weigh in favor of staying the proceedings here. Certainly, "the orderly course of justice" supports a stay, as any Supreme Court review would address questions of law that have a direct bearing on further proceedings, particularly if the Supreme Court agrees with this Court's prior decision. And even if the Supreme Court were to affirm the Ninth Circuit, it would very likely clarify the remaining issues of law and proof in this litigation. For these reasons, the "economy of time and effort for [the Court], for counsel, and for litigants," *Landis*, 694 F.3d at 1054, also counsels in favor of a stay.

Finally, there is little concern that a stay would be "indefinite in nature." *Dependable Highway Express, Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007). Supreme Court Rule 13, as modified by the Supreme Court's Miscellaneous Order of March 19, 2020, prescribes a finite time in which a party may seek review. If the Government petitions for certiorari, it will do so no later than that date, if not before. If a petition is filed and certiorari is granted, there is also a prescribed time in which the parties may brief the merits, and the Supreme Court

would presumably resolve the matter in regular order. While Plaintiffs assert that, if certiorari is sought and *granted*, the Supreme Court may not decide the matter until the 2021-22 term, that is both speculative and, in any event, not a justification for proceeding now. Plaintiffs chose to appeal this Court's prior decision. And further review by the Supreme Court remains an available avenue that, if sought and granted, could result in rejection of the FISA displacement theory, affirmance of this Court's decision upholding the state secrets privilege, and the issuance of binding guidance that would impact litigation of the remaining claims. At the very least, waiting for an initial decision on whether certiorari is sought and granted would cause little prejudice, particularly where there are *Bivens* matters that could be litigated in the meantime.

2. *Government Defendants' Response to Plaintiffs' Proposal for Proceeding*

Plaintiffs appear to acknowledge that further proceedings that implicate the state secrets privilege and FISA displacement theories would not be appropriate while the question of certiorari is pending. They propose to proceed while a decision on certiorari is pending on two fronts that they assert will not implicate the state secrets/FISA displacement issues. First, with respect to "search" claims arising under the Fourth Amendment and the FISA Section 1810, Plaintiffs seek to proceed on limited aspect of those claims, pertaining to the alleged collection of audio and visual recordings of conversations to which the informant (Mr. Monteilh) was not a party, and they contend that this would not be affected by any petition for certiorari concerning the state secrets/FISA displacement issues because the

Government Defendants did not assert the *Reynolds* state secrets privilege as to the search claims. As set forth below, the Government disagrees with that assessment. Second, plaintiffs propose to file for summary judgment on their religious discrimination claims, apparently based on declarations previously submitted by Mr. Monteilh concerning his activities. But there is no credible argument that such summary judgment proceedings on the religion claims would not implicate the state secrets privilege and FISA displacement issues that would be at issue in any cert petition.

Search Claims: With respect to the search claims, Plaintiffs seek to litigate in piecemeal fashion one aspect of the claims that puts at issue one category of evidence. By way of background, there are several distinct categories of alleged conduct at issue in these search claims, including: (1) the collection of audio or video by Monteilh while he was consensually in the presence of others; (2) the alleged non-consensual collection of (a) audio or (b) video by Monteilh, either by leaving devices unattended or otherwise collecting video in locations without consent; and (3) the alleged planting of audio listening devices by the FBI in the office of one Plaintiff (Fazaga) and in the home of another (AbdelRahim), and in several other mosques in Southern California. *Fazaga*, 965 F.3d at 1027, 1032-33 (describing the categories of alleged surveillance). The third category of alleged surveillance, referred to by the Ninth Circuit panel as recordings made by "planted devices," did not involve Mr. Monteilh; rather, he alleges that he was told by the individual capacity defendants, FBI Agents Allen and Armstrong, that this collection occurred. *Id.* at 1038, 1043. The plaintiffs claim that all three

categories of alleged surveillance were undertaken in violation of the FISA and Fourth Amendment.

In proposing to proceed, plaintiffs focus solely on the second category – the alleged non-consensual collection of audio and video by Monteilh – and argue that this is among the information as to which the Government's privilege assertion did not apply. As the Government has explained, the FBI had previously disclosed in a separate criminal proceeding that the informant at issue in this case (Mr. Monteilh) collected audio and video information for the FBI, and that it was reviewing that material for possible use in connection with further proceedings. *See* Public Declaration of Mark. F. Giuliano ("Pub. Giuliano Decl.") ¶ 12 (Dkt. 33). But the fact that some evidence relevant to one aspect of the search claims is not privileged does not mean that litigation of the search claims will not implicate the state secrets privilege and the Ninth Circuit's FISA displacement theory.

