No. 20-1191

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

WIKIMEDIA FOUNDATION,

Plaintiff–Appellant,

v.

NATIONAL SECURITY AGENCY, *et al.*,

Defendants–Appellees.

On Appeal from the United States District Court
for the District of Maryland at Baltimore

PETITION FOR REHEARING EN BANC

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INTRODUCTION & RULE 35(B) STATEMENT

This lawsuit challenges the NSA's "Upstream" surveillance program, which the agency uses to systematically search through Internet communications flowing into and out of the United States. This surveillance is the digital analogue of having a government agent open every letter that comes through a mail processing center to examine its contents before determining which letters to keep. The Wikimedia Foundation—which operates the online encyclopedia Wikipedia and engages in trillions of Internet communications with users around the world—filed suit to challenge the constitutionality of this novel, far-reaching surveillance.

The panel majority held that Wikimedia had met its standing burden at summary judgment by presenting extensive public and technical evidence that some of its communications are subject to Upstream surveillance. But the majority nonetheless dismissed the case on state secrets grounds. It held that the procedures Congress enacted in the Foreign Intelligence Surveillance Act ("FISA"), which require in camera review of sensitive surveillance materials, do not displace the state secrets privilege. Though the Supreme Court will hear argument on this precise question in *FBI v. Fazaga* in ten days, the panel majority—over the dissent of Judge Motz—refused to await the Supreme Court's guidance.

This Court should grant rehearing en banc for three reasons.

First, the case involves a question of exceptional importance concerning the

availability of FISA's safeguards against illegal surveillance. Ignoring the plain text of the statute and misapplying canons of construction, the majority held that FISA's mandatory in camera review procedures do not apply to civil cases like this one and do not displace the state secrets privilege. This interpretation would allow the government to thwart virtually any civil challenge to FISA surveillance simply by invoking secrecy, eviscerating Congress's chosen remedies.

Second, the panel's ruling conflicts with the Supreme Court's state secrets cases, which authorize only the exclusion of evidence—not dismissal—in cases like this one. The majority held that Wikimedia had put forward non-privileged evidence on which a reasonable factfinder could rely to find standing. In nevertheless dismissing the case, the panel conflated the evidentiary privilege recognized in *United States v. Reynolds*, 345 U.S. 1 (1953), which is at issue here, with the narrow justiciability bar in cases involving secret government contracts, which is not, *see Totten v. United States*, 92 U.S. 105 (1875). Moreover, as Judge Motz explained in dissent, even if dismissal were available under *Reynolds*, the panel failed to apply the requisite level of judicial scrutiny, allowing the government to obtain dismissal even when it "premises its only defenses on far-fetched hypotheticals." Op. 58. That "sweeping proposition" is in conflict with the Supreme Court's admonition in *Reynolds* that "[j]udicial control over the evidence

in a case cannot be abdicated to the caprice of executive officers." *Id.*; 345 U.S. at 9-10.

Third, the Supreme Court's forthcoming decision in *Fazaga* will almost certainly bear on this appeal. Op. 56-57, 63. To ensure that this case is resolved consistently with the Supreme Court's decision—and with Congress's design in enacting FISA—this Court should grant rehearing en banc, or, at a minimum, hold the petition in abeyance until *Fazaga* is decided.

BACKGROUND

In the six years since Wikimedia and others filed this suit challenging Upstream surveillance, the litigation has focused primarily on Wikimedia's standing to sue. In 2016, the district court granted the government's motion to dismiss for lack of standing. Op. 7. On appeal, this Court vacated that order as to Wikimedia and remanded for further proceedings. Op. 8.

On remand, the government refused many of Wikimedia's discovery requests, asserting the state secrets privilege. Wikimedia moved to compel the government to produce the withheld information in camera, pursuant to FISA. The district court denied that motion. Op. 8-11. The government subsequently moved for summary judgment, arguing that Wikimedia lacked standing and that further litigation would reveal state secrets. Op. 11. In response, Wikimedia substantiated its standing with official government disclosures, and with detailed expert

declarations explaining that—due to the volume and global distribution of Wikimedia's trillions of Internet communications, and due to the way in which Upstream surveillance operates—it is virtually certain the NSA is copying and reviewing Wikimedia's communications. JA.7: 3880; JA.2: 921; *see also* Technologists' Amicus Br., ECF No. 23. Nonetheless, the district court granted the government's motion on both grounds, and Wikimedia appealed.

