SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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FEDERAL BUREAU OF INVESTIGATION,   )

ET AL.,   )

        Petitioners,   )

          v.   ) No. 20-828

YASSIR FAZAGA, ET AL.,   )

        Respondents.   )

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Pages: 1 through 139

Place: Washington, D.C.

Date: November 8, 2021

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11   Washington, D.C.

12   Monday, November 8, 2021

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14   The above-entitled matter came on for

15   oral argument before the Supreme Court of the

16   United States at 10:00 a.m.

17

18   APPEARANCES:

19   EDWIN S. KNEEDLER, Deputy Solicitor General,

20   Department of Justice, Washington, D.C.; on behalf

21   of the Petitioners.

22   CATHERINE M.A. CARROLL, ESQUIRE, Washington, D.C.; on

23   behalf of the Agent Respondents.

24   AHILAN T. ARULANANTHAM, ESQUIRE, Los Angeles,

25   California; on behalf of Respondents Fazaga et al.

1   C O N T E N T S

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 1                P R O C E E D I N G S
 2                                   (10:00 a.m.)
 3            CHIEF JUSTICE ROBERTS:  Today's orders
 4   of the Court have been duly entered and
 5   certified and filed with the clerk.
 6            We will hear argument first this
 7   morning in Case 20-828, the Federal Bureau of
 8   Investigation versus Fazaga.
 9            Mr. Kneedler.
10           ORAL ARGUMENT OF EDWIN S. KNEEDLER
11              ON BEHALF OF THE PETITIONERS
12           MR. KNEEDLER:  Mr. Chief Justice, and
13   may it please the Court:
14            The state secrets privilege is firmly
15   grounded in the Constitution and the common law
16   and is critical to safeguarding the national
17   security.  The Ninth Circuit did not disagree
18   with the district court's conclusion that the
19   information concerning the foreign intelligence
20   investigation at issue here was -- falls within
21   that privilege.
22            The Ninth Circuit instead held that
23   Section 1806(f) of FISA displaces the state
24   secrets privilege and requires the district
25   court to adjudicate the merits of plaintiffs'
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1   challenge using the very information that is

2   covered by the privilege.

3   That novel interpretation cannot be

4   squared with the text, context, or purpose of

5   Section 1806(f). That section's purpose is to

6   provide a special mechanism for the suppression

7   of evidence when the government seeks to use it

8   against an aggrieved person in a judicial

9   proceeding or other proceeding.

10   The Ninth Circuit's first rationale

11   was that the government uses information against

12   a party when it invokes the state secrets

13   privilege. But the government invokes the

14   privilege to prevent the use of information, not

15   to facilitate its use.

16   Indeed, in this case, the government

17   argued, and the district court agreed, that

18   because the information concerning the reasons,

19   the subjects, the sources and methods of this

20   foreign intelligence investigation was so

21   central to the case that the case -- that the

22   First Amendment claim had to be dismissed.

23   The Ninth Circuit's other rationale

24   was equally erroneous. It ruled that

25   plaintiffs' prayer for relief seeking an

1   injunction requiring the FBI to destroy or

2   return the information comes within 1806(f)'s

3   reference to a motion or request to discover or

4   obtain surveillance application orders and

5   related materials. But that clause governs

6   discovery in aid of a suppression motion. It

7   likewise does not displace the privilege.

8   At the very least, given the

9   constitutional and deep common law roots of the

10   state secrets privilege, Section 1806 cannot be

11   read to -- to reflect a congressional intent

12   that would be required to abrogate the

13   privilege.

14   JUSTICE THOMAS: Mr. Kneedler, do you

15   place -- a -- few times in your opening remarks

16   you referred to this as a common law privilege.

17   Is that your argument, that it's based in common

18   law rather than inheres in executive power?

19   MR. KNEEDLER: No, we -- we think it's

20   very strongly rooted in executive power. It --

21   it -- it's also firmly rooted in the common law,

22   and the -- the reflection of it being in the --

23   in -- as part of the executive power goes all

24   the way back to the founding. Some -- many of

25   those early disputes were vis-a-vis Congress,

    1   not the courts. But the basic point of the need

    2   for the executive to protect information

    3   pertaining to the nation's security as being

    4   part of the presidential prerogative and the

    5   executive branch necessity goes all the way back

    6   to the founding.

    7   But it's also recognized for very good

    8   reasons, the same reasons, really, as a matter

    9   of federal common law.

   10   JUSTICE THOMAS: One final question.

   11   The Respondent seems to make quite a bit of the

   12   -- two cases, Totten and Reynolds, and argues

   13   that these two have separate doctrines with

   14   respect to executive powers or to state secrets.

   15   Do you think they're two separate

   16   doctrines, or is it just one doctrine?

   17   MR. KNEEDLER: We think, at bottom,

   18   that it's just one doctrine. The -- the

   19   question of the privilege in the first instance

   20   goes to the exclusion of the evidence --

   21   JUSTICE THOMAS: Yeah.

   22   MR. KNEEDLER: -- from the proceeding.

   23   But then the next question is, what happens if

   24   the evidence is excluded? And in that

   25   situation, as we argued here, where the evidence

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 1      is so central, at least where the evidence is so

 2      central to the case or its adjudication would

 3      risk disclosing information at the core of the

 4      case, the case should be dismissed.

 5              And, in fact, this Court's decision in

 6      Tenet versus Doe rejected the claim or the

 7      contention that -- that the doctrine of Totten

 8      was simply a contract doctrine.  The Court said,

 9      in fact, Totten was not so limited.

10              And the Court, quoting the -- the

11      famous passage from Totten, said public policy

12      forbids the maintenance of any suit in a court

13      of justice the trial of which would inevitably

14      lead to the disclosure of matters which the law

15      itself regards as confidential.

16              And in Reynolds itself, while the

17      Court was dealing with a privilege, it pointed

18      out that Totten was a particularly clear case,

19      and it was not necessary to -- even to get into

20      the question of evidence because the -- the case

21      concerned the existence of a -- of a spy

22      agreement that was central to the case.

23              But I think the way the -- the Court

24      referred to Totten indicates that that was an

25      easy case that actually could be dismissed in
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1    the face of the complaint because the face of

2    the complaint was alleging the existence that

3    was -- of a secret item that was -- that was

4    protected by the -- by the national security.

5              But, if you get further along, maybe

6    the face of the complaint doesn't say that, but,

7    as the government's declaration in this case

8    demonstrated, the adjudication of the case, if

9    it went forward, would concern the sources and

10   methods, et cetera, of the foreign intelligence

11   investigation that -- that -- such that

12   plaintiffs' First Amendment challenge could not

13   --

14             JUSTICE SOTOMAYOR:  Mr. Kneedler --

15             MR. KNEEDLER:  -- properly be

16   adjudicated.

17             JUSTICE THOMAS:  Thank you.

18             JUSTICE SOTOMAYOR:  -- part of -- I'm

19   sorry, Justice Thomas.

20             JUSTICE THOMAS:  No, I'm finished.

21             JUSTICE SOTOMAYOR:  Did you finish?

22   Thank you.

23             I'm a little confused.  I thought the

24   Ninth Circuit here basically only displaced the

25   state secrets privilege with respect to the
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 1      ability of the judge to determine whether, after

 2      reviewing the information that was necessary,

 3      that it thought necessary, that it should --

 4      then should determine whether the seizure was

 5      lawful or unlawful under 1806.

 6              I thought that there were separate

 7      writings basically saying that if, at that

 8      point, it found the seizure unlawful, that then

 9      it would consider disclosure only.  I don't

10      think it said it would disclose if the seizure

11      was lawful.  It said it would disclose only if

12      it's unlawful.

13              MR. KNEEDLER:  But --

14              JUSTICE SOTOMAYOR:  I don't know where

15      in any of our jurisprudence we've ever suggested

16      that an in camera review by a judge threatened

17      national security.

18              MR. KNEEDLER:  Our submission is not

19      that when the government invokes the state

20      secrets privilege that a court is altogether

21      barred from looking at the -- at in camera

22      submission by the government to explain why the

23      information is privileged.

24              But the Ninth Circuit went beyond

25      that.  It relied on 1806(f) to actually
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 1    adjudicate the merits.  It said the court should

 2    consider all of the constitutional challenges

 3    that -- that the plaintiffs are bringing.

 4              JUSTICE SOTOMAYOR:  I'm sorry.  1806

 5    only permits on its terms a disclosure if the

 6    information is seized unlawfully.  So I don't

 7    know where you would get that the Court was

 8    trying to do anything else but determine that.

 9              And I think there were some of the

10    majority who wrote separately and said, if the

11    Court chooses to disclose, then -- but that's a

12    big if -- assuming that your seizure was

13    unlawful, then it has to be disclosed.

14              I guess my bottom line is you seem to

15    be rendering 1810 a nullity by basically saying,

16    if I invoke state -- if I don't invoke 1806 by

17    move -- me, the government -- by moving to

18    suppress evidence, then -- and I tell you it's a

19    state secret, even if I seize these materials

20    unlawfully, the Petitioners have no claim under

21    1810.

22              Is that what you're saying?

23              MR. KNEEDLER:  Well, several things.

24              1810 does not apply to the government.

25    1810 is only a suit for damages.
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 1              JUSTICE SOTOMAYOR:  Exactly.  So if
 2    these --
 3              MR. KNEEDLER:  So it cannot be the
 4    basis for -- for a suit for an injunction.
 5              JUSTICE SOTOMAYOR:  Well, that's
 6    assuming we read 1806 the way you do.
 7              MR. KNEEDLER:  No.  No, I --
 8              JUSTICE SOTOMAYOR:  But 1810 --
 9              MR. KNEEDLER:  -- I was making a point
10    --
11              JUSTICE SOTOMAYOR:  -- lets a --
12              MR. KNEEDLER:  -- about 18 -- about 18
13    --
14              JUSTICE SOTOMAYOR:  -- person --
15              MR. KNEEDLER:  Yes.
16              JUSTICE SOTOMAYOR:  --- 1810 lets a
17    person who's been surveilled unlawfully sue for
18    actual damages, liquidated damages, punitive
19    damages, and reasonable attorneys' fees.
20              So assume, as I must, on the face of
21    the complaint that the plaintiffs might be able
22    to prove without your information that they have
23    standing because they've been unlawfully
24    surveilled, and they're suing for a violation of
25    1810.
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1   You're claiming that they don't --

2   they're not entitled to have the judge determine

3   whether they've been surveilled unlawfully or

4   not?

5   MR. KNEEDLER: There -- there are two

6   points about 8 -- about Section 1806(f). One is

7   that it is simply a suppression mechanism, not a

8   -- a -- a determination to --

9   JUSTICE SOTOMAYOR: Do we need to

10   reach that if we -- if we just say that 1806

11   doesn't displace state secrets? Why would we

12   even reach that question?

13   MR. KNEEDLER: Well, I -- state secret

14   -- because there's a threshold question.

15   1806(f) only applies -- it's triggered by the

16   government's intention or obvious purpose --

17   JUSTICE SOTOMAYOR: No, sir.

18   MR. KNEEDLER: -- to use the

19   information.

20   JUSTICE SOTOMAYOR: You -- you say

21   that the state secrets is not displaced by

22   1806(f). If we agree with that, why would we

23   reach that very knotty question, which, in your

24   brief, you asked us not to reach, of whether or

25   not a claim under 1810 would permit the judge to

1   look at the materials and say a seizure is

2   unlawful or not?

3   MR. KNEEDLER: What we've -- what

4   we've suggested is not before the Court is the

5   question of dismissal as a remedy or as a

6   consequence of invocation of the state secrets

7   privilege.

8   The other arguments we're making go to

9   the interpretation of 1806 itself. In terms of

10   when can it be invoked, in our view, it can be

11   invoked only when the government affirmatively

12   will use the information against an aggrieved

13   party.

14   CHIEF JUSTICE ROBERTS: Mr. Kneedler

15   --

16   MR. KNEEDLER: And the invocation of

17   --

18   CHIEF JUSTICE ROBERTS: -- how is that

19   -- how is that consistent -- I mean, I think I

20   understand the argument you made in this respect

21   in your brief, but I'd like to hear it

22   concisely.

23   How is that consistent with the

24   language that any aggrieved person can use the

25   statute to discover or obtain applications or

 1   orders or other materials relating to the

 2   electronic surveillance? That sounds like the

 3   other aggrieved person is using 1806(f).

 4   MR. KNEEDLER: Yes, but in -- but we

 5   submit in response, in the situation, just like

 6   in an ordinary suppression situation, if the

 7   government -- and -- and this is a statutory

 8   codification of what is, at bottom, a regular

 9   suppression motion or -- or procedure.

10   When the government intends to

11   introduce evidence obtained or derived from

12   foreign intelligence surveillance, then the

13   aggrieved party against whom the evidence would

14   be used has an opportunity, just as in a -- a

15   normal suppression motion, to challenge the

16   validity of the surveillance or -- or other way

17   in which the government obtained the evidence.

18   So it has to be triggered first by the

19   government's use of the information. And when

20   you -- when you read all -- all -- the preceding

21   sections and (f) together, we think that's very

22   clear.

23   Subsection (c) requires the government

24   to notify an aggrieved party when it intends to

25   use information against him in a proceeding.

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

2   then (f) is about how a suppression procedure

3   would operate, whether -- whether it -- it's the

4   result of the government's notification or a

5   motion under (e) or, as a -- as a safeguard to

6   make sure this procedure is exclusive, any other

7   way in which a aggrieved party might seek to

8   challenge the government's use of the

9   information.