In the first place, plaintiffs err in suggesting the Government did not assert the *Reynolds* privilege over the search claims at all. Rather, the Government did not initially seek *dismissal* of the search claims on state secrets grounds. But the Government was careful to note that "it remains possible that the need to protect properly privileged national security information might still foreclose litigation of these claims." *See* Government's Motion to Dismiss or for Summary Judgment at 4 (Dkt. 32). In short, given the potential availability of some non-privileged evidence as to the informant's collection of audio, the Government proposed to put off the issue of how the state secrets privilege would impact the litigation of the search claims. One aspect of the search claim that plaintiffs concede would implicate the state secrets

privilege and FISA displacement theory is the third category – the alleged planting of devices in the home and office of two plaintiffs. Plaintiffs now propose to take that issue off the table for further proceedings in seeking to avoid any issue raised on certiorari. But that still would not justify proceeding on one small aspect of the search claims, as Plaintiffs propose.

First, if certiorari were sought and granted, and the FISA displacement theory was rejected and this Court's 2012 decision upholding the state secrets privilege was affirmed, that would at least provide important guidance on how any remaining claims should proceed. For example, such a ruling could underscore that FISA Section 1806(f) proceedings would not apply, and that further litigation of the remaining claims may not risk the disclosure of state secrets. In any event, the playing field for further proceedings could substantially change from that presented by the panel's decision.

Second, even under Plaintiffs' proposal, the Fourth Amendment and FISA search claims could not be litigated to conclusion. That is, if just one aspect of the claims concerning one category of evidence (Monteilh's alleged non-consensual recordings) proceeds, the remaining portion of the claims pertaining to alleged unlawful electronic surveillance through planted devices (category 3) still plainly implicate the state secrets privilege and FISA displacement and would remain. This aspect of the search claims is at the very heart of plaintiffs' theory that FISA displaces the state secrets privilege; indeed, absent as assertion of privilege over alleged electronic surveillance there could be no FISA displacement

theory.[11] Accordingly, complete resolution of the claims would still have to await any Supreme Court review.

Third, even if the search claims proceeded solely with respect to the audio/video allegedly collected by Monteilh without consent, the Government has not taken the position that the state secrets privilege would have no impact on this aspect of the claim; as noted, in 2012, the Government specifically noted that possibility. In fact, it is quite foreseeable that information subject to the state secrets privilege, including the scope of Operation Flex, its subjects, the reasons for any investigations, and its sources and methods, could be at risk of disclosure even if this one aspect of the claim were to proceed. For example, at the least, inquiry into the background of Monteilh's actions could put at issue the basis for, or underlying facts related to, Operation Flex. Indeed, plaintiffs have consistently argued that the good faith basis for the investigation would be at issue in litigating any claim. Moreover, this Court has recognized that "'even if the claims

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[11] In a footnote, plaintiffs appear to suggest that FISA Section 1806(f) procedures would govern the search claims *regardless* of whether the Government had asserted the state secrets privilege over alleged electronic surveillance. But that makes no sense, and is clearly not what the Ninth Circuit panel or the D.C. Circuit have held. The panel held simply that FISA Section 1806(f) displaced the state secrets privilege asserted in this case *beyond* the Section 1810 claim. And the D.C. Circuit has made quite clear that plaintiffs who merely alleged they were subject to surveillance under the FISA were *not* entitled to use FISA procedures to discover whether they were in fact subject to surveillance. *ACLU Found. of S. Cal.*, 952 F.2d at 462. This basic disagreement as to how Section 1806(f) works thus counsels in favor of a stay pending any Supreme Court review.

and defenses might theoretically be established without relying on privileged evidence, it may be impossible to proceed with the litigation because—privileged evidence being inseparable from nonprivileged information that will be necessary to the claims or defenses—litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets.'" *Fazaga*, 884 F. Supp. 2d at 1045 (quoting *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1081 (9th Cir. 2010)). Thus, the fact that some aspect of the search claim implicates some nonprivileged evidence does not compel the conclusion that no state secrets issues would arise if this aspect of the claim were litigated in piecemeal fashion.

