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

REPLY BRIEF OF RESPONDENTS J. STEPHEN TIDWELL AND BARBARA WALLS SUPPORTING PETITIONERS

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In Plaintiffs' view, a defendant sued in her personal capacity has no remedy when the government's assertion of the state-secrets privilege deprives her of information and evidence essential to a full and effective defense. The defendant must simply face the plaintiff's case with her hands tied behind her back. Worse, Plaintiffs contend, the government's decision to assert the privilege triggers a requirement under the Foreign Intelligence Surveillance Act that the private defendant's liability be adjudicated in secret proceedings in which she has no apparent right to participate or have the assistance of counsel and no right to a jury.

Nothing in FISA or this Court's precedent supports that result. This Court has called it the "height of injustice" to allow a claim to go forward against private defendants while "deny[ing] the[ir] defense because of the Government's invocation of state-secret protection." *General Dynamics Corp.* v. *United States*, 563 U.S. 478, 487 (2011). That principle controls here. The district court concluded, after "rigorous judicial scrutiny" of the government's public and classified filings, Pet. App. 179a, that dismissal was required because "the privileged information gives Defendants a valid defense." Pet. App. 172a. The 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." Pet. App. 173a-174a (emphasis omitted). The court of appeals did not disagree with that assessment, and neither do Plaintiffs. Dismissal in this circumstance was fully consistent with this Court's precedent and necessary to prevent the unfairness of a one-sided trial.

Like the court of appeals, Plaintiffs contend that FISA's in camera, ex parte procedures provide a mandatory alternative to dismissal by requiring the district court to adjudicate the case on the merits in secret. FISA's text and structure do not support that interpretation. But even if that construction were plausible, it should be rejected as a matter of constitutional avoidance because it raises grave questions under the Due Process Clause and Seventh Amendment by requiring the private defendants' liability to be adjudicated in camera and ex parte—procedures that Plaintiffs themselves have described in another context as "presumptively unconstitutional," Pls.' Ex Parte Application to

Stay 4, *Fazaga* v. *FBI*, No. 11-cv-301 (C.D. Cal. Aug. 4, 2011) (quotation marks omitted). Even the court of appeals acknowledged that its approach would "severe[ly] curtail[] … the usual protections afforded by the adversarial process and due process." Pet. App. 39a. But Plaintiffs all but ignore those consequences of the court's holding.

Indeed, Plaintiffs' brief largely proceeds as if there were no individual-capacity defendants in this case. They stress that the government should not be permitted to exercise its control over the privileged information to both keep the information secret and rely on it to win dismissal. Whatever the merit of that view as applied to the government, it falls apart when applied to the individual-capacity defendants. Private defendants have no control over the privileged information and no control over the decision whether to invoke the privilege. Their ability to obtain or present privileged information essential to their defense is contingent on the government's consent. And that would remain true even if FISA were construed to displace the privilege. The state-secrets dismissal remedy takes account of that dilemma by allowing claims to go forward when they can be fully and fairly litigated on both sides without undue risk to national security but precluding one-sided trials when they cannot. Plaintiffs' interpretation of FISA would replace that balancing of interests with a scheme that not only impedes the private defendants' ability to defend themselves, but also threatens to violate their constitutional rights. The Court should reject that approach and reverse.[1]

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[1] Citations to "Resp. Br." refer to the brief for respondents Fazaga, Malik, and Abdelrahim ("Plaintiffs").

I. THIS COURT'S STATE-SECRETS PRECEDENT SUPPORTS DISMISSAL

Plaintiffs construct artificial boundaries to cabin application of the state-secrets privilege, but this Court's precedent is not so easily circumscribed. Plaintiffs contend that *Totten* v. *United States*, 92 U.S. 105 (1876), permits dismissal only in cases involving government contracts, Resp. Br. 20, 25-26, and that the privilege articulated in *United States* v. *Reynolds*, 345 U.S. 1 (1953), can never warrant dismissal, Resp. Br. 24-25. Even assuming these arguments are properly before the Court, both arguments are wrong.