10   And your reference to the language in

11   -- in (f) refers to a motion or request is made

12   by an aggrieved party to discover or obtain

13   applications or orders or other materials

14   relating to the surveillance.

15   That is all information. It's classic

16   suppression. We want -- we want to see what

17   went -- what went into the warrant or what went

18   into the application to the FISC. So it's about

19   suppression --

20   JUSTICE KAGAN: But why isn't --

21   MR. KNEEDLER: -- not about a -- a

22   general discovery.

23   JUSTICE KAGAN: -- well, why isn't it

24   about both? I mean, a significant part of it is

25   obviously about suppression, but there are also

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 1      these references to discovery.  And why -- why

 2      shouldn't we understand this provision as doing

 3      both things, as codifying a suppression

 4      procedure and also codifying a discovery

 5      procedure?  Because it may be that plaintiffs in

 6      a case like this one look to discover very

 7      sensitive materials and Congress wanted a

 8      procedure in place to deal with those kinds of

 9      discovery requests.

10               MR. KNEEDLER:  Well, in a -- in a

11      civil case, if there is a discovery request and

12      the -- and the information is covered by the

13      privilege, the mechanism for dealing with that

14      is the assertion of the state secrets privilege.

15               There is no automatic right in a civil

16      plaintiff to get discovery from the government

17      vis-α-vis a privilege.  But in -- but where the

18      government actually comes forward and says we

19      want to use this information against you, then

20      --

21               JUSTICE KAGAN:  But you're just --

22      you're just excising words from this statute.  I

23      mean, this -- this statute is about discovering,

24      obtaining, or suppressing evidence.  That's --

25               MR KNEEDLER:  Well --
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 1               JUSTICE KAGAN:  -- that's the (f)
 2    language, right?
 3               MR. KNEEDLER:  Yes, but the -- but --
 4               JUSTICE KAGAN:  Suppressing,
 5    obtaining, or discovering, right?
 6               MR. KNEEDLER:  Yes, but --
 7               JUSTICE KAGAN:  I mean, it just seems
 8    as though Congress wanted to do two things here.
 9               It said we realize there are these
10    very sensitive materials, and maybe the
11    government will want to use them, and the person
12    will say:  Oh, that's illegal, the government
13    can't use them.  That's one set of
14    circumstances.
15               And the other set of circumstances is
16    maybe a plaintiff wants access to those
17    materials, and the government wants to say:  No,
18    you can't have them.  And that's another way in
19    which this statute says here are the procedures
20    you use when that occurs.
21               MR. KNEEDLER:  I -- I think that that
22    phrasing has to be looked at in the context of
23    -- of all of the -- all of the subsections
24    dealing with the government's intent to use.
25               And, indeed, Section 1806 as a whole,
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1   1806 is termed -- is titled Use of Information.

2   Subsection (a) describes the uses to which the

3   government may put the evidence, that it can use

4   it only in connection with minimization

5   procedures.

6   Subsection (b) says that it -- that it

7   can't be turned over for law enforcement

8   purposes without a reservation by the Attorney

9   General.

10   (c) through (g) deal with the

11   government's use of the information against a

12   party in a -- in a narrow situation in a legal

13   proceeding.

14   JUSTICE GORSUCH: Mr. Kneedler, I'm --

15   I'm curious, in the list you gave the Chief

16   Justice of the various sets -- subsections that

17   you think support your -- your position, you

18   didn't list (a), and -- which talks about

19   preserving privileges that otherwise exist. And

20   I'm just curious why the government didn't

21   invoke (a). There must be a reason.

22   MR. KNEEDLER: No, I think -- I think

23   (a) does cover that. I --

24   JUSTICE GORSUCH: Oh, so let's throw

25   that in now too. Okay. All right.

1   MR. KNEEDLER: Well --

2   JUSTICE GORSUCH: Okay. No.

3   MR. KNEEDLER: -- but -- but I think

4   it was --

5   JUSTICE GORSUCH: No, I just wondered

6   if you had a -- had thought about it, and if

7   not, that's fine.

8   MR. KNEEDLER: Yeah. No, I think it

9   also covers, like, attorney-client privilege --

10   JUSTICE GORSUCH: Okay.

11   MR. KNEEDLER: -- of the person being

12   surveilled.

13   JUSTICE GORSUCH: Okay. All right.

14   If you --

15   MR. KNEEDLER: But --

16   JUSTICE GORSUCH: I just wondered if

17   you had had a thought about it.

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

19   JUSTICE GORSUCH: And if you didn't,

20   that's fine.

21   MR. KNEEDLER: -- I -- I think that's

22   a further confirmation of the --

23   JUSTICE GORSUCH: Okay, okay. I got

24   it.

25   "Otherwise use," help me out with

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 1    that.  The language is "enter into evidence,
 2    disclose, or otherwise use."
 3              Why doesn't "otherwise use" cover --
 4    cover this circumstance?
 5              MR. KNEEDLER:  Well, I -- I think,
 6    again, I'm -- I'm not sure if you're looking at
 7    subsection (c) --
 8              JUSTICE GORSUCH:  Yeah.
 9              MR. KNEEDLER: -- or (e), but
10    subsection (c) says "whenever the government
11    intends to enter into evidence or otherwise use
12    or disclose."  That --
13              JUSTICE GORSUCH:  So -- so it has to
14    be a circumstance, it seems to me, where the
15    government isn't putting the evidence on and it
16    isn't disclosing it to the other side, but it's
17    making use of the evidence in some other
18    fashion.
19              And, here, I think there's a pretty
20    good argument on the other side that the
21    government is using it as a means to dismiss the
22    case without disclosing it.  And -- and -- and
23    it is the existence of this secret evidence that
24    will neither be put in evidence nor disclosed
25    that is the basis for the dismissal under
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 1   Reynolds and Totten in the government's view.

 2   So why -- why doesn't that fit

 3   perfectly?

 4   MR. KNEEDLER: I -- the -- the -- the

 5   language "enter" -- "enter into evidence or

 6   otherwise use or disclose" is intended, as we

 7   understand it, to be a comprehensive description

 8   of any way in which the evidence might be --

 9   JUSTICE GORSUCH: But it isn't because

10   you've got "otherwise use." So it can't be that

11   "enter into evidence" and disclosure are

12   comprehensive.

13   MR. KNEEDLER: Well, you --

14   JUSTICE GORSUCH: By definition,

15   Congress says they aren't and that there's an

16   other -- there's another way to use this

17   evidence that doesn't involve its disclosure.

18   MR. KNEEDLER: Well, you -- "use"

19   could also -- I mean, "enter into evidence"

20   suggests a formal proceeding, either a judicial

21   proceeding or maybe a formal --

22   JUSTICE GORSUCH: I think we have --

23   MR. KNEEDLER: -- proceeding under the

24   --

25   JUSTICE GORSUCH: -- a pretty formal

1   proceeding here, Mr. Kneedler, don't you?

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

3   -- my -- I think you were looking -- I

4   understood you to be looking for an explanation

5   for the word "use." And the explanation I'm

6   giving is that when -- when you don't have a

7   formal proceeding where you -- where you have

8   Rules of Evidence introducing something into

9   evidence, something received in evidence, but an

10   informal adjudication before an agency that does

11   not have that sort of system --

12   JUSTICE GORSUCH: But, Mr. Kneedler,

13   we're talking --

14   MR. KNEEDLER: -- you might use it

15   even if --

16   JUSTICE GORSUCH: -- Mr. Kneedler,

17   we're talking about "otherwise use" in court,

18   and -- and, clearly, because we've got

19   disclosure and -- and entry into evidence.

20   Those things happen in court.

21   Why couldn't it be, again, that

22   "otherwise use" might include when the

23   government cites the existence of secret

24   evidence it's not willing to disclose or put in

25   evidence as a basis for dismissal of the

 1   lawsuit? That's using the evidence as an

 2   offensive weapon?

 3   MR. KNEEDLER: Well, it -- again, we

 4   think, when the government invokes the state

 5   secrets privilege, it is invoking it to keep it

 6   out of the case. It's not -- what -- what --

 7   what the language is, is "to use against the

 8   person in the proceeding," but the -- but

 9   assertion of the state secrets privilege

10   successfully --

11   JUSTICE BARRETT: Mr. Kneedler --

12   MR. KNEEDLER: -- keeps it out of the

13   proceeding. I'm sorry.

14   JUSTICE BARRETT: -- can I follow up

15   on Justice Gorsuch's question? I guess I had

16   understood -- and maybe I'm misunderstanding --

17   your position to be that in 1806(c), "intends to

18   enter into evidence or otherwise use or

19   disclose," that it's not simply in a trial, but

20   it's "to otherwise use or disclose at any trial,

21   hearing, or other proceeding in or before any

22   court, department, officer, agency, regulatory

23   body, or other authority of the United States."

24   I had understood you to be saying,

25   well, in all of those situations, you might not

1   be introducing into evidence, but you might be

2   using the evidence, bringing it before a

3   regulatory body in some way that's not a

4   proceeding. Or am I misunderstanding --

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

6   JUSTICE BARRETT: -- your argument?

7   MR. KNEEDLER: -- that's precisely our

8   explanation. One --

9   JUSTICE BARRETT: And I -- oh, go

10   ahead.

11   MR. KNEEDLER: I'm sorry.

12   JUSTICE BARRETT: Sorry. Go ahead.

13   MR. KNEEDLER: No, I was going to say

14   one other -- one other clue to this is the very

15   same phrase "intends to enter into" -- or "enter

16   into evidence or otherwise use or disclose" in

17   (c) is used in (e), which says "any person

18   against whom evidence obtained," et cetera,

19   "will be introduced or otherwise used or

20   disclosed, may file a motion to suppress."

21   So I think that links (c)'s language

22   about use to the motion to suppress, which is

23   the way in which, again, (e) uses the very same

24   language. And then (f) is about the procedures

25   for suppression. And (g) then says, if the

1   government -- if the district court determines

2   that the surveillance was not lawful, it shall,

3   in accordance with the requirements of law,

4   suppress the evidence which was unlawfully

5   obtained or otherwise grant the motion.

6   And "otherwise grant the motion" was

7   intended to leave open the question of whether

8   this Court's decision in Alderman would apply

9   under -- under FISA. So it --

10   JUSTICE BARRETT: Thank you.

11   MR. KNEEDLER: -- it all hangs

12   together. And it -- this would be a surprising

13   way in which the government -- excuse me -- in

14   which court -- Congress would override, abrogate

15   the state secrets privilege in a sentence about

16   discovery in the middle of four -- five

17   subsections of this statute dealing pretty

18   clearly with the suppression of evidence.

19   And even when you look at 1806(f)

20   itself, it -- it -- it talks about discover or

21   obtain applications or orders or other materials

22   relating to the electronic surveillance. It's

23   not a -- it's not talking about evidence about

24   the plaintiffs' claim generally. It's focused

25   specifically on the things dealing with the

 1 electronic surveillance.

 2   JUSTICE ALITO: It --

 3   JUSTICE BARRETT: Mister --

 4   JUSTICE ALITO: -- it seems to me, Mr.

 5 Kneedler, you have at least one textual argument

 6 regarding the language in subsection (f), and

 7 that is whether the prayer for relief

 8 constitutes a motion or request.

 9   But putting that aside, do you have

10 any other arguments about the literal meaning of

11 the language in subsection (f) on which the

12 Respondents rely? And if you don't, what are

13 the structural features that you rely on?

14   I understand your argument to be based

15 mostly on structure and not on the literal

16 language of -- of subsection (f). So two parts

17 to that. Any other strictly textual arguments?

18 And, if not, which structural arguments are you

19 relying on or which anomalies would result if

20 their interpretation were adopted?

21   MR. KNEEDLER: Well, there are, I

22 think, very important textual arguments in the

23 pertinent phrase, which actually has two parts,

24 but it says "discover or obtain."

25   And "discover" could, again, tie into

 1   formal court proceedings, where -- where you

 2   might file a discovery motion, but -- but

 3   outside of formal proceedings, if you want to

 4   obtain -- excuse me -- obtain the evidence

 5   effectively in the same way you would through

 6   discovery, but what you were --

 7   JUSTICE ALITO: But the point is,

 8   literally, they want to obtain this information,

 9   do they not?

10   MR. KNEEDLER: No, what -- what their

11   prayer for relief seeks is -- is actually

12   expungement of it, not -- not to receive it.

13   JUSTICE GORSUCH: I thought they made

14   very plain that they'd be very happy to get the

15   documents back, which I think would be to obtain

16   them.

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

18   JUSTICE GORSUCH: No?

19   MR. KNEEDLER: Yes, but that doesn't,

20   I think, really tie in with -- with what they --

21   what their complaint was. But the more

22   fundamental point is 8 -- 1810 does not provide

23   for injunctive actions against the United

24   States. And the Privacy Act does not provide

25   for expungement.