THE PANEL OPINION AND JUDGE MOTZ'S PARTIAL DISSENT

On appeal, Judges Diaz and Motz held that Wikimedia had presented sufficient evidence to establish a genuine issue of material fact as to its standing to challenge Upstream surveillance. Op. 23.

However, Judges Diaz and Rushing affirmed the district court's dismissal on state secrets grounds, rejecting Wikimedia's argument that in camera review under 50 U.S.C. § 1806(f) displaces the state secrets privilege. Op. 33. According to the majority, Section 1806(f) "describes procedures for determining the admissibility of electronic surveillance information only when the *government* seeks to use such evidence in a particular proceeding." Op. 37. This reading of Section 1806(f) parted ways with the Ninth Circuit's decision in *Fazaga v. FBI*, 965 F.3d 1015 (9th Cir. 2020), *cert. granted*, No. 20-828, 2021 WL 2301971 (U.S. June 7, 2021), which held that FISA applies in civil cases like this one and displaces the state secrets privilege.

Judge Motz, dissenting in part, argued that the Court should have stayed the case pending the outcome of *Fazaga*, rather than "rush[ing] to decide a novel and difficult question that the Supreme Court will resolve within the year." Op. 56. Judge Motz also noted "serious concerns" with the majority's opinion, particularly its acceptance of the government's invocation of the state secrets privilege based on "far-fetched hypotheticals," and its "relegat[ion] [of] the judiciary to the role of a bit player in cases where weighty constitutional interests ordinarily require us to cast a more 'skeptical eye.'" Op. 58 (quoting *Abilt v. CIA*, 848 F.3d 305, 312 (4th Cir. 2017)).

ARGUMENT

I. En banc rehearing is exceptionally important because the panel opinion would eviscerate safeguards against abusive surveillance that Congress enacted in FISA.

Rehearing is necessary because the panel's erroneous interpretation of Section 1806(f) would give the government the power to thwart practically any civil challenge to FISA surveillance, nullifying the safeguards that Congress enacted to check unlawful surveillance. After reading artificial limits into the text, the panel incorrectly held that Congress did not displace the state secrets privilege when it mandated in camera review of sensitive evidence under Section 1806(f). In so holding, the panel ignored the plain language of the statute, disregarded its legislative history, and adopted an interpretation that would eviscerate the civil

remedy Congress created in FISA.[1]

In 1976, a congressional committee, led by Senator Frank Church, issued a landmark report concerning unlawful and abusive executive branch surveillance of Americans. In response, Congress enacted FISA to bring foreign-intelligence surveillance under law and to establish strict safeguards. Through FISA, Congress "eliminat[ed] any congressional recognition or suggestion of inherent Presidential power with respect to electronic surveillance." S. Rep. No. 95-701, at 71-72.

Two of the key safeguards Congress enacted were designed to allow individuals to challenge illegal surveillance in court. In 50 U.S.C. § 1810, Congress established a civil damages remedy for Americans subjected to unlawful surveillance. And in 50 U.S.C. § 1806(f), Congress crafted specific discovery procedures for both criminal and civil cases involving FISA surveillance, to ensure that these cases could be litigated even if they involved government secrets:

> [W]henever 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 applications or orders or other materials relating to electronic surveillance . . . the United States district court . . . shall, notwithstanding any other law, if the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States, review in camera and

[1] Although the Supreme Court's decision in *Fazaga* will almost certainly bear on this case, *see* Part III *infra*, it is possible that the decision will be a narrow one that avoids the questions addressed by the majority—and thus leaves the extreme consequences of the panel's erroneous analysis in place. For this reason, as well, en banc rehearing is exceptionally important.

> 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.

Through Section 1806(f), Congress implemented the Church Committee's recommendation for "discovery procedures, including inspections of material in chambers . . . to allow plaintiffs with substantial claims to uncover enough factual material to argue their case." Church Report, Book II, S. Rep. No. 94-755, at 337.