A. *Totten*'s Animating Principle Is Not Limited To Government-Contract Cases

This Court has already rejected the argument that *Totten* announced "merely a contract rule," holding that "*Totten* was not so limited." *Tenet* v. *Doe*, 544 U.S. 1, 8 (2005). Instead, *Totten*'s "sweeping holding" broadly "'forbids the maintenance of *any suit* in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential.'" *Id.* at 8, 9 (quoting *Totten*, 92 U.S. at 107 (emphasis supplied in *Tenet*)).

Thus, in *Weinberger* v. *Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139 (1981), this Court relied on *Totten*'s broad rule to dismiss an action that involved not a government-contract claim or a secret espionage agreement but a challenge to the government's compliance with environmental regulations. The plaintiffs there contended that the Navy had failed to prepare an environmental-impact statement regarding the storage of nuclear weapons at a particular site, in violation of the National Environmental Policy Act of

1969. *See id.* at 142. But, as in this case, litigating that claim would have required, or at least substantially risked, disclosure of national-security information because the Navy's obligation to prepare an environmental-impact statement depended on whether the government intended to store nuclear weapons at the contested site—a fact the government could neither admit nor deny. *See id.* at 146. Analogizing to *Totten*, this Court concluded that whether the Navy had complied with the law was "beyond judicial scrutiny" and ordered that the case be dismissed because trial "'would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated.'" *Id.* at 146-147 (quoting *Totten*, 92 U.S. at 107); *see also Tenet*, 544 U.S. at 9 (discussing *Weinberger*).

Here, although the government has not argued that "the very subject matter of the action" as a whole is nonjusticiable as a matter of state secret, its assertion of the privilege with respect to whether and why any particular individual was targeted for surveillance precludes litigation at least of the religious-discrimination claims because the facts "central to" those claims must remain secret. *Tenet*, 544 U.S. at 9 (citing *Weinberger*). Plaintiffs' claims of intentional religious discrimination cannot be adjudicated without examining the reasons why particular individuals were or were not targeted for surveillance and the fit between the government's legitimate purposes and any sources and methods used. *See, e.g.*, *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 531-532 (1993). But those are the very facts that are subject to the government's privilege assertion, and allowing the claims to go forward would present an undue risk of disclosure.

Plaintiffs appear to agree that dismissal would be appropriate if they needed to rely on privileged information (or other evidence closely intertwined with it) to make their case-in-chief. Resp. Br. 27. But they argue that where privileged information is necessary only for the defense, dismissal is unwarranted because the government can eliminate the risk of disclosure of secret information by choosing to defend itself without relying on that information. Resp. Br. 27-28.

This Court rejected that view in *General Dynamics Corp.* v. *United States*, 563 U.S. 478 (2011). There, the Court explained that if a defendant's liability turns on "the validity of a plausible … *defense*," and if "full litigation of *that defense* would inevitably lead to the disclosure of state secrets," then "neither party can obtain judicial relief." *Id.* at 486 (emphases added; quotation marks omitted). That reasoning, moreover, rested not on the contractual nature of the dispute, *cf.* Resp. Br. 30-31, but on considerations of common sense and fairness that apply equally here—particularly with respect to the individual-capacity defendants.

First, contrary to Plaintiffs' suggestion (at 28), simply excluding confidential evidence cannot always eliminate the risk of disclosure. *See General Dynamics*, 563 U.S. at 482-483, 486-487. In some cases, like *Reynolds*, where the excluded confidential information is at most tangential to the claims, it is "possible … to adduce the essential facts … without resort to material touching upon military secrets." 345 U.S. at 11. But where, as here, the confidential information goes to the heart of the plaintiffs' allegations, "invocation of the state-secrets privilege obscure[s] too many of the facts relevant" to the litigation, and the parties' "incentive[s] to probe up to the boundaries of state secrets" in discovery creates too great a risk of disclosure. *General*

Dynamics, 563 U.S. at 487. The district court thus dismissed here not only because privileged information is needed for the defense but also because—even if "the claim *or* defense" could be established based on nonprivileged information alone—the case cannot be litigated without "an unacceptable risk of disclosing state secrets." Pet. App. 175a-178a (emphasis added).