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 1          But the structural point, we think, is
 2   also very important.  As I mentioned here, the
 3   -- the entirety of 1806 is addressed to the
 4   government's use of information derived from
 5   foreign intelligence surveillance.  That's the
 6   title.  (a) talks about use with minimization;
 7   (b) talks about when it's going to be furnished
 8   for law enforcement purposes.  All of these
 9   other provisions that -- that we're discussing
10   go to when the government tries to use it in the
11   proceedings.
12          JUSTICE ALITO:  Okay.  I've got that
13   point.  This is -- they are taking some language
14   out of this and interpreting it to mean
15   something that is quite different from most of
16   what is addressed in 1806.  I -- I've got that.
17          Any other structural features that you
18   rely on?
19          MR. KNEEDLER:  Well, the -- the
20   language -- I don't know whether it's structural
21   or -- but the language in -- in (c) and --
22   excuse me -- (c) and (e) that I referred to,
23   which ties "otherwise use" to suppression, and
24   then (f) being an implementation of the -- of
25   the method for suppression, and on -- on (g),
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 1    which talks about grant -- suppress the evidence

 2    or otherwise grant the motion....  it's the same

 3    motion to exclude the evidence from the

 4    proceeding.  The court can either suppress it

 5    or, I think Congress hoped, do something else

 6    besides -- besides turning over all the

 7    information to the defendant as part of the

 8    suppression.  That's --

 9              CHIEF JUSTICE ROBERTS:  Thank --

10              MR. KNEEDLER:  -- but -- but (g) talks

11    about suppression of evidence, not -- not

12    obtaining it.

13              CHIEF JUSTICE ROBERTS:  Thank you, Mr.

14    Kneedler.

15              MR. KNEEDLER:  I'm sorry.

16              CHIEF JUSTICE ROBERTS:  Justice

17    Thomas, anything further?

18              JUSTICE THOMAS:  Mr. Kneedler, you

19    were -- just one brief thing.  You were in the

20    process when you were discussing subsection (c)

21    and the -- it's 1806(c), you -- the phrase

22    "against an aggrieved person," you were about to

23    tell us what you thought of that before you got

24    distracted.

25              MR. KNEEDLER:  I think that's very
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1   important because it -- it -- it -- it shows

2   that it -- it has to be triggered by something

3   that the government is doing before you even get

4   into this procedure, and -- and that's why the

5   word "suppress" is very important here.

6   If the government intends to use the

7   information against somebody, you can move to

8   suppress it, or, if it's in a more informal

9   proceeding, you move to have it excluded or

10   don't consider it or whatever its -- whatever

11   its equivalent is.

12   Now there may be some civil

13   proceedings where -- where the evidence, you

14   know, maybe there's an argument it shouldn't

15   even be suppressed, but -- but, again, it's all

16   -- in 1978, it was all directed toward

17   suppression, where the government intends to use

18   information against the person in the

19   proceeding, whereas the state secrets privilege

20   keeps it out of the proceeding.

21   JUSTICE THOMAS: Thank you.

22   CHIEF JUSTICE ROBERTS: Justice

23   Breyer?

24   JUSTICE BREYER: Well, assume you're

25   right that 180 -- that this particular statute

1   doesn't displace the state secret doctrine.

2   Still, there are many situations and different

3   kinds in which it might arise.

4   This is an unusual one. A plaintiff

5   sues government officials and says: You have

6   unlawfully been wiretapping or surveying,

7   whatever. Okay?

8   The government goes back and says:

9   Judge, we have a good reason for doing that

10   wiretapping, and we don't want to tell people

11   what it is.

12   Doesn't the judge -- shouldn't he

13   still look to see if they're right? I mean,

14   one, maybe they don't. Two, maybe it isn't that

15   important. Three, maybe how they got it,

16   legally or illegal, has something to do with

17   whether -- and, E, maybe there are different

18   ways in which you could disclose some but not

19   all.

20   I mean, wouldn't that be generally

21   true whether this applies or it doesn't apply?

22   MR. KNEEDLER: What you're describing,

23   I think, is the normal administration of the

24   state secrets privilege.

25   JUSTICE BREYER: Uh-huh.

1   MR KNEEDLER: If the government

2   invokes it, yes, we're saying the court can look

3   at it, but it can't use it as a vehicle to

4   decide the merits of the case.

5   JUSTICE BREYER: Why not? If -- well,

6   that's Justice Scalia's opinion. I mean, I

7   don't know.

8   MR. KNEEDLER: No, I --

9   JUSTICE BREYER: Here, we have a

10   motion to dismiss, and all we have is that. And

11   before we decide whether the case should have

12   been dismissed or not dismissed, doesn't the

13   district judge and perhaps the court of appeals

14   and, for all I know, maybe us, have to look at

15   this information?

16   MR. KNEEDLER: Yeah, we -- we are --

17   we are not -- we are not saying that in the

18   normal state secrets case the court, if -- if

19   necessary --

20   JUSTICE BREYER: Could look at it.

21   MR. KNEEDLER: -- can't -- can't look

22   at the --

23   JUSTICE BREYER: Okay. Then why don't

24   we just say this, say this case needn't be

25   dismissed. What should happen -- and -- and it

 1   doesn't displace -- this 1806, it doesn't

 2   displace anything that's relevant here, but we

 3   should send it back, and the Ninth Circuit was

 4   wrong, and the district court and maybe the

 5   circuit too should go and look at the

 6   information if they deem that necessary in terms

 7   of the relevance to the case and decide --

 8   MR. KNEEDLER: But --

 9   JUSTICE BREYER: -- its relevance, how

10   it was obtained, dah, dah, dah, dah, dah, dah,

11   dah.

12   MR. KNEEDLER: But --

13   JUSTICE BREYER: And then someone can

14   move, like the government --

15   MR. KNEEDLER: -- the district court

16   --

17   JUSTICE BREYER: -- hey, keep this

18   out, dismiss the case.

19   MR. KNEEDLER: -- the district court

20   -- the government -- the district court already

21   did that. The government moved to --

22   JUSTICE BREYER: And did the Ninth

23   Circuit?

24   MR. KNEEDLER: The Ninth Circuit did

25   not reach the dismissal question --

 1   JUSTICE BREYER: No.

 2   MR. KNEEDLER: -- because it concluded

 3   --

 4   JUSTICE BREYER: So maybe they should

 5   go back and say: Well, given the nature of this

 6   information and how it was obtained, we will

 7   review whether the district court was right to

 8   dismiss it. Maybe we send it back to the

 9   district court. A lot of things.

10   But, I mean --

11   MR. KNEEDLER: No, we --

12   JUSTICE BREYER: -- my point is there

13   should be a way to look at the information for

14   the court and decide what to do, not whether

15   this particular statute applies or not. I don't

16   know.

17   MR. KNEEDLER: Yeah. Yeah, we don't

18   think this statute in this point in context --

19   JUSTICE BREYER: And that's the end of

20   the case. All we have to do is say that you're

21   out of it?

22   MR. KNEEDLER: No, that -- that -- I

23   mean, that's -- that's what we think the proper

24   disposition is.

25   JUSTICE BREYER: Okay.

1   MR. KNEEDLER: It should reject the

2   district court -- or the court -- court of

3   appeals' erroneous view of 1806(f) and that it

4   displaces the state secrets privilege and have

5   it go back to the Ninth Circuit to review the

6   district court's determination that the evidence

7   was covered by the privilege, which Respondent

8   did not challenge below, and then whether

9   dismissal is necessary because --

10   JUSTICE BREYER: Yeah, because those

11   are separate questions.

12   MR. KNEEDLER: -- the evidence is so

13   central to the -- to the case.

14   JUSTICE BREYER: No more questions.

15   CHIEF JUSTICE ROBERTS: Okay. Justice

16   Alito, anything further?

17   Justice Sotomayor?

18   JUSTICE SOTOMAYOR: Can you answer my

19   question directly? 1810 gives any person who's

20   been unlawfully surveilled the right to seek

21   damages, punitive and otherwise, and attorneys'

22   fees.

23   If I'm hearing you right, your

24   arguments, you say that if a party has standing

25   -- and very few have standing because very few

1   people know they've been surveilled in the way

2   these plaintiffs do.

3   I've had research done, and the only

4   plaintiffs that have standing that I found where

5   a court has found standing to bring an 1810

6   claim is the Fourth Circuit case.

7   So -- but I think what you're saying

8   to me is, if those -- these plaintiffs, who

9   appear to have reasonable grounds to believe

10   they were surveilled, so they have standing,

11   that they can't proceed if you claim state

12   secrets.

13   They can't have a judge look at this

14   evidence to determine whether it was lawful or

15   unlawful because you say, if a judge says it's

16   unlawful, and I don't know how, because if a

17   judge says it's unlawful, how are you injured?

18   All they have to do after that is prove their

19   damages.

20   MR. KNEEDLER: But -- first of all --

21   JUSTICE SOTOMAYOR: You have no

22   defense once they've proven --

23   MR. KNEEDLER: -- first of all, we

24   don't believe that they have established

25   aggrieved party status. Whether -- whether --

 1   whether, to what extent, or against whom

 2   electronic surveillance was used has not been

 3   disclosed. And so --

 4   JUSTICE SOTOMAYOR: My bottom line is

 5   you're saying a person who's been unlawfully

 6   surveilled, if I -- if the government claims

 7   secret, doesn't have recovery under 1810?

 8   MR. KNEEDLER: Unless it could be

 9   proved in -- in some other way. Now, in the --

10   in --

11   JUSTICE SOTOMAYOR: They have proved

12   it some other way.

13   MR. KNEEDLER: Well, you -- you could

14   -- you could have -- you -- you could have other

15   disclosures of -- of surveillance maybe in a

16   criminal prosecution or in some other way.

17   There was testimony by the -- the informant here

18   in a criminal proceeding that disclosed some

19   information that could have been the -- the

20   basis for an 1810 proceeding.

21   But our bottom line is 1810 says

22   nothing about the state secrets privilege. It

23   is --

24   JUSTICE SOTOMAYOR: But answer my

25   question. If they -- if -- you -- once you

 1   claim state secret, you say there's no way to

 2   look at the information to determine whether it

 3   was unlawfully obtained?

 4   MR. KNEEDLER: If the requisites for

 5   dismissal are satisfied, which means the court

 6   agreeing that the information is privileged and

 7   that the case cannot proceed because the

 8   information is so central. But there's nothing

 9   in 1810 that suggests the displacement of the

10   state secrets privilege.

11   And, yes, if -- if -- if all those

12   requisites were shown, then, yes, the case would

13   not go forward.

14   CHIEF JUSTICE ROBERTS: Justice Kagan?

15   JUSTICE KAGAN: I'm going to follow up

16   on Justice Breyer's question, and I'm not sure I

17   understood the government's position.

18   Is the government's position now that

19   it would be wrong to dismiss on the pleadings

20   without any further inquiry into the nature of

21   the materials and how they affect the lawsuit?

22   MR. KNEEDLER: No. I mean, the

23   government invoked the state secrets privilege.

24   The government -- the district court found it

25   was privileged. The government argued that,

 1   therefore, the First Amendment claim needs to be

 2   dismissed because that claim is the invest --

 3   this foreign intelligence surveillance

 4   investigation was actually based solely on their

 5   First Amendment rights.

 6   And to defend against that, it would

 7   be necessary to look at the sources, methods, et

 8   cetera, of -- of that --

 9   JUSTICE KAGAN: Yes. So --

10   MR. KNEEDLER: -- investigation.

11   JUSTICE KAGAN: -- I mean, I -- I -- I

12   think what Justice Breyer was suggesting is, in

13   a case like this, I mean, maybe dismissal would

14   be the only appropriate remedy for the problem,

15   but maybe not. It depends, and it depends on

16   some investigation of the materials and how they

17   figure in the case and what harms they present

18   and so forth.

19   And the Ninth Circuit seems to have

20   misunderstood that point. Maybe you contest

21   that point. But the Ninth Circuit seems to say

22   in a kind of old-fashioned Totten-like way, the

23   government says state secrets and we just have

24   to dismiss it in the ordinary case, putting

25   aside the statute.

1   And I thought we made clear in General

2   Dynamics that that's only true in a small

3   category of cases where the subject matter of

4   the lawsuit itself revealed a state secret but

5   that in cases like this -- in cases like this,

6   where asked -- it's an evidentiary privilege.

7   And, first, we're going to decide what

8   kind of evidence should be excluded, and then

9   we're going to decide based on the -- the full

10   evidence of the case whether the suit can go

11   forward or not in all fairness to the parties.

12   And that's what it seems the Ninth

13   Circuit didn't understand, and maybe you

14   contest, but I'm not sure you do.

15   MR. KNEEDLER: Well, no, no, I -- I

16   think the Ninth Circuit did get confused, but I

17   -- I want to make the point that the district

18   court already did what you're describing.

19   The government invoked the state

20   secrets privilege. The district court held in

21   the Ninth -- Respondents, and the Ninth Circuit

22   did not disagree, that -- that all the

23   information about the investigation was

24   privileged.

25   The district court then proceeded to

1   say, can this court -- can this case properly go

2   forward without that information? And said no,

3   both because that -- that's the very central

4   fact of the case, what was the basis or reason

5   for the investigation, and that can't be

6   adjudicated without delving into that

7   information or, at the very least, it would risk

8   disclosure of that. Therefore, that First

9   Amendment claim should be dismissed.

10   We -- and -- and that should have been

11   affirmed, in our view, by the Ninth Circuit.

12   But they didn't reach that question because they

13   -- they went through this other process of

14   saying 1806(f) displaces the state -- state

15   secrets privilege. Therefore, there's no basis

16   for dismissal under the state secrets privilege

17   at least -- at least as of now.

18   So we think it should go back, where

19   we think the Ninth Circuit should affirm the

20   district court's --

21   JUSTICE KAGAN: But it should --

22   MR. KNEEDLER: -- dismissal.

23   JUSTICE KAGAN: -- but your -- it

24   should -- you think it should affirm, but you're

25   saying the Ninth Circuit should reach that

1   question --

2   MR. KNEEDLER: Yes. Yes.

3   JUSTICE KAGAN: -- and should decide

4   that question --

5   MR. KNEEDLER: Yes.

6   JUSTICE KAGAN: -- as to whether all

7   of those conclusions about whether the nature of

8   the evidence required dismissal was -- was

9   correct?