Moreover, there is an important difference between circumstances in 2012 and today: whether the search claims could proceed in 2012 based solely on nonprivileged evidence was unresolved at the time, but the Government's motion to dismiss argued that the privileged evidence should be off the table for any such litigation. That is, if any aspect of the search claims were to proceed on nonprivileged evidence, the privilege assertion still would have been applicable to further proceedings, and information bearing on the subjects, predicates, and sources and methods of the investigation would remain excluded. But the Ninth Circuit panel decision has thrown that into uncertainty, having held the privilege assertion is displaced in favor of FISA procedures. For this reason, if Plaintiffs were allowed to proceed on one purportedly non-privileged aspect of their search claims, and issues were to arise concerning the protection of information under the prior state secrets privilege, as the Government believes is likely, the

Ninth Circuit's FISA displacement theory would remain in play even as to the narrow aspect of the claim on which plaintiffs seek to proceed. Thus, aside from the inherently piecemeal nature of plaintiffs' proposal for proceeding on the search claims, the parties and Court have no clarity as to how future issues of privilege would be resolved in litigation over that claim.

Religion Claims: Plaintiffs' proposal for proceeding on their religion discrimination claims, without waiting for resolution of any petition for certiorari, underscores that the state secrets privilege and FISA displacement theory would remain at issue. Plaintiffs again assert that they have adequate non-privileged evidence, in the form of declarations from Monteilh, to present their summary judgment motion on religious discrimination claims. They further assert that the Government could respond if necessary with a state secrets assertion, and only then would the question of FISA displacement come into play. But this suggested approach essentially seeks to replicate proceedings that have led to where the case is today. Even if plaintiffs believe they could make a prima facie case on summary judgment with non-privileged evidence, the evidence needed to respond to the religious discrimination is at the heart of the state secrets privilege assertion the Government *already asserted* in 2012, as this Court recognized.[12] And in

[12] *See Fazaga,* 884 F. Supp. 2d at 1047 ("[T]he Court is persuaded that privileged information provides essential evidence for Defendants' full and effective defense against Plaintiffs' claims—namely, showing that Defendants' purported "dragnet" investigations were not indiscriminate schemes to target Muslims, but were properly predicated and focused. Doing so would require Defendants to summon privileged evidence related to Operation Flex, including the subjects who may or may not

reversing this Court, the Ninth Circuit panel decision indicated that review of the religion claims, and the *non*-FISA privileged evidence associated with them, also would be subject to Section 1806(f) procedures. *Fazaga*, 965 F.3d at 1066. Plaintiffs' proposal to proceed with summary judgment on the religion claims now thus would be an exercise in déjà vu – bringing the case back to where it was in 2012. Under Plaintiffs' proposed path forward, the state secrets privilege assertion would squarely be at issue in any summary judgment proceeding – that is apparent now, and there is no point in waiting for the Government to assert it again. Moreover, the Ninth Circuit already has held that FISA procedures would displace that privilege even as to non-FISA information and the religion claim. In these circumstances, it should be apparent that proceeding now on remand with summary judgment on the religion claims would squarely put at issue precisely what could be at issue in any petition for certiorari – whether the state secrets evidence at issue in litigating those claims has been displaced by the FISA procedures.

It is also worth noting that, even assuming the FISA Section 1806(f) procedures did displace the state secrets privilege in this case, Plaintiffs' proposal of moving for summary judgment on the religion claims

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have been under investigation, the reasons and results of those investigations, and their methods and sources. Additionally, even if Plaintiffs can successfully show that Defendants' actions substantially burdened their exercise of religion with nonprivileged information, defense against Plaintiffs' First Amendment claims entails analysis of whether the Government had a "compelling state interest" and its actions were "narrowly tailored" to achieve that interest.).

is in tension with the panel decision as to how those claims would play out. The panel noted that, under the FISA procedures, "Plaintiffs' religion claims will not go forward under the open and transparent processes to which litigants are normally entitled." 965 F.3d at 1040. The panel added: "As it is Plaintiffs who have invoked the FISA procedures, we proceed on the understanding that they are willing to accept those restrictions to the degree they are applicable as an alternative to dismissal, and so may not later seek to contest them." *Id.* Even if this admonition could be read to allow plaintiffs to seek summary judgment on claims that they demanded be litigated *ex parte* under FISA Section 1806(f), it should be apparent that any further adjudication of such a motion would implicate the state secrets privilege and the purported applicability of FISA procedures to non-FISA information and claims. Once again, whether FISA displaces the state secrets privilege in this case would be a central issue if certiorari is sought and granted.

One alternative approach would be for Plaintiffs to *file* their motion for summary judgment, and then for the Court to stay proceedings without requiring a response. That approach would provide additional information as to why adjudication of Plaintiffs' claims that Operation Flex was an indiscriminate dragnet based solely on religion calls for evidence subject to the privilege assertion, including information as to who was being investigated, for what reasons, and through what sources and methods. In this way, Plaintiffs' summary judgment motion should help demonstrate why this Court's prior state secrets dismissal of these claims was correct, but in the meantime further litigation of

that motion should not proceed pending a decision on certiorari.