Second, where the privileged information is relevant to a party's defenses, its exclusion would result in unreasonably one-sided litigation. As this Court explained in *General Dynamics*, it is "unrealistic to separate … the claim from the defense, and to allow the former to proceed while the latter is barred," because "[i]t is claims and defenses *together* that establish the justification, or lack of justification, for judicial relief." 563 U.S. at 487. Therefore, "when public policy precludes judicial intervention for the one it should preclude judicial intervention for the other as well." *Id.* The same is true here. Plaintiffs allege that the government and the individual-capacity defendants unlawfully targeted them for surveillance based on their religion. Whether those claims have merit necessarily depends upon evidence regarding whom the government targeted for surveillance, why, and how. *See* Pet. App. 173a-175a. But that information is a matter of state secret. *See* JA 28-29, 51-52. Allowing "a one-sided trial" to proceed without that information—in which Plaintiffs may "substantiate [their] claims by presenting [their] half of the evidence to the factfinder as if it were the whole"—would "'be a mockery of justice.'" *Wikimedia Found.* v. *National Sec. Agency*, 14 F.4th 276, 2021 WL 4187840, at *23 (4th Cir. Sept. 15, 2021) (quoting *In re Sealed Case*, 494 F.3d 139, 148 (D.C. Cir. 2007)).

Third, as *General Dynamics* confirms, those concerns are particularly acute where the government's

invocation of the state-secrets privilege deprives a private defendant of evidence relevant to his or her defense. Only the government can assert the privilege, *see Reynolds*, 345 U.S. at 7, but once the government does so and a court upholds the assertion, no party may rely on the privileged information, *see General Dynamics*, 563 U.S. at 485. While Plaintiffs repeatedly contend that the government should not be rewarded for asserting the privilege over information that would have supported its defense with dismissal of the claims against it, the individual-capacity defendants did not and could not have invoked the state-secrets privilege. Yet because of the government's invocation, they cannot access or introduce evidence critical to establishing the predicates, objects, and methods of the challenged surveillance—evidence directly relevant to refuting Plaintiffs' allegations of religious bias. As this Court has held, it would be "the height of injustice" to allow Plaintiffs' claims to proceed in such circumstances while "deny[ing] the defense[s] because of the Government's invocation of state-secret protection." *General Dynamics*, 563 U.S. at 487. Instead, where liability cannot be determined "without penetrating several layers of state secrets," a court should "leave the parties where they stood when they knocked on the courthouse door." *Id.* The district court properly did so here.

B. Dismissal Is Consistent With *Reynolds*

Plaintiffs argue that when the state-secrets privilege is successfully asserted, *Reynolds* requires the suit to go forward so the plaintiff can make his case—even if the defendants are prohibited from making their own because fully litigating the defense would pose an unacceptable risk of disclosure of privileged information. Resp. Br. 24-25. Plaintiffs thus read *Reynolds* to

mandate the one-sided trials that *General Dynamics* later disapproved. *Supra* pp. 7-8. That stretches *Reynolds* far beyond its facts.

The question in *Reynolds* was whether the government was properly ordered to produce a report in response to the plaintiffs' discovery request despite the government's assertion that disclosing the report could harm national security by revealing sensitive military secrets. 345 U.S. at 4-5. Applying the "well established" "privilege against revealing military secrets," the Court held that the government was entitled to withhold the report. *Id.* at 6-7, 11. In reaching that conclusion, the Court explained that the privilege could not be "lightly invoked" by the government nor "lightly accepted" by a court; the privilege assertion had to meet rigorous requirements and be evaluated by the court in light of the plaintiffs' demonstrated need for the information. *Id.* at 7-8, 11. There, the government satisfied those prerequisites, and the plaintiffs made only a "dubious showing of necessity." *Id.* at 11-12.

Given those circumstances, the Court had no occasion in *Reynolds* to address what should happen when the exclusion of evidence precludes full and fair litigation of the parties' claims and defenses, or when—even with the evidence excluded—the case cannot be fully litigated without risking disclosure of state secrets. *Reynolds* thus nowhere "requires" that a plaintiff be permitted to proceed with a one-sided trial, as Plaintiffs contend. Resp. Br. 27.