Section 1806(f) applies here because Wikimedia is an "aggrieved person" under FISA, *see* 50 U.S.C. § 1801(k); it moved to "discover" FISA applications, orders, and other materials in discovery, *see, e.g.*, JA.1: 114-17; and the government refused, filing affidavits asserting that disclosure would harm national security, JA.1: 170-200. Section 1806(f) displaces the state secrets privilege in these circumstances because its procedures directly map onto, and therefore replace, the common-law rules governing the privilege. *See United States v. Texas*, 507 U.S. 529, 534 (1993) (discussing displacement). FISA's in camera review procedures are triggered by a process "nearly identical to the process that triggers application of the state secrets privilege," *Fazaga*, 916 F.3d at 1232; they apply broadly, "whenever" an aggrieved person makes "any" motion to "discover" FISA materials, 50 U.S.C. § 1806(f); and they apply "notwithstanding any other law," *id.*

A. The panel opinion conflicts with the plain text and legislative history of Section 1806(f).

In holding that Section 1806(f) does not control here, the majority erred in several respects.

First, the majority misread the statute's clear text, holding that it applies only where the government seeks to use FISA materials. Op. 37-38. But the text contains no such limitation. Section 1806(f) encompasses "*any motion*" to discover FISA materials —including Wikimedia's—regardless of whether the government plans to introduce those materials into evidence.

Ignoring this plain text, the majority misapplied the canons of noscitur a sociis and ejusdem generis to artificially cabin the statute's reach. Op. 37-38. Neither canon applies here because Section 1806(f) is unambiguous. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002).

Even on their own terms, however, the canons are inapposite. Courts rely on ejusdem generis only "to ensure that a general word will not render specific words meaningless," *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 562 U.S. 277, 295 (2011), and on noscitur a sociis "to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words," *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995). But nothing in Section 1806(f) renders other parts "meaningless" or "inconsistent." The statute applies in three scenarios, described in the first three clauses of the text: (1) when the government provides notice of its

intent to use FISA materials; (2) when, pursuant to Section 1806(e), an aggrieved person moves to suppress evidence obtained or derived from FISA, regardless of whether the government has stated an intent to use FISA materials; and (3) when, as here, an aggrieved person makes "any motion . . . pursuant to *any other* statute or rule . . . to discover or obtain" FISA materials, or "to discover, obtain, or suppress" information obtained or derived from FISA. 50 U.S.C. § 1806(f) (emphasis added). The panel incorrectly reasoned that, if the third clause of Section 1806(f) applied to *any* motion to discover FISA materials, it would render the second clause "superfluous." Op. 38. Not so. In the third clause, Congress specifically accounted for the second clause, by extending the third clause to motions "*other*" than the motions specified in the second clause.

Second, the majority was also wrong to suggest that Wikimedia's interpretation of Section 1806(f) would require "an entire trial in camera." Op. 41. The statute simply requires that courts determine the legality of surveillance after reviewing sensitive evidence in camera, as they have for decades under FISA. Here, Wikimedia would present its public evidence—including the government's official disclosures and the testimony of its expert—in public, alongside its legal arguments. After conducting its Section 1806(f) review, the court would issue a decision about the lawfulness of the challenged surveillance, including Wikimedia's standing. Although parts of that decision might be redacted, as in

other FISA cases, the entire proceeding need not occur in camera.

Third, the majority also erred in holding that Section 1806(f) does not displace the state secrets privilege because the two procedures may involve different government affiants. Op. 43-44. This minor difference only underscores the enormous similarity between the process for invoking the state secrets privilege and the process for triggering Section 1806(f). *Fazaga*, 965 F.3d at 1046. The underlying question—whether disclosure would harm national security—is the same in both contexts.

Fourth, the majority's interpretation conflicts with the legislative history of FISA, which reflects Congress's intent "that an in camera and ex parte proceeding is appropriate . . . *in both criminal and civil cases*"—regardless of whether the government intends to use FISA materials as evidence. H.R. Rep. No. 95-1720, at 31-32 (emphasis added). Moreover, the legislative history makes clear that Section 1806(g) does not apply solely in the context of suppression, Pl. Reply, ECF No. 40 at 5-7, confirming Section 1806(f)'s application to civil cases like this one.

B. The panel opinion would allow the government to thwart virtually any civil challenge to FISA surveillance, nullifying the statute's remedies.

By holding that Section 1806(f) does not displace the state secrets privilege, the majority opinion would allow the government to defeat practically *any* civil suit challenging FISA surveillance—rather than allowing such cases to proceed

using Section 1806(f)'s procedures. This would nullify the civil remedies that Congress enacted in FISA itself, *see* 50 U.S.C. § 1810, and in 18 U.S.C. § 2712, another statute permitting damages for FISA violations.

As the Ninth Circuit recognized in *Fazaga*, "[i]t 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, and provide procedures deemed adequate for the review of national security-related evidence, but not intend for those very procedures to be used when an aggrieved person sues [under Section 1810]." 965 F.3d at 1050-51 (cleaned up).