10   MR. KNEEDLER: Yes.

11   CHIEF JUSTICE ROBERTS: Justice

12   Gorsuch?

13   JUSTICE GORSUCH: I -- I'd like to

14   come at that same question from a different

15   angle. Here's where I'm stuck, Mr. Kneedler.

16   You know, Reynolds told us and General Dynamics

17   reaffirmed that the state secret privilege

18   allows the government to keep evidence away from

19   a party but that generally the party is free to

20   prove its case using other evidence.

21   And so the government's really at a

22   choice. Does it want to disclose the evidence

23   and defend itself, or does it want to let a

24   judgment, a tort judgment, go ahead against it

25   and -- and keep -- keep national security safe?

 1   Okay. And FISA was enacted against

 2   that backdrop. And -- and if I were pressed, I

 3   would say FISA is perfectly consistent with that

 4   understanding of state secrets.

 5   The problem is that now the government

 6   takes a very -- much stronger view of what state

 7   secrets doctrine is and it imports a lot of the

 8   Totten stuff into it and says anytime we have a

 9   secret, we're -- we're entitled to use that

10   evidence in our possession without telling you

11   anything about it as a basis for dismissing the

12   suit more or less as a matter of routine.

13   And instead of being put to the choice

14   of accepting a tort judgment but keeping a

15   secret, it now gets both. It gets to reject the

16   tort judgment and keep the secret. And in a --

17   in a world in which the national security state

18   is growing larger every day, that's quite a

19   power.

20   And it seems like the Ninth Circuit

21   operated on this understanding of the state

22   secrets doctrine, which might be inconsistent

23   with FISA, I think probably is inconsistent with

24   FISA, and then we have to ask the question of

25   which displaces. But that question only arises

 1   if we accept a mistaken view of the state

 2   secrets doctrine.

 3   And so I think your friends on the

 4   other side have made this point and suggested

 5   why don't we just address the state secrets

 6   problem and say the Ninth Circuit misunderstood

 7   state secrets doctrine and reverse or remand on

 8   that basis, and then we don't have to get into

 9   this question of a conflict which only arises on

10   a mistaken understanding of state secrets

11   doctrine.

12   What say you to that?

13   MR. KNEEDLER: The Ninth Circuit did

14   not -- did not reach the -- the dismissal issue

15   in this case.

16   JUSTICE GORSUCH: I -- I -- I

17   understand that.

18   MR. KNEEDLER: But -- and -- and with

19   respect to their argument about 1806(f)

20   displacing, in their view, it displaces the

21   state secrets privilege with respect to the

22   exclusion of the evidence also, not just to the

23   -- not -- not just to the dismissal remedy.

24   We think that is -- that that is

25   clearly wrong and that it -- what they're

         1   basically saying --

         2   JUSTICE GORSUCH: Well, why wouldn't

         3   this be an alternative basis for affirmance

         4   and -- and for finding for the Respondent?

         5   MR. KNEEDLER: Because it would change

         6   the judgment. The Ninth Circuit's judgment

         7   contemplated -- I mean, in two ways -- well --

         8   well, the opinion contemplated that if -- it --

         9   it assumed, with, frankly, I think maybe no

        10   basis to assume, but anyway, that -- that the --

        11   that the entire case would be wrapped up in

        12   terms of whether there was electronic

        13   surveillance, which --

        14   JUSTICE GORSUCH: That's clearly --

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

        16   JUSTICE GORSUCH: -- wrong. So why

        17   not just say that and send it back, and we don't

        18   have to get into this question about whether

        19   FISA displaces state secrets, which begs the

        20   question of what state secrets is?

        21   MR. KNEEDLER: No, I -- I -- I think

        22   it's the other way around, with all respect,

        23   Justice Gorsuch. This is a -- this is a case in

        24   which the Ninth Circuit relied on a statutory

        25   holding, which could have ramifications much

1   more -- much broader than this.

2   But -- but the -- the point about the

3   court deciding it, it would require an

4   alteration of the judgment because the Ninth

5   Circuit contemplated that in proceedings on

6   remand, there could -- the state secrets

7   privilege could be invoked and maybe even the

8   dismissal remedy would be available in the

9   district -- in the court of appeals' view on --

10   on remand.

11   So that -- so it's not properly before

12   this Court without a -- without a

13   cross-petition.

14   CHIEF JUSTICE ROBERTS: Justice

15   Kavanaugh?

16   JUSTICE KAVANAUGH: Yeah, I have

17   several questions, Mr. Kneedler.

18   First, I just want to make sure, with

19   respect to Justice Gorsuch, is it your view that

20   that issue's before us?

21   MR. KNEEDLER: I -- I don't think it

22   is before you. I mean, it has been advanced as

23   an alternative ground for affirmance, but I

24   think it would require an alteration of the

25   judgment. But, in any way -- in any event, it

     1   does seem to us that the statutory question is

     2   antecedent the way the court looked at it.

     3   And if the court was wrong, then it

     4   should reach the question of dismissal. And --

     5   and I would think this Court would want the

     6   Ninth Circuit's view of -- of looking at the

     7   evidence is this a case where dismissal might be

     8   appropriate before it entered into the question

     9   of -- of how dismissal can -- how and when

    10   dismissal can follow a successful --

    11   JUSTICE KAVANAUGH: You've said this

    12   --

    13   MR. KNEEDLER: -- invocation of

    14   privilege.

    15   JUSTICE KAVANAUGH: -- but I just want

    16   to nail it down. The district court looked at

    17   the evidence, concluded that the state secrets

    18   privilege applied and dismissed.

    19   When -- when we send it back to the

    20   Ninth Circuit, they will be able to review that,

    21   I think you said that --

    22   MR. KNEEDLER: Yes, that evidence is

    23   in the record. It's available to -- to this

    24   Court. It's -- there was a classified

    25   declaration that was presented to the attorney

1   general, Attorney General Holder, when he

2   invoked or asserted the state secrets privilege.

3   JUSTICE KAVANAUGH: So your -- that

4   was your answer to Justice Breyer and Justice

5   Kagan, I think. So --

6   MR. KNEEDLER: Yes.

7   JUSTICE KAVANAUGH: Okay. And then

8   picking up on Justice Thomas's first question,

9   back to the statutory issue, he referred to the

10   constitutional status of the state secrets

11   privilege, and I think -- I would be curious how

12   that plays into our statutory interpretation.

13   I think you said at one point we

14   shouldn't expect Congress to do a drive-by

15   incursion on the state secrets privilege through

16   this kind of language. But how does the

17   constitutional -- potential constitutional

18   backdrop of the state secrets privilege play in?

19   MR. KNEEDLER: I think the -- I think

20   the Court should insist upon some sort of clear

21   statement or clear indication that Congress

22   intended to abrogate a privilege that is, in our

23   view, critical to the president's exercise of

24   his Article II powers. And -- and so there is,

25   I think, a strong presumption against reading a

 1   phrase buried in a statute clearly otherwise

 2   dealing with the suppression of evidence and --

 3   and a statute that is protective of the

 4   government's interests and protective of the

 5   national security, to read it to abrogate a

 6   privilege in a -- in a disposition of a case

 7   that would undermine that.

 8   JUSTICE KAVANAUGH: Because there

 9   would be a major Article II issue if Congress

10   tried to do that, but we don't need to get into

11   that. Is that --

12   MR. KNEEDLER: That -- that's correct.

13   And the same thing would be true about a statute

14   that is said to be in derogation of the common

15   law. You --

16   JUSTICE KAVANAUGH: Right.

17   MR. KNEEDLER: -- you wouldn't

18   naturally read a statute to overcome that.

19   JUSTICE KAVANAUGH: Last question.

20   The search claims are still alive regardless of

21   what we're talking about here, right? We're

22   talking about the religious claims?

23   MR. KNEEDLER: The -- the district

24   court dismissed the Fourth Amendment claims. We

25   did not -- we did not seek that. So, on appeal,

1   it's the religion claims because that goes to

2   the reasons and the scope of the investigation.

3   That's the core of the state secrets privilege.

4   And the government decided that at

5   this point it was not going to assert the state

6   secrets privilege over the Fourth Amendment

7   claims. But down the road, it might if they

8   can't be disposed of on -- on another basis.

9   JUSTICE KAVANAUGH: So are they still

10   alive in the district court then, the search

11   claims?

12   MR. KNEEDLER: Well, not the way the

13   district court disposed of it, but the -- but

14   the Ninth Circuit said it was wrong for the

15   district court to do that. So, if this case

16   goes back, the Ninth Circuit presumably would --

17   would reach the same conclusion.

18   JUSTICE KAVANAUGH: Would the

19   government oppose the search claims continuing?

20   MR. KNEEDLER: No, I -- I think that

21   was our -- our position on appeal. I -- I --

22   JUSTICE KAVANAUGH: That's --

23   MR. KNEEDLER: -- standing here, I

24   can't think of a reason why, but I -- you know,

25   I --

1   JUSTICE KAVANAUGH: I'm not binding

2   you for all time --

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

4   JUSTICE KAVANAUGH: -- but at this

5   moment. Yeah.

6   MR. KNEEDLER: -- I would just want to

7   make sure.

8   JUSTICE KAVANAUGH: Thank you.

9   CHIEF JUSTICE ROBERTS: Justice

10   Barrett?

11   JUSTICE BARRETT: Mr. Kneedler, do you

12   concede that 1806(f) could apply in a suit

13   brought against the government? Maybe under

14   1810, maybe under something else.

15   MR. KNEEDLER: No, 1810 could not be

16   brought against the government because of --

17   JUSTICE BARRETT: I'm sorry.

18   MR. KNEEDLER: Yeah. Only damages.

19   But, if the government intended to introduce or

20   use the evidence in that case against -- against

21   the civil plaintiff, it could be used, yes. But

22   it -- but it's not a free-floating discovery

23   device.

24   JUSTICE BARRETT: No, I understand

25   it's not a free-floating discovery device. I'm

 1   just -- I understand your position that it's,

 2   you know, when the government wants to use or

 3   introduce evidence, that it -- that it applies

 4   then, but the government may seek to do that

 5   even if -- even if it's not a criminal

 6   prosecution, for example, that the government

 7   has brought?

 8   MR. KNEEDLER: Yes. If the government

 9   -- if -- or if -- if a plaintiff brings a suit

10   against the government and the government

11   intends to use the information --

12   JUSTICE BARRETT: Right.

13   MR. KNEEDLER: -- then 1806(f) would

14   be available.

15   JUSTICE BARRETT: So you're not taking

16   the position that Judge Bumatay took in the

17   Ninth Circuit, where he seemed to view it more

18   as confined to that circumstance?

19   MR. KNEEDLER: Yeah. No, we think it

20   -- it -- it applies irrespective of who brought

21   the proceeding.

22   JUSTICE BARRETT: Okay.

23   MR. KNEEDLER: It's the use,

24   introduction into evidence, use, et cetera,

25   against the person. So the -- the -- the

 1   against is what -- is what triggers it.

 2   JUSTICE BARRETT: Thank you.

 3   CHIEF JUSTICE ROBERTS: Thank you, Mr.

 4   Kneedler.

 5   Ms. Carroll.

 6   ORAL ARGUMENT OF CATHERINE M.A. CARROLL

 7   ON BEHALF OF THE AGENT RESPONDENTS

 8   MS. CARROLL: Thank you, Mr. Chief

 9   Justice, and may it please the Court:

10   I'd like to make two points.

11   First, Section 1806(f) provides only a

12   narrow mechanism for deciding the admissibility

13   and discoverability of surveillance materials.

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

15   government's assertion of the state secrets

16   privilege deprives the individual defendants of

17   a valid defense, a defense that depends not on

18   the surveillance evidence that would be at issue

19   in a FISA proceeding but on the privileged

20   information about the targets, predicates, and

21   scope of the investigation.

22   Second, adjudicating the individual

23   defendants' liability in camera and ex parte

24   with no jury and no right to participate would

25   violate the Seventh Amendment and Due Process

1   Clause.

2   Even if the court of appeals'

3   interpretation were plausible, FISA does not

4   compel it, and this Court should reject a

5   reading that raises those grave concerns.

6   I welcome the Court's questions.

7   JUSTICE THOMAS: If we accept the

8   government's argument, though, we don't have to

9   get to that, right?

10   MS. CARROLL: Accepting the

11   government's argument that -- that FISA does not

12   displace the privilege --

13   JUSTICE THOMAS: Yeah.

14   MS. CARROLL: -- I think that that

15   resolves the -- the question because that was

16   the holding of the Ninth Circuit. The Ninth

17   Circuit instructed the district court to decide

18   in camera and ex parte whether the defendants

19   violated the constitutional and statutory

20   provisions. That's the invocation --

21   JUSTICE THOMAS: No, I'm -- actually,

22   I'm -- I may have confused matters. I mean the

23   constitutional avoidance argument.

24   MS. CARROLL: Correct. These are

25   constitutional issues that would arise if the

 1   court of appeals' interpretation of FISA were

 2   accepted. And I think it's largely undisputed

 3   that under the court of appeals' reading you

 4   would have an in camera ex parte adjudication

 5   not just of the lawfulness of the surveillance

 6   under FISA but of the ultimate liability on the

 7   First Amendment and equal protection claims.

 8   And I think it's undisputed that that

 9   would violate the individual defendants' jury

10   trial rights and due process rights.