Nor does *Reynolds* foreclose dismissal when a court concludes, after careful scrutiny of the government's privilege assertion and consideration of all the relevant interests, that a case cannot be fairly litigated without undue risk to national security. To the contrary,

as later cases confirm, in those circumstances the *Reynolds* privilege and the *Totten* bar "converge[]" and "both require dismissal." *Mohamed* v. *Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1082 (9th Cir. 2010) (en banc); *see also, e.g.*, *Tenet*, 544 U.S. at 8-10 (discussing *Reynolds*); *Weinberger*, 454 U.S. at 147 (citing both *Totten* and *Reynolds* to support dismissal). Where an assertion of the state-secrets privilege requires exclusion of the privileged evidence under *Reynolds*, a court must next resolve whether and how "the matter should proceed in light of the successful privilege claim." *El-Masri* v. *United States*, 479 F.3d 296, 304 (4th Cir. 2007). And as the lower courts have uniformly held, if the case cannot be fully and fairly litigated without undue risk to national security and without the unfairness of a one-sided trial, dismissal is appropriate and consistent with *Reynolds*. *See id.* at 309-311; *see also, e.g.*, *Wikimedia Found.*, 2021 WL 4187840, at *21-22; *Jeppesen*, 614 F.3d at 1079; Tidwell & Walls Br. 15 (citing cases).

Plaintiffs' contrary view again disregards the right of private defendants to defend themselves. As the district court found, dismissal was required in this case because "the privileged information gives Defendants a valid defense." Pet. App. 172a; *see also Jeppesen*, 614 F.3d at 1083. Excluding that privileged information would "[d]eprive[]" the individual-capacity defendants "of the ability in practice to adduce the evidence necessary to mount a defense" to Plaintiffs' claims, leaving them vulnerable to "be held liable in damages for what in fact was wholly blameless conduct." *Ellsberg* v. *Mitchell*, 709 F.2d 51, 69 (D.C. Cir. 1983). This Court should not sanction that result, but should confirm the consensus of the lower courts that dismissal is required when the government's assertion of the state-secrets

privilege precludes private defendants from fully and effectively litigating their defense—particularly in a case, like this one, where *any* possible defense would "require Defendants to summon privileged evidence related to Operation Flex, including the subjects who may or may not have been under investigation, the reasons and results of those investigations, and their methods and sources," Pet. App. 173a-174a; *see also* Pet. App. 158a; *El-Masri*, 479 F.3d at 309; *In re Sealed Case*, 494 F.3d. at 149.

II. FISA Should Not Be Interpreted To Threaten The Constitutional Rights Of The Individual-Capacity Defendants

In defending the court of appeals' holding that FISA displaces the state-secrets privilege, Plaintiffs double down on the view that a defendant sued in her individual capacity should have no remedy when the government's assertion of the privilege deprives her of evidence essential to her full and effective defense. Indeed, under Plaintiffs' view, a private defendant in that circumstance not only must face the plaintiff's claim without the ability to obtain or introduce necessary evidence, but also must have her liability adjudicated through secret proceedings in which she has no apparent right to participate and no right to a jury determination of material factual disputes.

FISA's text and structure do not support that interpretation. As previously explained, the in camera, ex parte procedures set forth in § 1806(f) provide a mechanism for determining the admissibility of evidence and related discoverability issues when the government intends to use evidence derived from electronic surveillance against an aggrieved person. Pet. Br. 21-24; Tidwell & Walls Br. 18-20. They do not establish

any procedures for adjudicating a claim on the merits, and they evince no congressional intent to displace the state-secrets privilege. Moreover, the government does not intend to "use" the "information obtained or derived from" electronic surveillance against Plaintiffs. 50 U.S.C. § 1806(c). To the contrary, it has exercised its prerogative to *exclude* from the case sensitive information about the predicates, objectives, and methods of the challenged surveillance, necessitating dismissal because the case cannot be fully and fairly litigated without undue risk of disclosure of state secrets. That cannot be considered a "use" of the privileged information "against" Plaintiffs within the meaning of the statute—and it is certainly not a use of information "obtained or derived from" electronic surveillance. *Id.* Likewise, FISA's reference to a "motion or request" by an aggrieved person is best understood in light of the statutory context to apply only to requests made "*in response* to the government's attempt to use surveillance evidence in a proceeding." *Wikimedia Found.*, 2021 WL 4187840, at *17.