3. *Government Defendants' Position on Further Proceedings.*

The Government maintains its position that proceedings should be stayed pending resolution of any petition for certiorari. If certiorari is not sought by the Government, or if any petition for certiorari is not granted by the Supreme Court, the Government believes that further steps in this Court should proceed incrementally, starting with (i) motions practice concerning whether the plaintiffs *Bivens* claims against the individual capacity defendants proceed; and thereafter (ii) motions practice concerning whether the plaintiffs can establish as a factual matter, with non-privileged evidence, their standing as "aggrieved" persons, before any proceedings under Section 1806(f) proceed and before any discovery. If plaintiffs fail to establish their aggrieved status, then the FISA displacement theory would drop out of the case, and any litigation of the remaining claims would proceed in accordance with the exclusion of evidence based on the state secrets privilege. This threshold question should be resolved first before the case proceeds on remand, because it will impact how all other claims are litigated.

Notwithstanding its theory that FISA displaces the state secrets privilege in this case as to all information subject to the privilege assertion and all claims, including the religion claims, the panel's decision leaves open a door for the Government to renew an assertion of the state secrets privilege "should [the panel's] prediction of the overlap between the information to be reviewed under the FISA

procedures to determine the validity of FISA-covered electronic surveillance and the information pertinent to other aspects of the religion claims prove inaccurate, or should the FISA-covered electronic surveillance drop out of consideration" ("*if, for instance, Plaintiffs are unable to substantiate their factual allegations as to the occurrence of the surveillance*"). 965 F.3d at 1066-67 & n.51 (emphasis added). In that case, "the Government is free to interpose a specifically tailored, properly raised state secrets privilege defense." *Id*. at 1067.

FISA Section 1806(f) applies, by its terms, only in certain circumstances to determine the "legality" of electronic surveillance. It does not apply to determine the predicate question whether alleged electronic surveillance occurred. *Compare* 18 U.S.C. § 3504 (requiring the government to "affirm or deny" surveillance). Section 1806(f) proceedings apply solely to persons who first establish as a factual matter that they are "aggrieved persons" within the meaning of FISA. FISA defines "aggrieved" to mean a person who is the target of or subject to electronic surveillance. *See* 50 U.S.C. §1801(k). Citing allegations that listening devices purportedly had been planted in the office of Plaintiff Fazaga and home of Plaintiff AbdelRahim, the panel concluded that "Plaintiffs are properly considered aggrieved persons as to those categories of surveillance." *Fazaga*, 965 F.3d at 1053 (citing pages 1038–39 of the panel opinion). But that observation rested on mere allegations of alleged unlawful electronic surveillance. *See id.* at 1025–26 (emphasizing that "the truth or falsity of [Plaintiffs'] allegations . . . is entirely unproven"); *id.* at 1038 (citing *allegations* of electronic surveillance through the planting of devices in plaintiffs home and office,

and other mosques in the area). Mere allegations are not sufficient to proceed under Section 1806(f), however. *See Amnesty Int'l*, 568 U.S. at 412 n.4 (rejecting an *in camera* proceeding to determine standing to challenge alleged surveillance because such a procedure "would allow a terrorist (or his attorney) to determine whether he is currently under U.S. surveillance simply by filing a lawsuit challenging the Government's surveillance program"); *ACLU Found. of S. Cal. v. Barr*, 952 F.2d 457, 468-69 & n.13 (D.C. Cir. 1991) ("[I]f the government is forced to admit or deny such allegations, in an answer to the complaint or otherwise, it will have disclosed sensitive information that may compromise critical foreign intelligence activities."). The very authority on which the panel relied indicates that Plaintiffs must first establish their aggrieved status as a factual matter before Section 1806(f) proceedings can be triggered. *See In re Nat'l Sec. Agency Telecomms. Records Litig.*, 564 F. Supp. 2d 1109, 1137 (N.D. Cal. 2008) (a litigant must first establish himself as an "aggrieved person" before seeking to make a "motion or request * * * to discover or obtain applications or orders or other materials relating to electronic surveillance . . . ."); *see also* Order Granting Defs.' Mot. for Summ. J., *Jewel v. NSA*, Civ. 08-4373 (N.D. Cal. April 25, 2019) (Dkt. 462), *appeal docketed*, No. 19-16066 (9th Cir. May 21, 2019).

Moreover, at least two courts have recognized that the state secrets privilege may be interposed to protect facts concerning *whether* a person is aggrieved *before* Section 1806(f) proceedings are utilized to determine the lawfulness of any such surveillance. *See Jewel v. NSA*, Civ. 08-4373 (N.D. Cal. April 25, 2019) (Dkt. 462); *Wikimedia v. Nat'l Sec. Agency,* 427 F.