11   Now Mr. Kneedler, I think, has made

12   some good points that we agree with about the

13   language of 1806(f) regarding what a use is and

14   what a -- what a covered motion or request is.

15   But I think there's a -- just a

16   broader point to make about that statute, and

17   that is that the FISA, both 1806(f) and,

18   frankly, an 1810 claim, are completely

19   orthogonal to what is at issue in the First

20   Amendment and equal protection claims and the

21   defenses that are necessary to those claims.

22   As has been discussed, the result of

23   an 1806(f) procedure is limited to suppression

24   or admission of the fruits of the surveillance,

25   so the recordings, and potentially disclosure to

1 the aggrieved party of the application,

2 materials, and court orders.

3 None of that enables revelation of or

4 certainly not disclosure to my clients or the

5 ability to adjudicate the merits and defenses of

6 the religious discrimination claims, which, as I

7 said, don't turn on the surveillance evidence.

8 They turn on who was or was not a target of

9 investigation, why were they under

10 investigation, what were the motivations and

11 predicates, and what was the degree of fit

12 between the methods used and legitimate

13 counterterrorism goals, what were my clients'

14 individual motivations.

15 Those are all classic jury questions.

16 They are questions that are completely subject

17 to the privilege, as Judge Carney found, and

18 they -- they cannot come out, even in a limited

19 FISA proceeding, even if we thought that 1806

20 was available. So I think that that's kind of a

21 broader reason why the statute as a whole can't

22 be read to displace the privilege.

23 The -- the privilege here, as Mr.

24 Kneedler indicated, was properly asserted, and

25 the -- the court of appeals did not dispute

1   that.

2   In -- in making that determination,

3   the district court -- and he says he paid

4   especially close attention to the classified

5   materials, which the district court described as

6   providing comprehensive and detailed

7   information, informing the court as to the

8   sensitive and privileged facts.

9   And Judge Carney concluded from that

10   classified material that it provided essential

11   evidence to showing "that the purported dragnet

12   investigations were not indiscriminate schemes

13   to target Muslims but were properly predicated

14   and focused." That is the information that the

15   individual defendants need to be able to defend

16   themselves.

17   And this Court recognized in General

18   Dynamics, as the lower courts have uniformly

19   recognized, that it would be manifestly unfair

20   to allow claims to go on in that situation where

21   the government's assertion of the privilege

22   prevents an individual capacity defendant from

23   putting forward a defense that depends on that

24   privileged information, which, again, even if

25   there were some reason -- reading of FISA that

1   would allow a limited proceeding in camera to

2   determine the lawfulness of the proceeding under

3   FISA, that has nothing to do with the privileged

4   information and is not a mechanism for bringing

5   it out or allowing my clients to rely on it.

6   Just a -- a couple of quick points on

7   the text of 1806(f). Justice Gorsuch, you asked

8   what could the phrase "otherwise use" mean if

9   we're not talking about entry into evidence.

10   And I agree with Mr. Kneedler that

11   that language certainly covers use of

12   information in a proceeding outside of a court.

13   But even in court, as Your Honor knows, there

14   are many ways to use information without

15   entering in -- into evidence. I think, in this

16   context, with surveillance information, the most

17   likely use would be to impeach a witness. But

18   there are other ways --

19   JUSTICE GORSUCH: Counsel, on that,

20   you'd agree, though, that there aren't many ways

21   to use evidence in court without either entering

22   it into evidence or disclosing it, impeachment

23   being a good example of disclosing it?

24   MS. CARROLL: Impeachment, I think, is

25   also a use because you're not --

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 1              JUSTICE GORSUCH:  It involves
 2   disclosure, right?
 3              MS. CARROLL:  And I think refresh --
 4              JUSTICE GORSUCH:  Can you think of
 5   another example?
 6              MS. CARROLL:  -- refreshing a
 7   witness's recollection, I think, is one.
 8              JUSTICE GORSUCH:  Can you think of
 9   another example?  Refreshing recollection,
10   that's a good one.  That's a good one.  Others?
11              MS. CARROLL:  I think -- I think also,
12   in -- in a summary judgment proceeding, as the
13   language of Rule 56 indicates, that when you use
14   information in support of a summary judgment
15   motion, it is not officially being entered into
16   evidence.  It has to be in form that could be
17   admissible into evidence, but it is not --
18              JUSTICE GORSUCH:  I guess my question,
19   though, for -- for -- for Mr. Kneedler and I
20   guess for you is, can you think of another use
21   in court that doesn't involve disclosure or
22   entry into evidence?  Each of the examples
23   you've given me involves at least disclosure.
24              MS. CARROLL:  I'm not actually sure
25   that you do disclose to the jury when you're
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 1   refreshing a witness's recollection. But, in
 2   any event --
 3   JUSTICE GORSUCH: No, but you're
 4   disclosing it to the witness, right?
 5   MS. CARROLL: You're disclosing it to
 6   the witness, that -- that is true, and if it --
 7   if it's something that would help them to
 8   remember their recollection. But I think,
 9   again, that that also brings in the fact that we
10   could be talking about proceedings that aren't
11   subject to the Rules of Evidence as well.
12   And I think, again, thinking back to
13   the broader question, even if the Court thought
14   it were plausible to read that language more
15   capaciously, a reading of Section 1806(f) that
16   would allow, as the court of appeals thought,
17   adjudication not just of whether the privilege
18   was properly asserted, not just of whether the
19   FISA surveillance was lawfully authorized and
20   conducted, but whether the individual defendants
21   are liable for damages on constitutional claims,
22   to have that adjudication conducted without a
23   jury in an ex parte procedure in which they have
24   no apparent right to participate would plainly
25   raise grave and I think undisputed

     1   constitutional questions that -- that plainly

     2   favor the government's equally and, we think,

     3   more plausible interpretation of the statute.

     4   So we think the Ninth Circuit was

     5   clearly wrong to hold that the privilege was

     6   displaced by FISA. It should, as Mr. Kneedler

     7   has suggested, instead have affirmed on the

     8   ground that Judge Carney relied on given that

     9   the classified information indicated, as the

    10   district court put it, the classified

    11   information gives defendants a valid defense

    12   that is no longer available because of the

    13   assertion of the privilege.

    14   JUSTICE SOTOMAYOR: Counsel, why is it

    15   -- why is it that the government's reading helps

    16   you? I thought the essence of your claim is

    17   that an ex parte review hurts your client

    18   because it doesn't give your clients an

    19   opportunity to be a part of it, as the Seventh

    20   Amendment, correct?

    21   MS. CARROLL: That's correct.

    22   JUSTICE SOTOMAYOR: So why does it

    23   matter if the government is the one that's

    24   moving to use the evidence? Why wouldn't your

    25   agents be suffering the same deprivation?

1   MS. CARROLL: I think it -- I think it

2   would be, and I think that relates to the

3   broader point I was making that even if 1806(f)

4   is invoked, regardless of how you think it could

5   be invoked, it doesn't get to the real problem

6   in this case, which is the unavailability of the

7   privileged information.

8   To Your Honor's point, the

9   constitutional claims we've mentioned under the

10   Seventh Amendment and the Due Process Clause are

11   violations that would arise from the court of

12   appeals' -- may I finish my response?

13   CHIEF JUSTICE ROBERTS: Yes.

14   MS. CARROLL: From the court of

15   appeals's interpretation. And under the

16   avoidance canon, where this Court has before it

17   two plausible interpretations of the statute,

18   the avoidance canon calls for rejecting the

19   interpretation that would raise those grave

20   questions.

21   And we think the government's

22   interpretation, as recently adopted as well by

23   the Fourth Circuit, is certainly plausible and

24   that the Ninth Circuit's interpretation is

25   certainly not more than plausible. And so the

1   avoidance canon would come into play there.

2   CHIEF JUSTICE ROBERTS: Thank you, Ms.

3   Carroll.

4   Justice Thomas?

5   JUSTICE THOMAS: Nothing for me,

6   Chief.

7   CHIEF JUSTICE ROBERTS: All right.

8   Justice Sotomayor? Okay.

9   Justice Gorsuch, anything further?

10   No?

11   Justice Barrett? Justice Barrett?

12   JUSTICE BARRETT: No.

13   CHIEF JUSTICE ROBERTS: Okay. Thank

14   you, counsel.

15   Mr. Arulanantham.

16   ORAL ARGUMENT OF AHILAN T. ARULANANTHAM

17   ON BEHALF OF RESPONDENTS FAZAGA, ET AL.

18   MR. ARULANANTHAM: Thank you, Mr.

19   Chief Justice, and may it please the Court:

20   Defendants do not seek just to exclude

21   secret information from this case. If that were

22   true, there would have been no need for them to

23   file a motion to dismiss our religion claims.

24   Instead, what they seek is not just to

25   exclude information but also to dismiss it. And

 1   to be clear, as we've said repeatedly below, we

 2   will not seek discovery on the religion claims.

 3   We're prepared to proceed just on our own

 4   evidence. So this case is entirely about

 5   dismissal based on their need to use secret

 6   information to defend themselves.

 7   Now we recognize they have a

 8   legitimate interest in defending themselves, but

 9   neither Congress nor the common law permit

10   dismissal on that basis.

11   Congress struck a balance. FISA

12   permits them to defend the suit using

13   information that we will never see, but, as

14   Justice Sotomayor had suggested earlier, it

15   requires the court to review the information ex

16   parte and in camera to determine if the

17   surveillance was lawful.

18   Section 1806, as Justice Gorsuch has

19   already mentioned, applies not just when they

20   seek to enter secret information into evidence

21   but also when they otherwise use it. "Use" is

22   very broad. It means to put into service, and

23   "otherwise use" means, as Justice Gorsuch has

24   been saying, in a different manner. So there

25   has to be a way different from just using or

 1 disclosing that's also covered by the statute.

 2 Relying on information to win dismissal of a

 3 lawsuit is obviously using that information.

 4   The government is also wrong on the

 5 common law. As General Dynamics explained, the

 6 Reynolds privilege is a privilege. The

 7 privileged information is excluded, but the case

 8 goes on without it. And in a -- that's 150

 9 years of case law on which Reynolds relies. In

10 both the U.S. and England, they can't point to a

11 single case where plaintiffs could make their

12 case without the privileged information and yet

13 still the court ordered dismissal.

14   Like the widows in Reynolds itself, we

15 are entitled to that opportunity, whether under

16 FISA's rules or under the common law.

17   Lastly, I want to emphasize again,

18 Your Honors, that the court of appeals did not

19 hold that we can ever see privileged evidence.

20 If the district court orders disclosure to us,

21 the government can reassert the privilege.

22   JUSTICE THOMAS: Counsel, can you give

23 me an example of a case where "used" was

24 employed the way you are suggesting?

25   MR. ARULANANTHAM: Yes, Your Honor.

 1   In the firearms context, this Court has done it

 2   even without the word "otherwise" actually. So

 3   the Court has said, for example, in Bailey v.

 4   United States that just referring to a gun in

 5   the course of a criminal transaction is using

 6   it.

 7   I -- I think, also, that statute,

 8   again, is only "use." We have "otherwise use."

 9   So I think ours is even more -- more broad than

10   the one that -- the examples that the government

11   uses or Judge Bumatay's.

12   And sticking on the same point, if I

13   may, Your Honor, it is conceivable, I suppose,

14   that there might be some other use you could

15   come up with, although I don't think I've heard

16   one yet that is not a -- a disclosure or enter

17   into evidence, but that's not really the

18   question, right?

19   The question is whether, when you

20   refer to a document in your motion and say we

21   win and the other side loses their religion

22   claims because of those documents, is that also

23   a use of it? And it just seems perfectly clear

24   that that must be true.

25   JUSTICE THOMAS: But it seems

 1   counterintuitive that you would say you use it

 2   by excluding it.

 3   MR. ARULANANTHAM: Yes, Your Honor.

 4   And this goes to Justice Gorsuch's point also

 5   about the relationship between the common law

 6   and FISA. If they were only seeking to exclude

 7   it, if they say we will keep it in our vault and

 8   then let the chips fall where they may, I don't

 9   think that would be a use.

10   But, when they then go further and say

11   we don't just want the common law traditional

12   rule, we want to now dismiss the religion

13   claims, even though you can make your case with

14   your own evidence, that transforms it from just

15   keeping it excluded into an affirmative use.

16   They're using it to effectuate the dismissal of

17   the religion claims.

18   So, at that point, it becomes a use.

19   And that's why I think it's also relevant that

20   the Ninth Circuit -- the decision below only --

21   they said they only are finding it displaced

22   with respect to the dismissal remedy.

23   And -- and that's, I think, important

24   because it's -- it's when they move to dismiss

25   that it becomes a use and isn't merely exclusion

 1   of the information at issue.

 2   CHIEF JUSTICE ROBERTS: Well, you just

 3   said "the information at issue." And what

 4   they're using, it seems to me, is the privilege.

 5   They're not using the information. The whole

 6   point of this statutory provision in 1806 is to

 7   keep the information from being used. I think

 8   it makes more sense to talk about using the

 9   privilege as opposed to a counterintuitive

10   reading, at least, I guess this is their

11   argument, which -- which is that this is to --

12   this proceeding is to prevent -- prevent the use

13   as opposed to using it.

14   Maybe a consequence of it is that the

15   privilege is established, and then that meant --

16   means the information can't be used, but I don't

17   see how the -- not allowing the information to

18   be introduced is using the information.

19   MR. ARULANANTHAM: So I -- I don't

20   disagree with Your Honor there. I think, if all

21   they were doing was trying to keep it out and

22   nothing else, that would not be a use.