At a minimum, Plaintiffs' reading is not the only reasonable interpretation of the statute. Even if their reading were plausible, therefore, the Court should reject it to avoid the grave constitutional questions it raises. Adjudicating the individual-capacity defendants' liability in an ex parte trial without a jury threatens to violate their rights under the Due Process Clause and Seventh Amendment. Tidwell & Walls Br. 21-32. Under the canon of constitutional avoidance, the Court should "shun an interpretation that raises serious constitutional doubts" in favor of the "alternative that avoids those problems." *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 836 (2018).

Plaintiffs barely acknowledge the serious questions their interpretation raises. They do not dispute that the individual-capacity defendants' Seventh Amendment rights attach to the adjudication of the *Bivens* claims against them and require a jury determination of any factual disputes material to those claims. *See Carlson* v. *Green*, 446 U.S. 14, 22 (1980); *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 718 (1999). Nor do they dispute that FISA's in camera, ex parte procedures preclude any role for a jury. Tidwell & Walls Br. 27-30.

Similarly, Plaintiffs do not dispute that the court of appeals' decision appears to preclude the individual-capacity defendants from participating or having the assistance of counsel in the adjudication of their own liability or that this Court and the lower courts have repeatedly condemned the use of such procedures as a violation of due process. Tidwell & Walls Br. 22-27. Indeed, Plaintiffs themselves initially objected to the district court's ex parte review of the government's classified filings in this case as "presumptively unconstitutional" and "anathema in our system of justice." Pls.' Ex Parte Application to Stay 4, *Fazaga* v. *FBI*, No. 11-cv-301 (C.D. Cal. Aug. 4, 2011) (quotation marks omitted). If Plaintiffs viewed the use of ex parte proceedings for the mere purpose of reviewing classified filings as constitutionally suspect, then surely the use of such procedures to adjudicate the defendants' personal liability for damages on the merits raises significant constitutional questions. *See Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner."); *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring) ("[F]airness can

rarely be obtained by secret, one-sided determination of facts decisive of rights.").

The few responses Plaintiffs do offer misapprehend the role of the canon of constitutional avoidance. Resp. Br. 63-66. Echoing the court of appeals (but citing no other support), Plaintiffs principally contend that any constitutional objections to the use of in camera, ex parte proceedings to adjudicate liability are "speculative and premature" because "no one even knows whether any material facts triggering the jury trial right will ever be in dispute." Resp. Br. 63. But the avoidance canon "is not a method of adjudicating constitutional questions" that have already arisen. *Clark* v. *Martinez*, 543 U.S. 371, 381 (2005). It is a tool of statutory interpretation that calls on a court faced with two plausible readings to adopt the one that avoids raising serious constitutional questions—regardless of whether those constitutional difficulties will actually "pertain to the particular litigant before the Court." *Id.* at 380-381. And Plaintiffs do not dispute that difficult Seventh Amendment questions are sure to arise in at least some cases—*e.g.*, if the court does find a material factual dispute—or that the use of in camera, ex parte proceedings to adjudicate liability would raise significant due process concerns.[2]

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[2] Plaintiffs' speculation that the constitutional deficiencies could be addressed by allowing the individual-capacity defendants to rely on "unclassified substitutes" or nonprivileged evidence fails for the same reason—*i.e.*, the potential availability of "substitute procedures" does not eliminate the serious constitutional questions. Resp. Br. 65. In any event, no nonprivileged information or "substitute" procedure could address the concerns raised by adjudicating a defendant's liability through ex parte proceedings, and nothing in the cases applying the Classified Information Procedures Act ("CIPA") suggests otherwise because CIPA does not