Supp. 3d 582 (D. Md. 2019). As noted, the Government's prior privilege assertion protected such information. Unless plaintiffs can establish they are aggrieved persons subjected to the alleged electronic surveillance through non-privileged evidence, the matter should not proceed under Section 1806(f). In that circumstance, under the panel decision, the question of FISA displacement would drop out, *see Fazaga*, 965 F.3d at 1028 & n.5, and the case would revert to application of the state secrets privilege as to the remaining non-FISA information and claims.

In sum, to the extent Section 1806(f) may be applicable (which the Government disputes), it cannot be invoked based on mere allegations. Thus, the first issue to be litigated on any remand – before any attempt to litigate any claims utilizing the FISA Section 1806(f) process – is whether Plaintiffs can establish factually their "aggrieved" status without privileged information. Mere allegations will no longer suffice when this litigation moves beyond the pleading stage. *Amnesty Int'l, USA*, 568 U.S. at 412 n.4 (rejecting suggestion that the Government could help resolve the standing inquiry by disclosing to a court through an in camera proceeding whether a party is subject to surveillance, noting that it is a plaintiffs' burden to prove their standing by pointing to specific facts, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992), "not the Government's burden to disprove standing by revealing details of its surveillance" and because such a process would inherently risk disclosure of national security information); *see also ACLU Found. of S. Cal.* 952 F.2d at 469 ("the government would need only assert that plaintiffs do not have sufficient evidence to carry their burden of proving ongoing surveillance . . . .").

Plaintiffs' first response to this approach is to argue that the question of aggrieved status need not be addressed because they do not seek to put the state secrets privilege/FISA displacement at issue for now. But, as explained, plaintiffs' proposal for proceeding on both the search and religion claims would put the state secrets privilege and FISA displacement theory at issue. Plaintiffs also contend that the Ninth Circuit has already found they are aggrieved for purposes of Section 1806(f), and that Monteilh's declarations would constitute admissible evidence on that point. Both contentions are wrong.

As explained, the Ninth Circuit was addressing solely plaintiffs' *allegations* of being subject to unlawful electronic surveillance, and specifically left open the possibility that plaintiffs may be "unable to substantiate their factual allegations as to the occurrence of the surveillance." *Fazaga*, 965 F.3d at 1066-67 & n.51. Also, the fact that allegations may be set forth in sworn declarations would not establish plaintiffs' alleged aggrieved status as a factual matter, at the summary judgment stage, as subject to electronic surveillance required under Section 1806(f) Notably, for example, Plaintiffs' allegation that the FBI planted devices in Plaintiff Fazaga's office and/or Plaintiff AbdelRahim's home – alleged unlawful electronic surveillance – is based solely on what Monteilh claims to have been told by the FBI. But the fact that Monteilh has attested to something does not establish the matter factually, and a response to his averments would also put at issue information subject to the state secrets privilege—including information that bears on his credibility. Moreover, the mere fact that Monteilh claims he was told something about alleged planted devices in a Plaintiff's home or office

would clearly be insufficient at the summary judgment stage to show that Plaintiffs are aggrieved persons for purposes of Section 1806(f). Absent proof of aggrieved status, and in the face of a state secrets assertion over the very issue of whether Plaintiffs are aggrieved, the FISA displacement theory would drop out of the case, and any litigation of the remaining claims would proceed in accordance with the state secrets privilege. Thus, the outcome of motions practice on plaintiffs' alleged aggrieved status would impact all other proceedings on whether FISA procedures or the state secrets privilege would apply. That is why this issue of aggrieved status should be addressed first if the case proceeds, absent a stay pending a petition for certiorari.

B. Claims Against the United States under the Federal Tort Claims Act

The plaintiffs are advocating that the parties proceed to litigate the surviving claims, particularly the search claims (i.e., "the Ninth, Tenth, and part of the Eleventh Causes of Action"), arguing that the "surviving search claims should not be affected by resolution of [the] question [whether FISA preempts the *Reynolds* state secrets privilege], as the Government Defendants did not assert the Reynolds state secrets privilege as to those claims." They further assert that "the surviving search claims [are not] subject to further attack on the pleadings . . . [and that] the Court [should] permit the Parties to initiate discovery on those claims. . . ."

The 11th cause of action arises under the Federal Tort Claims Act (FTCA). Contrary to Plaintiffs' assertion, the FTCA claims are subject to further attack on the pleadings and, if these claims

are litigated, information protected by the state secrets privilege is highly likely to be at issue along with the FISA displacement theory for which certiorari is under consideration.