23   And I think it's because they argue

24   that the state secrets privilege actually

25   authorizes dismissal, unlike every other

1 privilege, even when the plaintiffs can move

2 forward without the privileged information,

3 that's why it becomes a use.

4   But, to go back to the beginning of

5 your question, Mr. Chief Justice, I think to say

6 that they're using the privilege and not using

7 the information is a little odd. I think they

8 are using the privilege, but the -- the motion

9 makes no sense without the references to the

10 secret information, without the, you know,

11 submission of actually two classified

12 declarations and a classified memorandum. So

13 they're using both.

14   And -- and I think that that is the

15 most natural meaning of the word "otherwise

16 use." It -- it -- it -- I really can't imagine

17 how their motion would make any sense if it

18 didn't refer to the information.

19   So -- and once they're referring to

20 it, again, not just to keep it out but also to

21 win dismissal of the religion claims, that's

22 what makes it into a use.

23   JUSTICE GORSUCH: Could -- could they

24 win dismissal by invoking a privilege if there

25 were no evidence to support the invocation of

 1   the privilege?

 2   MR. ARULANANTHAM: Yeah, and we

 3   struggled, Your Honor, we could not think of a

 4   -- a context in which that would arise. It

 5   seems like they have to, in order to win, say

 6   it's not just the fact that we're excluding the

 7   information, it's also now that the -- the

 8   evidence, even though it's out of the case, is

 9   actually not out of the case and is doing some

10   kind of work to come and dismiss claims, even

11   though the plaintiffs say that they can make

12   their case without it.

13   CHIEF JUSTICE ROBERTS: But it would

14   be a perfectly natural argument to say we think,

15   because of the national security basis, this

16   information cannot be used. I mean, that's how

17   you'd say it before the judge. And then the

18   judge is supposed to say: Well, you're using

19   it, so you lose.

20   MR. ARULANANTHAM: Again, Your Honor,

21   I -- I really think, if that's all they were

22   saying, if they were saying because of the

23   national security implications, this information

24   has to go out of the case, then they would have

25   filed a motion in limine. They wouldn't have

1   filed it just in response to the complaint.

2   They would have waited for us to file

3   either a discovery motion, which, again, we're

4   not going to file, or a motion for summary

5   judgment. And -- and then they'd file a motion

6   in limine. That would not be a use.

7   But, instead, what they've come --

8   what they've done is they've said: On the

9   pleadings and declarations, only because we put

10   them in the case because we were concerned about

11   this possibility, really, because normally we

12   could have waited and filed the declarations

13   later, just on the pleadings they've said the

14   whole -- the whole religion aspect of the case,

15   the first eight counts, have to be gone.

16   That's not just a result of the

17   exclusion of the evidence. So this is very

18   different from a case like most state secrets

19   cases where the plaintiffs need the information

20   in order to receive. This is a case where we

21   have all the evidence that we need on these

22   religion claims just based on our own evidence,

23   and yet they're still saying the religion claims

24   cannot go forward.

25   JUSTICE ALITO: Can you explain the

 1   basis for the distinction that I understand you

 2   to have just made? And perhaps I didn't

 3   understand what you said, but what I thought you

 4   said was that invoking the state secrets

 5   privilege for the purpose of excluding evidence

 6   is a use, but invoking the privilege for the

 7   purpose of seeking dismissal is not a use.

 8   MR. ARULANANTHAM: I must have

 9   misspoken. I'm very sorry --

10   JUSTICE ALITO: Oh.

11   MR. ARULANANTHAM: -- Your Honor.

12   That's exactly backwards. So if they just

13   invoke it to exclude the information --

14   JUSTICE ALITO: I'm sorry. All right.

15   Backwards. I --

16   MR. ARULANANTHAM: -- that is not a

17   use.

18   JUSTICE ALITO: What is the basis for

19   drawing that distinction? It seems that you're

20   -- you're -- if invoking the privilege is using

21   the privilege, wouldn't it be -- wouldn't you --

22   wouldn't you be using the privilege in both of

23   those situations? Why -- why in one and not in

24   the other?

25   MR. ARULANANTHAM: I -- I think it's

 1   using the privilege, but it's not using the

 2   information.

 3   JUSTICE ALITO: Why is it not using

 4   the information?

 5   MR. ARULANANTHAM: Well, I -- I just

 6   think, in normal discovery, normal privileges,

 7   all the privileges, if -- and the -- these are

 8   arguments that we agree with, that they're in

 9   their brief, if I'm in an attorney-client

10   situation and someone tries to get discovery and

11   we say, well, that information is privileged, we

12   want to keep it out of the case, you don't say

13   you're using the evidence.

14   But, if I then say: Oh, because you

15   have done that, now the underlying claim on

16   which you sought discovery has to be dismissed,

17   even though you say you don't need the evidence

18   and you don't want it anymore, or, actually, I

19   mean, like, we never wanted it, but anyway, you

20   know, you -- you don't want it.

21   Now you're doing something more than

22   just keeping it out of the case, and that --

23   that -- that distinction is -- is critical.

24   JUSTICE BREYER: So -- so, look, I

25   read Professor Donohue's brief from Georgetown,

 1   and so that's very much in my mind. I thought

 2   it was a good brief, and I think she seems to

 3   know what she's talking about it certainly does.

 4   So I'm thinking, look, the thing is

 5   that you don't want the case dismissed. Of

 6   course. And Totten doesn't apply. And so they

 7   shouldn't have had anything to do with that.

 8   They should just look to Reynolds.

 9   MR. ARULANANTHAM: That's right, Your

10   Honor.

11   JUSTICE BREYER: All right. Now give

12   -- that's what seems to be the issue and the

13   problem. So do you really care whether the

14   government's right or wrong on the displacement

15   of the state secrets doctrine by 1806 or

16   whatever?

17   Suppose we said, no, it doesn't, but

18   it doesn't matter that it doesn't because, of

19   course, as quoting the government, the judges

20   will look at this information, and if the

21   information -- it doesn't solve the problem --

22   simply to say we don't want the information,

23   namely you, of course, you don't.

24   But the government says: Judge, look

25   at this. You will see that we both can't

 1   introduce the information because it's just too

 2   secret, it's unbelievable harm if we do, and it

 3   proves beyond any doubt their case is wrong.

 4   What is the Court supposed to do then?

 5   And there I don't know. And we have Justice

 6   Scalia's opinion on that. And where I am at the

 7   moment is I don't know, but I don't have to

 8   decide that yet.

 9   And it might not be those situations

10   that are the dilemma I just described until not

11   only the district court under the proper

12   standard but also the court of appeals looks at

13   this and sees if there's some special reason to

14   dismiss the whole case or not.

15   No automatic dismissal. No automatic

16   no dismissal. I don't know.

17   All right. There you are. That's

18   where I am. Say anything you like.

19   MR. ARULANANTHAM: Thank you, Your

20   Honor. Three -- three thoughts I have about

21   that.

22   First, I just want to be clear on the

23   very first point you made, why do we even care

24   about FISA? We have two distinct paths, as we

25   see it, to success in -- in this Court.

1   The Court could hold that the state

2   secrets privilege does not authorize dismissals,

3   either at all, outside of contracting cases, or

4   where the very subject matter is not secret, or

5   the narrower ground, which I think Your Honor

6   had discussed with Mr. Kneedler, which is on the

7   pleadings before any of the information has been

8   looked at. And the district court looked at

9   declarations, not at the underlying information.

10   JUSTICE KAGAN: But Mr. Kneedler says

11   that that way of resolving the case would not

12   get to an affirmance. How would it get to an

13   affirmance?

14   MR. ARULANANTHAM: I -- I think it

15   gets to an affirmance because, at the very end

16   of the court of appeals decision, the court says

17   it's adopting -- this is in the proceedings on

18   remand -- it says it's adopting the D.C.

19   Circuit's rule from In re Sealed Case that the

20   government -- it's essentially Judge -- then

21   Judge Scalia's view in Molerio, the valid

22   defense rule saying you can't dismiss that on

23   the pleadings.

24   You've got to look at the information

25   and see if the injustice that we're

1   contemplating here actually would happen. Is it

2   true that, actually, there was no bug in Mr.

3   Fazaga's office when he was giving very, you

4   know, intensive religious instruction to his

5   congregants, or maybe it was warranted, you

6   know, meaning there was a warrant for it.

7   And -- and then, if that's true, and

8   so this would be -- work a grave injustice on

9   the government, once we know that, if that's

10   actually true, then you dismiss the case.

11   That was what Judge -- then Judge

12   Scalia said in Molerio; the decision below

13   adopts that through its affirmance of In re

14   Sealed Case. And so that's why I think it would

15   be an affirmance.

16   This Court could just say: We hold it

17   was too early, send it back, and I suppose you

18   could say FISA displaces it or you -- you could

19   not -- or, excuse me, you could say FISA doesn't

20   displace it or you could say we don't have to

21   decide that, we vacate that, and just send back

22   the state secrets portion of the case, and that

23   would be an affirmance because it would lead you

24   to a very similar result, which is that, just as

25   Congress wanted, the Court is looking at the

 1   evidence not just to decide if it should be

 2   secret but if the government broke the law, if

 3   the surveillance was actually unlawful.

 4   You know, that -- that, I think, is

 5   the critical reason why, because of that last

 6   part, it is an affirmance.

 7   Now that being said -- and I still

 8   want to come back to the other parts of your

 9   question, Justice Breyer -- we only have to win

 10   that it's a basis for -- an alternative basis

 11   for affirmance if it's not in the question

 12   presented, right?

 13   I mean, if it's in the question,

 14   because you can't determine if FISA displaces

 15   the state secrets privilege without knowing what

 16   the state secrets privilege does, then it seems

 17   to me that the Court can address it that way as

 18   well.

 19   We said in our brief in opposition, in

 20   compliance with this Court's rule, 15.2, we said

 21   we are going to argue that under General

 22   Dynamics, there is no dismissal remedy available

 23   in this case. We also argued that in the court

 24   of appeals, a slightly different theory, but we

 25   preserved the claim.

 1   And then they replied in their reply

 2   on the merits, and they cited a long set of

 3   court of appeals cases that they said affirmed

 4   their rule. And now they've come and said it's

 5   not in the question presented. It said that --

 6   I think it is in the question presented, and we

 7   also gave notice of that, and they didn't say

 8   that it was not.

 9   So I do think it's an alternative

10   basis by which the -- an alternative path to

11   victory. But just to go back then to, Justice

12   Breyer, the second part of your question, and

13   not to abandon in any way our arguments on FISA,

14   I want to stress another part of our

15   displacement argument which has actually not

16   been discussed thus far today.

17   1806(f) says, if the attorney general

18   files a declaration that disclosure or an

19   adversary hearing would harm national security,

20   then it shall apply these ex parte in camera

21   procedures that we have been talking about to

22   determine if the surveillance was lawfully

23   authorized and conducted.

24   Now that standard, the attorney

25   general files a declaration that disclosure

        1   would harm national security, is almost

        2   identical to the standard in Reynolds that

        3   divulging the information could risk endangering

        4   national security.

        5   Substantively, the substantive rule is

        6   almost identical. And the result of their view

        7   is that the same attorney general declaration,

        8   because this declaration satisfies 1806(f), it

        9   says disclosure of this information would

       10   reasonably endanger national security, an

       11   attorney general declaration in our case, gives

       12   the government two options.

       13   They can move to dismiss under state

       14   secrets privilege, which is what they've done,

       15   or they can go through 1806(f) and give the

       16   information ex parte and in camera to the court

       17   even though the statute says these are the

       18   procedures that shall be applied,

       19   notwithstanding any other law, whenever these

       20   conditions are met.

       21   And so that is a powerful displacement

       22   effect not for the state secrets privilege in

       23   general but for the state secrets privilege as

       24   applied to cases involving the domestic

       25   electronic surveillance of Americans.

 1   And that's all that's issue in this

 2   case, is just about giving the district court ex

 3   parte in camera review, not -- not evidence, not

 4   -- not disclosure to us, because the decision

 5   below says they can reassert the privilege if

 6   there's a disclosure to us.

 7   But just that -- that aspect, the ex

 8   parte in camera review for cases involving

 9   domestic electronic surveillance, on that

10   aspect, 1806(f) occupies the field. It takes

11   away any other options, including outright

12   dismissal under what they say is the state

13   secrets privilege.

14   JUSTICE KAGAN: I -- I guess what

15   strikes me as wrong about that argument is that

16   if you look at 1806 and you just take a step

17   backward and you're not focusing on, like, what

18   does this word mean and what does that word

19   mean, but if you just take a step backward, what

20   1806 is all about is deciding whether

21   surveillance is legal.

22   And according to 1806, that matters

23   with respect to whether the government can use

24   it in the standard way that illegal evidence

25   can't be used in a proceeding, and, for whatever

1   reason, Congress thought it also mattered with

2   respect to discovery requests on the part of,

3   let's say, a plaintiff.

4   And -- and that's a very different

5   focus, you know, is -- was this -- was this

6   obtained illegally, because we think that that

7   question has something to do with whether we --

8   it should be discoverable or whether it should

9   be usable in court from the normal state secrets

10   inquiry, which is, you know, illegal, legal, who

11   cares? It's just dangerous for national

12   security.

13   MR. ARULANANTHAM: Yes, Your Honor. I

14   agree that both -- both parts of that. I -- I

15   certainly agree that the purpose of it is to

16   determine if it was lawfully authorized and

17   conducted.