The majority's assertion that "[e]very state secrets case presents the possibility" that a plaintiff will be denied a remedy, Op. 47, ignores the text, structure, and purpose of FISA. In *this* context, in response to grave surveillance abuses, Congress enacted procedures for handling classified evidence so as to permit civil challenges to go forward. And unlike in other contexts, Congress clearly intended for its rules to govern matters pertaining to foreign intelligence surveillance. *See* S. Rep. No. 95-604, at 7.

Finally, the majority's observation that the government has not invoked the state secrets privilege in every single FISA case misses the point. Op. 45. Regardless of the government's decision in any particular case, the problem is that

the opinion gives the executive branch the power and discretion to thwart virtually any civil challenge to unlawful FISA surveillance.

II. The panel opinion conflicts with the Supreme Court's state secrets decisions.

The majority's ruling with respect to the state secrets privilege conflicts with Supreme Court precedent in two fundamental ways.

A. The panel wrongly conflated the *Totten* bar with the *Reynolds* privilege, which does not permit dismissal here.

In dismissing the case on state secrets grounds, the panel erred by conflating two "quite different" doctrines the Supreme Court has long distinguished. *General Dynamics Corp. v. United States*, 563 U.S. 478, 485 (2011).

The doctrine involved here—the *Reynolds* privilege—is a common-law privilege "in the law of evidence," concerning "military and state secrets." *Reynolds*, 345 U.S. at 6-7; *see* Op. 48. When the government successfully invokes this privilege, "[t]he privileged information is excluded and the trial goes on without it"—"the Court [does] not order judgment in favor of the Government." *General Dynamics*, 563 U.S. at 485; *see Reynolds*, 345 U.S. at 11.[2]

The other state secrets doctrine, not presented here, is a justiciability bar the

[2] The common law from which *Reynolds* derived has always required this approach. Plaintiffs occasionally succeeded on the merits even after privileged material was excluded. *See* Amicus Br. of Professor Laura Donohue at 6, *FBI v. Fazaga*, No. 20-828 (Aug. 6, 2021), https://perma.cc/BV6U-2Z7W ("Prof. Donohue Amicus Br.").

Supreme Court created from its "authority to fashion contractual remedies in Government-contracting disputes." *General Dynamics*, 563 U.S. at 485. That doctrine requires dismissal of government contracting 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*, 92 U.S. 105); *id.* at 12 (Scalia, J., concurring) ("the bar of *Totten* is a jurisdictional one"). The authority for such dismissals is "something quite different from a mere evidentiary point," and the "state secrets jurisprudence bearing upon that authority is not *Reynolds*, but two cases dealing with alleged contracts to spy." *General Dynamics*, 563 U.S. at 485-86 (citing *Tenet* and *Totten*). Individuals entering into such secret contracts "assume[] the risk that state secrets would prevent the adjudication of" any disputes arising from them. *Id.* at 491.

This case has nothing to do with contracts to spy, and thus the *Totten* bar has no application here.

The panel opinion nonetheless suggested that the case must be dismissed because the "whole object" of Wikimedia's suit was to inquire into "the methods and operations of the [NSA]," which it categorically labeled "a state secret." Op. 53. But the government has officially acknowledged Upstream surveillance, the subject of this lawsuit, and it has released scores of documents describing the scope and operation of the program. JA.2: 1061. The Court can determine the

lawfulness of Upstream surveillance based on this public evidence.

For these reasons, the government's invocation of the *Reynolds* privilege would at most support the *exclusion* of any secret evidence, not *dismissal*. *See* Prof. Donohue Amicus Br. at 4-17 (collecting cases). Dismissal may result when a plaintiff cannot prove its case without the secret evidence—but here, the panel specifically held that Wikimedia's public evidence was sufficient, if credited by a reasonable factfinder, to establish Wikimedia's standing. Op. 28. Under the Supreme Court's decisions, Wikimedia must have the opportunity to make its case.