The chart prepared by Plaintiffs describes the FTCA claims as "unlawful search and religious discrimination" claims, but they are described differently in the First Amended Complaint. In paragraphs 254-260, Plaintiffs assert the following FTCA claims based upon the audio and video surveillance:

(1) Invasion of Privacy under California law;

(2) Violation of the California constitutional right of privacy;

(3) Violation of California Civil Code 52.1; and

(4) Intentional infliction of emotional distress (IIED).

The District Court dismissed the FTCA claims because the discretionary function exception to the FTCA could not be litigated without evidence protected by the state secret privilege. The District Court did not address the United States' other grounds for dismissal, which included:

(1) Because California law permits law enforcement officers to conduct consensual monitoring, the alleged claims surveillance is not actionable.

(2) The Amended Complaint fails to state a claim for relief under the California Civil Code Section §52.1 because it does not allege requisite elements that the defendants acted violently or threatened plaintiffs with violence.

(3) Plaintiffs' claims for IIED, which are based on covert surveillance they claim is ongoing and making their lives difficult, should be dismissed because they fail to allege facts showing that they suffered severe emotional distress.

(4) Plaintiffs' claims for IIED, which are based upon the informant's conduct that occurred in 2006 and 2007, are barred by the applicable statute of limitations. 28 U.S.C. § 2401(b).

(5) Plaintiffs' claims for IIED, which are based on audio and video surveillance, are speculative because the surveillance was covert and plaintiffs admit that they did not know about it until February 2009, which was several years after the informant disappeared from the Muslim community. The covert surveillance, by definition, could not by itself have caused the plaintiffs to suffer emotional distress, and to the extent that the claims are based on the plaintiffs' current beliefs and suspicion they are still under surveillance, such claims are speculative at best.

(6) The invasion of privacy and IIED claims must be dismissed because litigating these claims would likely reveal information protected by the state secrets privilege.

Separate and apart from litigating the discretionary function exception argument, if Plaintiffs succeed in defeating a motion to dismiss the FTCA claims, information at issue in litigating these claims will implicate the state secrets privilege and thus the FISA displacement issue, which would be at issue if certiorari is sought and granted. For example, litigating the key issues for the invasion of privacy and

intentional infliction of emotional distress claims would risk or require the disclosure of privileged information. Litigation of these claims entails an inquiry into whether the alleged intrusions were highly offensive and/or constituted serious invasions of privacy, which may depend upon the degree and setting of each intrusion and the explanation, justification, motive, and objective. *See generally Hernandez v. Hillsides, Inc.,* 47 Cal. 4th 272, 286-87, 211 P. 2d 1063 (Cal. 2009); *Sheehan v. San Francisco 49ers*, 45 Cal. 4th 992, 998, 201 P. 2d 472 (Cal. 2009). An essential element the plaintiffs must prove to establish intentional infliction of emotional distress claims is whether the conduct was extreme and outrageous with the intention of causing, or reckless disregard of the probability of causing, their emotional distress. The resolution of this element may depend on the explanation and justification for the alleged conduct. *See generally Potter v. Firestone Tire & Rubber Co.,* 6 Cal. 4th 965, 1001, 25 Cal. Rptr. 2d 550 (1 993). Here again, to litigate these issues, evidence concerning what occurred under Operation Flex-who was subject to investigation, why, and how- would be at issue or at risk of disclosure.

Government Defendants' Proposed Timeline Deadline

Deadline	Date
Government motion to stay proceedings pending writ proceedings. If Government seeks certiorari, proceedings stayed until Supreme Court disposes of writ and, if	Motion to be filed on September 1, 2020 and noticed for hearing under local rules.

certiorari granted, until Supreme Court rules.	
Briefing on *Bivens* claims, including in light of the Supreme Court's intervening decision in *Ziglar v. Abbasi,* 137 S.Ct. 1843 (201 7), or on other grounds those defendants may raise.	TBD by those parties and Court.
Motions briefing on whether the plaintiffs can establish their standing factually as "aggrieved" persons before Section l 806(f) proceedings. Plaintiffs' Opening Motion	January 22, 2020 if Government does not seek certiorari; or 45 days after SCT denies any petition for writ of certiorari.
Government' Response in Opposition and/or Cross Motion	45 days after Plaintiffs' filing
Plaintiffs' Reply Brief and Opposition to any Cross Motion	45 days after USG filing
Government's Reply in Support of any Cross Motion	30 days after Plaintiffs' filing

III. AGENT DEFENDANTS' STATEMENT

Defendants Tidwell, Walls, Rose, Armstrong, and Allen (the "Agent Defendants") respectfully propose that the Court should proceed with briefing and resolution of renewed motions to dismiss the *Bivens* religious discrimination claims against the Agent Defendants, which could be case-dispositive as to Tidwell, Walls, and Rose and dramatically narrow the claims against Allen and Armstrong. The Agent Defendants otherwise agree with the Government Defendants that all other proceedings should be stayed pending the Government's potential petition for certiorari. To the extent the Court disagrees and allows any other matters to proceed, the Agent Defendants request that those proceedings be sequenced so that the Agent Defendants' renewed motions to dismiss can be resolved first, before other proceedings move forward.