18   And while I -- I do think that's

19   broader -- if you'll permit a slight

20   deviation -- I think it's broader than what the

21   individual defendants' counsel has suggested,

22   that it's only about Fourth Amendment. It

23   certainly incorporates First Amendment, and FISA

24   was very much about the First Amendment and, in

25   part, the persecution of religious minorities

 1   actually.

 2   So I -- I think that it's broader than

 3   that. But I agree it's just about determining

 4   whether the surveillance was lawful in whatever

 5   context it may arise.

 6   And I also agree, Your Honor, that

 7   often, in the pre-FISA practice, the only

 8   inquiry in the state secrets privilege analysis

 9   was whether or not the information should be

10   secret.

11   But there were also cases where the

12   courts were not simply interested in whether or

13   not it was secret. They were also interested in

14   whether the Fourth Amendment was violated here.

15   We have cited a few of those in our brief,

16   Jabara v. Kelly. There's also a dissent in

17   Halkin v. Helms from the rehearing en banc where

18   the judge makes this argument.

19   So I don't think it's implausible that

20   the -- Congress might have looked -- seeing a

21   backdrop of abuses identified in the Church

22   Committee, surveillance of Vietnam War

23   protestors and MLK and even a justice of this

24   court, I believe, they -- they would have said

25   we don't just want to know whether this is

1   secret. We also want to know did you break the

2   law.

3   And so I don't think it's that

4   implausible to believe that they used the same

5   substantive standard but said we want to bring

6   the courts in to decide if the government was

7   acting illegally.

8   JUSTICE ALITO: What is your answer to

9   Ms. Carroll's argument about the rights of -- of

10   her clients? Suppose that, in conducting this

11   ex parte in camera review, the judge says this

12   was illegal because it was based on religion.

13   Does that -- is that the end of the

14   case for her clients?

15   MR. ARULANANTHAM: I don't think it's

16   the end of the case. But --

17   JUSTICE ALITO: Well, then can they

18   have a trial?

19   MR. ARULANANTHAM: I mean, on that

20   question, I think, if the Court finds that, then

21   you're not going to be able to give that same

22   question to the jury. We acknowledged that at

23   --

24   JUSTICE ALITO: Well, isn't that a

25   violation of -- of their due process rights?

1   MR. ARULANANTHAM: So we have

2   deliberately not said in our briefing whether we

3   think that's true or not and instead left it --

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

5   asking you now. How can that possibly be

6   consistent with -- with due process?

7   MR. ARULANANTHAM: Well, I think --

8   JUSTICE ALITO: I mean, that's --

9   that's the Star Chamber. I mean, a judge in

10   camera ex parte, without any -- not -- not only

11   without the participants -- the presence of the

12   defendants, without the presence of their

13   attorneys, determines that they violated the --

14   the plaintiffs' First Amendment rights.

15   MR. ARULANANTHAM: So I want to say,

16   after I answer your question, why I think it's

17   not a reason to construe the statute, so if

18   you'll -- but -- but, to answer your question

19   directly, I think the -- the tricky issue for a

20   court, if they were actually considering this

21   constitutional question, it would have to first

22   consider what about the mirror image, because,

23   obviously, the same exact thing that you have

24   said is true of us.

25   And if it's true that they have

1   engaged in entirely lawful conduct, it sure

2   sounds bad for the reasons Your Honor has said,

3   but if they've engaged in unlawful conduct and

4   you're going to dismiss the claim without us

5   having any opportunity to have a jury trial and

6   all the rest of it and due process as well, it

7   is -- and as -- we have not been able to

8   understand why it's any --

9   JUSTICE ALITO: Well, do you think

10   that every --

11   MR. ARULANANTHAM: -- different. It's

12   exactly the mirror problem.

13   JUSTICE ALITO: -- do you think that

14   everybody who is aggrieved and would like to

15   bring suit has a due process right to bring that

16   suit and recover?

17   MR. ARULANANTHAM: No, but this is a

18   different situation. For both sides, we're

19   hypothesizing -- and this gets to my reasons for

20   believing it's premature -- we're hypothesizing

21   we've beaten summary judgment, both sides,

22   right? Both sides have beaten summary judgment.

23   We've shown standing. There's no sovereign

24   immunity problem. All the other doctrines,

25   Iqbal, et cetera. And yet, still here we are.

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 1    And in -- in that situation, I think it's the

 2    mirror image problem.

 3              The other thing I would say, Your

 4    Honor --

 5              JUSTICE ALITO:  Well, it's not -- I

 6    don't see how it can be a mirror image problem

 7    because the due process rights of potential

 8    plaintiffs are not the same as the due process

 9    rights of -- of potential defendants.

10              But, beyond that, if this is the

11    conclusion -- if this is the result to which

12    your argument leads, isn't that a powerful

13    reason for interpreting the statutory language

14    differently?

15              MR. ARULANANTHAM:  Right.  Thank you,

16    Your Honor.  So I think it's not for two

17    reasons.  You know, the -- the -- the main

18    reason is because, if you look at Section

19    1806(g), which is the provision which authorizes

20    relief in the case, once the district court has

21    determined that the surveillance either was or

22    was not lawfully authorized and conducted, it

23    says you suppress the evidence or otherwise

24    grant the motion in accordance with the

25    requirements of law.
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 1   And what read -- we read that to mean

 2   that if we have an 1806(f) process, whether on

 3   summary judgment or however it comes up, and

 4   then the court finds the surveillance is

 5   unlawful, they now have the right to say at that

 6   point this would violate the Seventh Amendment

 7   to bind us to that.

 8   And, therefore, it would not be in

 9   accordance with the requirements of law, and

10   then the issue can be litigated. And I should

11   say, when I say the issue would be litigated,

12   the Bivens litigation hasn't happened. The

13   1810 -- our 1810 claim in this case, which no

14   one has moved to dismiss, although you heard Mr.

15   Kneedler say they might move to dismiss it,

16   right, that claim still remains to be litigated.

17   And the defendants may well be out of

18   this case long before we get to this spot. Or,

19   if there really wasn't a warrant and they were

20   spying on Mr. Abdelrahim while he was leading

21   his housemates in prayer without a warrant, then

22   they might lose on summary judgment, and then

23   the case will be gone.

24   So I think it would be a mistake to

25   construe the statute very narrowly and, on their

1 view, basically destroy the ability to litigate

2 1810 claims because of this possibility which

3 is, you know, very, very unlikely to happen.

4   JUSTICE ALITO: What about this -- the

5 -- the "grant the motion in accordance with law"

6 language that you just mentioned? In -- "in

7 accordance with law," does that include in

8 accordance with the state secrets privilege?

9   MR. ARULANANTHAM: It actually does,

10 Your Honor. On the relief side, it does. And

11 that's consistent with the Ninth Circuit's

12 holding as to what would happen -- well,

13 actually, I'm sorry. The Ninth Circuit had, I

14 think, two reasons -- you know, let me step back

15 a second.

16   The Ninth Circuit said we think the

17 privilege is still available here and we haven't

18 required disclosure to the plaintiffs. And I

19 think that is consistent with FISA, both

20 1806(f), and when we're going through the

21 process of deciding whether or not the

22 information was lawfully authorized or

23 conducted, and on the relief side.

24   It's consistent on the (f) part

25 because the statute does not say that the

1   district court "shall" disclose to the

2   plaintiffs if needed to -- to determine the

3   lawfulness of surveillance. It says you "may

4   disclose to the plaintiffs subject to security

5   procedures and protective orders only if needed

6   to determine the lawfulness of the

7   surveillance."

8   And what that means is that the

9   government has the ability to argue in the

10   extremely unlikely event -- it has never

11   happened -- that -- that -- it happened once and

12   then it got reversed on appeal. You know, the

13   -- the -- the -- the -- a district court ordered

14   a disclosure when determining the legality of

15   surveillance to the plaintiffs, right?

16   In the extraordinarily unlikely event

17   that that happens, the government will have the

18   ability to come in and say no, even with

19   protective orders, even with whatever else you

20   want to do with your SCIF or whatever it is,

21   there is no way to protect national security to

22   give this information to them. And that is, I

23   think, the -- the state secrets privilege.

24   That's the same argument.

25   JUSTICE BARRETT: And -- and to kind

1   of go back, like Justice Kagan was saying, the

2   state secrets privilege says, lawfully or

3   unlawfully obtained, we don't care because it

4   would harm national security. So you're

5   conceding that, even after you run through the

6   gamut of 1806(f) and conclude, listen, this was

7   unlawfully obtained, you're conceding that the

8   state secrets privilege could kick in and still

9   keep it out?

10   MR. ARULANANTHAM: At the relief

11   stage, so it -- it doesn't -- the main thing it

12   does is -- what -- what FISA does is it brings

13   the court into the picture where they can see

14   the evidence.

15   But -- but, when the portions of it

16   that require disclosure to plaintiffs, that has

17   "may" in it. And so that's why it's a -- it's a

18   -- I -- I think it's perfectly consistent with

19   the state secrets privilege at common law, but I

20   just want to make sure clearly that I'm

21   understanding -- that I'm answering your

22   question. You're looking like I'm not answering

23   your question.

24   JUSTICE BARRETT: No, I'm just trying

25   to follow how this actually would play out.

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1              MR. ARULANANTHAM:  Yeah.  Sure.  So

2     you have to give the information to the court.

3     And that's what -- that's what Congress wanted.

4     The courts get to find out if the government is

5     breaking the law or not.

6              But, if you ever want to disclose to

7     the plaintiffs to go beyond just the court and

8     now go to us and to the public, now the

9     government has the ability to argue that -- that

10    that's not permitted in the --

11             JUSTICE BARRETT:  So you would be --

12             MR. ARULANANTHAM:  -- interests of

13    national security.

14             JUSTICE BARRETT:  -- deprived of your

15    opportunity to get relief?

16             MR. ARULANANTHAM:  Yes.  In our -- in

17    our -- yes.  And in our --

18             JUSTICE BARRETT:  So you would lose?

19    Like, you couldn't -- it was unlawfully

20    obtained, but because it was protected by the

21    state secrets privilege, you can't recover?

22             MR. ARULANANTHAM:  No -- well, I mean,

23    I think that's possible in some cases.  In our

24    particular case, we said -- the -- the prayer

25    for relief clearly says we want the evidence --
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 1   the unlawful -- the information unlawfully

 2   obtained to be destroyed or returned. That's

 3   what we said.

 4   So I think we have made a request to

 5   obtain, absolutely, because we said "return."

 6   That's one of the things that we asked for. But

 7   we said "destroyed or returned," and that means

 8   that -- I mean, what we would argue in the

 9   district court if we ever got to this spot was

10   that, look, even if they say they can't show it

11   to everyone, they still need to destroy it.

12   And that would make a difference. I

13   mean, then our clients would at least still know

14   that the government, whatever records they got

15   from them because, you know, Mr. Fazaga was

16   leading his congregation in prayer or Mr. Malik

17   decided as a young man to embrace his faith,

18   they would at least know then that got burned

19   because it wasn't right. It wasn't right to spy

20   on them because you thought that they were

21   dangerous just because they were embracing their

22   faith.

23   And so it wouldn't be everything, you

24   know, perhaps that we want, but it's well --

25   well within the scope of the complaint, and it

1   would also preserve the government's state

2   secrets privilege.

3   That being said, I feel all of this

4   we're so far ahead of it, Right? All the Court

5   would have to decide now in either of the two

6   paths is that FISA displaces the state secrets

7   privilege when the government is seeking to use

8   information, as it is here. And you wouldn't

9   even have to decide this question about request

10   to obtain. You could just decide they are using

11   it. They're otherwise using it. And because of

12   that, they can keep the information in their

13   vault, but they can't win dismissal of our

14   religion claims. We get our day in court on the

15   religion claims.

16   Or the Court could decide it was

17   premature to dismiss -- I think, as Justice

18   Kagan perhaps was suggesting, you could decide

19   it's premature to dismiss on state secrets at

20   this stage --

21   JUSTICE KAVANAUGH: Where does Article

22   II fit into your analysis? Because Judge

23   Bumatay and then Judge Diaz on the Fourth

24   Circuit both started with an Article II backdrop

25   and the roots of the state secrets privilege and

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 1    said, in interpreting 1806(f), we think this is

 2    the better reading as a matter of text, but we

 3    also think this would be a very odd way for

 4    Congress to narrow, I guess, the state secrets

 5    privilege, which is so foundational to the

 6    national security of the country.

 7              MR. ARULANANTHAM:  All right, so, the

 8    bottom-line answer -- and I have lots of

 9    thoughts on the doctrine that they were

10    discussing -- but the bottom-line answer is,

11    when we're not talking about an area of

12    exclusive and conclusive executive power --

13              JUSTICE KAVANAUGH:  Well, that's --

14    I'm going to stop you right there, sorry --

15    that's debatable --

16              MR. ARULANANTHAM:  Well --

17              JUSTICE KAVANAUGH:  -- right?  And

18    that's the issue that hopefully we never have to

19    decide.

20              MR. ARULANANTHAM:  So --

21              JUSTICE KAVANAUGH:  But -- but I

22    think, right now, that's -- that's a question.

23    And so you avoid deciding that question, which

24    has a lot of ramifications, and I understand

25    exactly what you're saying on the Jackson
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1   framework there, and we avoid deciding that by

2   not interpreting the statute to trigger that

3   question.

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

5   on the same page on the standard, right, then I

6   would say it's limited to the domestic

7   electronic surveillance of U.S. persons, and, I

8   mean, this Court in Keith invited Congress to

9   legislate in that area, right?