Several of this Court's decisions have strayed from the Supreme Court's strict delineation between the *Reynolds* evidentiary privilege and *Totten*'s jurisdictional bar, permitting dismissal when a court deems state secrets "so central" to a case, or believes the defendant cannot defend itself without secret evidence. *See, e.g.*, *Fitzgerald v. Penthouse Int'l*, 776 F.2d 1236 (4th Cir. 1985); *Sterling v. Tenet*, 416 F.3d 338 (4th Cir. 2005); *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007). But the Court has not reconsidered its earlier precedents in light of the Supreme Court's most recent state secrets decision, which drew a bright line between *Reynolds* and *Totten*. *Compare General Dynamics*, 563 U.S. at 485, *with Abilt*, 848 F.3d 305. This question warrants the full Court's consideration.

B. The government's hypothetical defense provides no basis for dismissal under *Reynolds*.

This case also warrants en banc review because, even if dismissal were available in narrow circumstances under *Reynolds*, that drastic remedy cannot be awarded to the government based on an entirely hypothetical defense. Op. 58, 62. Instead, the district court was required to examine the purportedly privileged evidence in camera. The majority's holding to the contrary conflicts with controlling Supreme Court precedent and the law of other circuits.

As Judge Motz explained in dissent, *Reynolds* "expressly recognized that in camera review might sometimes be necessary to evaluate a privilege claim," especially when the outcome of a case depends on it or the claim of privilege is in some doubt. Op. 59. In those circumstances, "the claim of privilege should not be lightly accepted." *Reynolds*, 345 U.S. at 11. Here, the government argued that it could, "in theory," have privileged information that would rebut Wikimedia's proof of standing. JA.6: 3450; *see* Gov't MSJ Br. 27, ECF No. 164-2. But it is entirely unknown to the Court, and perhaps even the government's own attorneys, whether such evidence actually exists.[3] When the government seeks dismissal of a

[3] Wikimedia's own expert and nearly two dozen networking engineers and technologists have explained why evidence supporting the government's Wikimedia-avoidance theory almost certainly does *not* exist. JA.7: 3880-3939; Technologists' Amicus Br. 3, ECF No. 23 (the government's hypothetical "lacks a basis in both Internet technology and engineering").

case by positing only the *possibility* of a secret defense, relying on purportedly secret facts that may or may not exist, a court cannot simply dismiss the case based on the government's hypothetical. Doing so would surrender control of the privilege to "the caprice of executive officers," which the Supreme Court has forbidden. *Reynolds*, 345 U.S. at 9-10. The state secrets privilege attaches only to actual evidence, not hypothetical evidence, and it is the judiciary's province under *Reynolds* to determine whether the privilege has been validly invoked.

The majority's opinion also conflicts with the approach of other circuits that have confronted this question. *See* Op. 60 (collecting cases). Both the D.C. and Ninth Circuits have held that, to obtain dismissal on the ground that the *Reynolds* privilege precludes a defense, the government must establish to the court that the privilege precludes a legally *meritorious* defense—one that would require judgment for the defendant. *In re Sealed Case*, 494 F.3d 139, 149-50 (D.C. Cir. 2007); *Fazaga*, 916 F.3d at 1253. As these courts have persuasively explained, "[w]ere the valid-defense exception expanded to mandate dismissal of a complaint for any plausible or colorable defense, then virtually every case in which the United States successfully invokes the state secrets privilege would need to be dismissed." *In re Sealed Case*, 494 F.3d at 149-50. To assess the validity of a privileged defense, a court must conduct an "appropriately tailored in camera review of the privileged record." *Id.* at 151. For the reasons described by Judge

Motz, that review would be straightforward here. Op. 60-61. It is this approach, embraced by other circuits, that properly adheres to *Reynolds*'s "formula of compromise." 345 U.S. at 9-10.

III. The Supreme Court's pending decision in *Fazaga* will address issues central to this appeal.

The Supreme Court will hear argument on several of the issues central to this case in ten days. Yet the panel majority, over Judge Motz's objection, decided watershed FISA and state secrets questions without awaiting the Supreme Court's controlling decision in *Fazaga*. If the Supreme Court holds that Congress displaced the state secrets privilege in FISA, or that the privilege did not permit dismissal in *Fazaga*, the proper course here would be to reverse the district court and remand for further proceedings. This Court should grant rehearing en banc to ensure that its ruling in this case is consistent with the Supreme Court's impending decision. At a minimum, it should hold Wikimedia's petition in abeyance until *Fazaga* is decided and the Court has an opportunity to assess whether the Supreme Court's ruling or reasoning warrants review of the panel's divided opinion.

CONCLUSION

For these reasons, the Court should grant rehearing en banc.

Date: October 29, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 35(b)(2)(A) because it contains 3,894 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

Date: October 29, 2021

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