Defendants Tidwell, Walls, and Rose are somewhat differently situated from the other Agent Defendants, in that all claims against them have now been dismissed except for the *Bivens* claims alleging unconstitutional religious discrimination (the first, third, and sixth causes of action). The court of appeals held that qualified immunity bars all other claims against Tidwell, Walls, and Rose entirely, including the Fourth Amendment and FISA claims. Amended Op. 46-47, 82. Moreover, the religious discrimination claims survive only to the extent that they assert *intentional* religious discrimination. *See* Amended Op. 85-89.

Given the narrow scope of the few claims remaining against them, Defendants Tidwell, Walls, and Rose agree with Plaintiffs that the Court should

permit the Agent Defendants to renew their motions to dismiss the religious discrimination claims on the ground that no *Bivens* remedy is available, and that the briefing and hearing of that motion should proceed while the government considers whether to seek further review in the Supreme Court of its assertion of the state secrets privilege. In addition, Defendants Tidwell, Walls, and Rose also moved to dismiss the religious discrimination claims on qualified immunity grounds, and neither this Court nor the court of appeals has addressed that defense. *See* Amended Op. 96 n.44. The Agent Defendants should accordingly be permitted to renew their qualified immunity defenses along with the *Bivens* issue.

The Agent Defendants disagree with the Plaintiffs that any other litigation should move forward before the *Bivens* and qualified immunity issues have been decided. As the court of appeals emphasized, "there are likely to be few, if any, remaining *Bivens* claims against the Agent Defendants" given the "narrow availability of *Bivens* remedies under current law." Amended Op. 75 n.31; *see also id.* at 81-82 (noting that recent precedent has "severely restricted the availability of *Bivens* actions for new claims and contexts"). If this Court were to conclude that the "severely restricted" availability of any *Bivens* remedy (or qualified immunity) requires dismissal of the religious discrimination claims, *id.* at 81, then no claims would remain against Defendants Tidwell, Walls, and Rose at all, and the claims against Defendants Allen and Armstrong would be quite limited. Accordingly, even if the Court were to deny the stay requested by the Government Defendants, the Agent Defendants respectfully request that

resolution of the *Bivens* and qualified immunity issues should proceed first.

That sequencing is appropriate to avoid further delay in the resolution of the Agent Defendants' long-standing motions to dismiss the *Bivens* claims. Under Plaintiffs' proposed schedule, the first order of business would be a Rule 26(f) conference, with nearly two more months passing before the motions to dismiss would be heard. But the Agent Defendants are prepared to renew their motions to dismiss expeditiously, and given how long those motions have been pending, the schedule should ensure that those motions can be briefed, heard, and decided without further delay caused by the pendency of simultaneous discovery and motions practice.[13]

Apart from the prospect of further delay, the Agent Defendants should not be subjected to the burdens of discovery while their motions to dismiss remain unresolved—especially because, for Defendants Tidwell, Walls, and Rose, those motions could end this case. Certainly Defendants Tidwell, Walls, and Rose should not be required to respond to discovery requests or other motions while the *Bivens* and qualified immunity issues remain unresolved. "Qualified immunity is an entitlement not to stand trial or face the other burdens of litigation." *Micenheimer v. Finander*, 2018 WL 5098851, at *8 (C.D. Cal. Aug. 29, 2018) (internal quotation mark omitted), *report and recommendation adopted*, No.

[13] Moreover, if this Court were to reject the Agent Defendants' remaining qualified immunity defenses to the *Bivens* claims, that decision would be immediately appealable, *e.g.*, *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 587 (9th Cir. 2008), offering a further reason why discovery should not be permitted to proceed.

CV16-4314-CJC, 2018 WL 5099701 (C.D. Cal. Oct. 16, 2018). And even if discovery were limited to the other Defendants, those burdens would nonetheless fall on Defendants Tidwell, Walls, and Rose because, as the Supreme Court has recognized, "[i]t is quite likely that, when discovery as to the other parties proceeds, it would prove necessary for [defendants] and their counsel to participate in the process to ensure the case does not develop in a misleading or slanted way that causes prejudice to their position." *Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009).