In a similar vein, Plaintiffs argue (again with no support) that the canon of constitutional avoidance need not be considered because FISA "requires the district court to act 'in accordance with the requirements of law' when granting any relief." Resp. Br. 64 (quoting 50 U.S.C. § 1806(g)). Plaintiffs appear to read this language as an invitation to ignore for now the grave constitutional concerns their interpretation raises on the theory that the district court can address those concerns at a later stage of the litigation by declining to follow the interpretation of FISA that Plaintiffs press. Circularity aside, if that theory were correct, then the avoidance canon would never have any role to play. Even where a statute contains no such language, a court must always act "in accordance with the requirements of law." In Plaintiffs' view, that obligation would mean that a court would never need to construe a statute to avoid an unconstitutional result, Resp. Br. 64—but that plainly contravenes this Court's precedent. *See, e.g.*, *Clark*, 543 U.S. at 380-381. The better reading of that statutory language is that it reinforces the narrow function of § 1806(g) as requiring suppression of evidence unlawfully obtained while further indicating that Congress did not intend an interpretation of FISA that would yield a potentially unconstitutional result.

Plaintiffs contend that the constitutional problems here are "overstate[d]" because "[n]o court has ever held that FISA's ex parte, in camera review procedures" violate the Due Process Clause or Seventh Amendment. Resp. Br. 64-65. But the issue for purposes of the avoidance canon is whether using FISA's

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contemplate ex parte adjudication of ultimate liability. *See* Tidwell & Walls Br. 30-31.

in camera, ex parte proceedings to adjudicate the individual-capacity defendants' liability on the merits in secret, without a jury, would raise serious constitutional *questions*—not whether a court has already answered those questions. And with their tepid assertion that adjudicating a defendant's liability in an ex parte trial without a jury would "*not necessarily* render the proceedings unconstitutional," Plaintiffs all but admit that their reading poses grave constitutional questions. Resp. Br. 65 (emphasis added).

In any event, it is little wonder that no court has yet held that it would violate the Due Process Clause or the Seventh Amendment to adjudicate a defendant's liability on the merits through FISA's in camera, ex parte procedures, because no court until the decision below has construed FISA to require such a procedure. As previously explained (and Plaintiffs do not dispute), none of the decisions on which the court of appeals relied in brushing aside the due process concern involved the use of ex parte procedures to adjudicate a case on the merits, and none held that such procedures could be used consistent with the Constitution to determine ultimate issues of liability. Tidwell & Walls Br. 24-25. And Plaintiffs do not dispute that outside of the FISA context, courts and Congress have rejected the use of in camera, ex parte procedures to adjudicate liability on the merits. *Id.* at 30-32.[3]

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[3] *Molerio* v. *FBI*, 749 F.2d 815 (D.C. Cir. 1984), is not to the contrary. *Cf.* Resp. Br. 65. As previously explained, *Molerio* merely applied the general principle that when privileged information would have established a valid defense, it would be inequitable to allow the claim to proceed. Tidwell & Walls Br. 26. There was no ex parte adjudication of liability, and there were no individual-capacity defendants who would have been prejudiced by ex parte proceedings. *Id.*

Plaintiffs finally contend that dismissal of their claims against the individual-capacity defendants would "itself raise serious questions regarding *Plaintiffs'* First Amendment, Due Process, and Seventh Amendment Rights" by "deny[ing] [Plaintiffs] any forum to adjudicate a substantial claim that their constitutional rights have been violated." Resp. Br. 65-66. As an initial matter, Plaintiffs have not yet established that they have any right of action at all against the individual-capacity defendants. *See* Pet. App. 65a n.31 ("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"); *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1863 (2017). Moreover, Plaintiffs' assertion that they "can prove their claims without any privileged evidence" again fails to recognize that the claims cannot be separated from the defense. "It is claims and defenses *together* that establish the justification, or lack of justification, for judicial relief." *General Dynamics*, 563 U.S. at 487. If there is a valid defense, then Plaintiffs have no substantial constitutional claim and no right to relief. And where the government's privilege assertion precludes the individual-capacity defendants from fully and effectively establishing their defense, "neither party can obtain judicial relief." *Id.* at 486. FISA did not replace that "traditional course," *id.* at 487, with a regime of one-sided secret trials—and if it did, it would at the very least raise grave constitutional doubts. This Court should not accept a reading of FISA that invites those serious questions.

CONCLUSION

The court of appeals' decision should be reversed.

Respectfully submitted.

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OCTOBER 2021