Plaintiffs attempt to distinguish *Iqbal* on the ground that it involved high-level officials who faced burdens "unique to their status." *Supra* at 10. But nothing in *Iqbal* suggests that the Supreme Court's analysis turned on the rank of the defendants. The Court noted that discovery burdens would be "magnified" for high-level officials, but it nowhere denied the common-sense proposition that any individual-capacity defendant (no matter his or her rank) who remains a party facing potential personal liability cannot ignore ongoing discovery against official capacity defendants, lest that discovery develop in a prejudicial manner. Nor did the Court qualify its plain statement that "[t]he basic thrust of the qualified immunity doctrine is to free officials from the concerns of litigation, including avoidance of disruptive discovery." *Iqbal*, 556 U.S. at 685; *see also Herrick v. Strong*, 745 F. App'x 287, 289 (9th Cir. 2018) ("[A] stay of discovery was appropriate here because qualified immunity's determinative impact constitutes more than just a defense to liability—it is immunity from suit altogether"); *Packnett v. Patrakis*, 441 F. App'x 462, 463 (9th Cir. 2011) ("[T]he district court did not err in staying discovery pending

resolution of defendants' qualified immunity claim."). Neither *Iqbal* nor any other case holds that qualified immunity shields *only* high-level officials from the burdens of litigation.

Plaintiffs also argue that the Government-focused discovery they contemplate will impose only minimal burdens on Tidwell, Walls, and Rose and that any such burdens can be disregarded because they would continue to exist even if these Defendants are dismissed from the litigation. That is incorrect. The discovery burdens faced by non-parties are materially less substantial than those faced by parties facing the prospect of personal liability. *See, e.g.*, *Loumiet v. United States*, 315 F. Supp. 3d 349, 354 (D.D.C. 2018) (dismissing argument that discovery should proceed because "Individual Defendants would be involved in discovery anyway even if they are found immune from liability" on grounds that their "role in this case conceivably would differ if … non-party witnesses."). So long as Tidwell, Walls, and Rose remain defendants, they and their counsel must fully participate in discovery to safeguard their interests. If those Defendants are found immune and dismissed from the case, their participation in discovery would be far more limited.[14]

[14] Plaintiffs suggest that the Agent Defendants could simply "seek this Court's intervention" should they find any particular discovery request to be too burdensome. But having to do so would itself be burdensome. And by suggesting it, Plaintiffs implicitly acknowledge that if any discovery goes forward, the Agent Defendants and their counsel will have to monitor and evaluate the potential consequences of every discovery request Plaintiffs propound.

As to Defendants Allen and Armstrong, Plaintiffs' search claims survive only to the extent they allege violations of FISA and/or the Fourth Amendment for the placement of listening devices in Plaintiff Fazaga's office and/or Plaintiff AbdelRahim's home. Amended Op. 44-47. Plaintiffs ask to begin discovery on these claims, because the Government did not move to dismiss them under the state secrets privilege.

Discovery on these claims cannot go forward without intruding on matters protected by the state secrets doctrine, because the Government has asserted that the alleged placement of these listening devices is a state secret. Amended Op. 26 (recognizing Government assertion that "whether a particular individual" was an investigatory target and the "particular sources and methods … used in a counterterrorism investigation" were state secrets). In addition, Plaintiffs have previously argued that the Agent Defendants violated the Fourth Amendment and/or FISA because they placed the listening devices with a discriminatory motive – another area covered by the Government's assertion of state secrets. *Id.* (recognizing Government assertion that "the initial reasons (*i.e.*, predicate) for an FBI counterterrorism investigation of a particular person" is a state secret).

Under the Ninth Circuit's decision, the only way these claims can proceed is by way of the *in camera* and *ex parte* procedures set forth in FISA. But the application of those procedures is precisely the issue that would be heard by the Supreme Court, assuming the Government seeks certiorari and the high court grants it. Accordingly, Defendants Allen and Armstrong join the Government in requesting that no "discovery" or other litigation of the search

claims (except for pleading challenges) be permitted until the certiorari process is concluded.

For all these reasons and those offered by the Government Defendants, all discovery should be stayed pending the Government's consideration and potential pursuit of further review in the Supreme Court. But if the Court disagrees and concludes that some discovery may proceed, the Court should adopt a schedule under which the renewed motions to dismiss the *Bivens* claims are addressed first—with a hearing on those motions no later than November 13, 2020—and defer any Rule 26(f) conference and any other permissible discovery activities until after those motions have been resolved.

[Signature blocks for counsel omitted]

Date: August 31, 2020