10   And also, equally important, Your

11   Honor, only ex parte in camera review, and that

12   second element is also important. If you look

13   at Nixon, for example, look at the last footnote

14   in Nixon. It's Footnote 21 on page 716. What

15   the Court says is we expect the district court

16   is now going to have to go through -- this is

17   high-level communications between the president

18   and his advisors -- and excise the information

19   that may be privileged under Reynolds.

20   JUSTICE KAVANAUGH: Nixon also, as you

21   know well, distinguished national security

22   information, so that would not be -- that would

23   be different, at least if it's presidential

24   communications, and I think that's --

25   MR. ARULANANTHAM: Right, but -- but,

 1   respectfully, Your Honor, I'm -- I'm making a

 2   narrow point here just about ex parte review.

 3   JUSTICE KAVANAUGH: Yeah.

 4   MR. ARULANANTHAM: That footnote cites

 5   Reynolds. It doesn't just cite it. It says we

 6   will have to -- the district court should -- and

 7   it says you should cooperate with government

 8   counsel to go through the information that may

 9   need to be excised under Reynolds.

10   And so what I think that the -- the

11   Court was imagining was the -- the president's

12   communication about national security with his

13   high-level advisors may not belong anywhere out

14   in the New York Times or anywhere else, but the

15   Court can look at it to determine if -- and --

16   and exclude it in the course of litigation,

17   which is important to determine if the president

18   broke the law.

19   And that's all FISA did here. That's

20   why I think the -- the -- the scope of the

21   displacement here is very narrow. It's just

22   limited to ex parte in camera review by courts.

23   And that's why I think there's not even a

24   serious Article II question here.

25   I mean, this is --

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 1              JUSTICE KAVANAUGH:  One other
 2    question.  Sorry.
 3              MR. ARULANANTHAM:  Sure.  No.
 4              JUSTICE KAVANAUGH:  I appreciate all
 5    that explanation, which is helpful.
 6              One other question, which is, are you
 7    seeking to narrow Totten on your state secrets
 8    argument, or are you taking it as written?
 9              MR. ARULANANTHAM:  We -- we take it
10    exactly as General Dynamics described it.
11              JUSTICE KAVANAUGH:  Okay.  Not as
12    written?
13              MR. ARULANANTHAM:  And in our view,
14    also as Tenet described it, yes, Your Honor.
15              JUSTICE KAVANAUGH:  Yeah.  Yeah.
16              MR. ARULANANTHAM:  And I know you had
17    asked -- I can't remember, I think it was Mr.
18    Kneedler -- the -- about the passage in Totten
19    where they say:  Look, judicial -- I can't
20    remember the exact language, but it's something
21    like review of -- of any matter that could give
22    rise to the divulging of secret information, you
23    know, that passage, and I would just point to
24    the fact this is the same passage that's picked
25    up in Tenet and that the government relies on to
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 1   say it's -- it's broad.

 2   The very next paragraph there, the

 3   Court says: As a -- I'm talking about Totten

 4   now -- as a general matter, we can say that

 5   suits about matters which are sort of inherently

 6   secret cannot be maintained. And what they cite

 7   is marital communication, attorney-client

 8   communication, all of these things, regular

 9   privilege law.

10   JUSTICE KAVANAUGH: Well --

11   MR. ARULANANTHAM: It's -- that part

12   of the case is actually not resting on a

13   national security rationale. It's just saying,

14   look, if I want to sue my wife over a promise

15   that she made in the kitchen or something, you

16   know, that's going to be -- that's going to be

17   barred. And the court can figure that out very

18   early. You don't need to wait for discovery to

19   figure out that, obviously, that suit is barred.

20   JUSTICE KAVANAUGH: To pick up Justice

21   Breyer's question earlier, though, it doesn't

22   seem like we need to get into that.

23   If we conclude -- if we agree with the

24   government -- I know you don't want us to -- but

25   if we agree with the government on the 1806(f)

 1 issue and send it back to the Ninth Circuit, as

 2 Justice Breyer and Justice Kagan described and I

 3 mentioned earlier, all these kinds of issues can

 4 be fleshed out and come back to us where that's

 5 the central focus of the case.

 6   I feel like we'd be doing a drive-by

 7 in this case on a massively important issue if

 8 we get into that.

 9   MR. ARULANANTHAM: Yeah, I -- I agree,

10 Your Honor, that the narrowest ruling in our

11 favor probably in the whole case, yeah, I mean,

12 I think the "otherwise use" -- maybe I'm the

13 only one, or maybe not, I don't know, but I -- I

14 -- I think -- I think "otherwise use" is very

15 plausible as -- as a ground of statutory

16 interpretation for FISA.

17   You don't need to get into the

18 question, Justice Sotomayor, you had asked about

19 whether plaintiffs can use it in discovery if

20 you find the government is using it here, right?

21 But -- but the narrowest ground, perhaps even

22 narrower than that, would just be to say it was

23 wrong to dismiss on the pleadings in this case.

24   We know the very subject matter of

25 this case is not a state secret. The government

1   said this person worked for them. They said

2   they expect the majority of the audio and video

3   will be available for the litigation below. And

4   the district court still dismissed the whole

5   thing without ever looking to see whether --

6   JUSTICE KAVANAUGH: Well, the -- I'm

7   sorry to interrupt. The Ninth Circuit hasn't

8   really passed on that yet.

9   MR. ARULANANTHAM: They didn't. They

10   didn't.

11   JUSTICE KAVANAUGH: So why would we

12   pass on it before the Ninth Circuit did? That

13   would seem out of order to me.

14   MR. ARULANANTHAM: Well, yes, I -- I

15   -- it's true -- our argument that the dismissal

16   was premature, that was our primary argument. I

17   guess the issue is that I read their brief --

18   perhaps you can ask them -- but I -- I -- I read

19   their brief to be arguing for an affirmance, you

20   know, going underneath, an affirmance of the

21   district court order. And you cannot affirm the

22   district court order. But maybe that's wrong.

23   Maybe that's not what they're saying.

24   JUSTICE KAVANAUGH: Well, I -- I guess

25   I heard a little different from Mr. Kneedler,

 1   but he can get back into that on rebuttal.

 2   MR. ARULANANTHAM: Yes, but -- but --

 3   but I think the Court could also say we disagree

 4   on FISA, but we want you, court of appeals, to

 5   address the prematurity argument, and state

 6   secrets is nowhere here.

 7   I think I would -- I would say, if --

 8   if Your Honors find that the question presented

 9   does not include state secrets at all, then that

10   would also mean you shouldn't touch the valid

11   defense issues that are in the -- that are in

12   the case as well.

13   JUSTICE GORSUCH: I'd like your help

14   with a related problem, and -- and that is, you

15   know, asking this question that we're struggling

16   with about 1806's consistency with state

17   secrets, it raises a question what state secrets

18   is.

19   And in 1978, when the Church Committee

20   issued -- after Church Committee issued its

21   report and Congress adopted FISA, Reynolds was

22   on the books, and that was pretty much it, and

23   Totten was over there having to do with spy --

24   contracts with spies. And so -- so the state

25   secrets doctrine pretty clearly meant you

 1   exclude the evidence and the case continues.

 2   It's only since then in relatively

 3   recent times that the government has asserted

 4   the Totten bar really kicks in in a lot of cases

 5   and that lower courts have run with that ball.

 6   So asking what the state secrets means

 7   today and whether that implicates FISA seems to

 8   be a different question.

 9   MR. ARULANANTHAM: Yes, I completely

10   agree, Your Honor. I would note that in their

11   long string cite footnote in their reply brief,

12   where they say here is all the court of appeals

13   cases, and leaving aside that most of those

14   cases are about where the plaintiff can't make

15   their case, but, even leaving that aside, the

16   string cite ends before 1978. You know, it ends

17   around 1980, I think.

18   I mean, there's -- there's -- even in

19   all of the cases that they have cited, they

20   don't prove that dismissal was a contemplated

21   remedy under state secrets outside the

22   government contracting context in 1978.

23   And I think it's quite clear that

24   actually, in 1978, if you -- there's lots of

25   state secrets cases. These are in Professor

         1   Donohue's brief, among other places, and,

         2   actually, several of them are in ours as well,

         3   but -- but, you know, it's very clear that that

         4   prior rule, the evidence was excluded and the

         5   case goes on without it.

         6   I mean, we cite cases from England

         7   from the early 1800s, Wyatt v. Gore --

         8   JUSTICE GORSUCH: I mean, I -- I -- I

         9   -- I'm sorry to interrupt, but the -- but the --

        10   but the -- but I do want to interrupt because I

        11   think my real problem and what I'm hoping for an

        12   answer for, we're -- we're -- we're in

        13   tremendous agreement on this point, but -- but

        14   what I'm struggling with is your -- the case was

        15   asked us, does -- does FISA displace state

        16   secrets doctrine? And if this Court hasn't

        17   definitively answered what the state secrets

        18   doctrine is, that's hard, and if Congress had in

        19   mind one version of the state secrets doctrine,

        20   is that relevant -- the one that's relevant that

        21   we should be asking about, you know, or do we

        22   ask something -- other question?

        23   MR. ARULANANTHAM: I mean, I --

        24   JUSTICE GORSUCH: That's what I need

        25   your help with.

 1   MR. ARULANANTHAM: -- I see. I see.

 2 I haven't thought, to be perfectly honest, about

 3 whether the question presented is incorporating

 4 today's understanding versus that one.

 5   I think, when you're looking at what

 6 -- what Congress contemplated -- I can answer

 7 that part of the question for you -- Congress

 8 obviously in 1978 is thinking about a state

 9 secrets doctrine in 1978.

10   And so the fact that they are saying,

11 oh, look, FISA is not displaced and, yes, allow

12 us to dismiss claims, that -- that doesn't make

13 any sense because, if you're going to say, okay,

14 freeze the world and -- and operate as it

15 existed in 1978, then you can't be giving them a

16 dismissal remedy.

17   I don't know if that -- that

18 satisfactorily answers your question, but, yeah,

19 that -- that's my -- that's my view on that

20 subject.

21   I also think that if the Court thinks

22 that the state secrets question is not within

23 the question presented, if that's -- if that's

24 the Court's view, then -- but -- but the Court

25 also thinks that the district court can, you

 1   know, proceed on the state secrets question, I'm

 2   not sure there's a rationale for answering

 3   either one, to be perfectly honest with you,

 4   but, yeah, that's my -- that's my view on that.

 5   JUSTICE ALITO: But what happens in

 6   your view in this situation? The plaintiff

 7   claims that electronic surveillance was

 8   conducted for discriminatory reasons, in

 9   violation of the -- the plaintiff's right to the

10   free exercise of religion, makes that a prima

11   facie case. That's not that hard to do in an

12   employment case.

13   The evidence obtained through the

14   electronic surveillance shows without any doubt

15   that, in fact, the surveillance was not based on

16   the plaintiff's religion; it was based on the

17   fact that there was evidence that the plaintiff

18   is a terrorist.

19   What happens in that situation? And

20   the latter is covered by state secrets. And the

21   government says this can't be, it -- this is too

22   sensitive to be disclosed. What happens there?

23   MR. ARULANANTHAM: Yeah, I think

24   there's two options. Under the decision below,

25   which adopts the D.C. Circuit's view, which in

 1   -- sort of based on the Molerio decision that we

 2   discussed earlier, Judge -- then Judge Scalia's

 3   view, the court can look at that information,

 4   find the exact finding that you just made, and

 5   then rule for the defendants. That -- that's

 6   one view.

 7   The common law view is different. The

 8   common law view is that, look, privilege

 9   sometimes hurts one side, sometimes hurts the

10   other side. It often leaves evidence out that

11   probably would have resulted in a victory, you

12   let the chips fall where they may.

13   And the -- and the decision below did

14   not adopt that rule. It adopted the rule from

15   the D.C. Circuit. I think those are the two

16   plausible options.

17   What is not acceptable in our view is

18   to say even if the evidence may show the

19   opposite, it may show it was blatant religious

20   discrimination, it said simply on Muslims,

21   that's what -- that's what -- that he was told,

22   the FBI told him to surveil simply on Muslims,

23   that nonetheless you would still win dismissal

24   because, hypothetically, they could have a full

25   and effective defense. That's the Fourth

 1   Circuit view. It's the view that's pressed by

 2   the other side. And that we would strongly

 3   object to, Your Honor.

 4   CHIEF JUSTICE ROBERTS: Thank you,

 5   counsel.

 6   1806(f), the provision we're talking

 7   about, takes up the whole page of 207a and yet

 8   it consists of two sentences. The sentence

 9   we've been talking about is 20 lines, and

10   squirreled away in there are these few words

11   that you're relying on for displacement of the

12   state secrets privilege, for a reading of -- of

13   FISA that has enormous consequences for state

14   secrets, for national security.

15   And I just wonder, why would Congress

16   put such significant language stuck in this

17   provision? Isn't that an oblique way to have

18   the consequences you're ascribing to that

19   language?

20   The -- the -- the jargon in our

21   opinions, as you know, is this is, you know,

22   burying an elephant in a mouse hole, which is a

23   little overused, but what's the answer to that?

24   MR. ARULANANTHAM: Yes. So I favor

25   short declarative sentences, but, you know,

1   leaving that aside, I -- I -- I disagree with

2   their claim that FISA as a whole is hiding

3   anything in a mouse hole. You know, it's --

4   it's passed in the wake of extensive abuses that

5   were uncovered by the Church Committee. And

6   this provision, it says, if the attorney general

7   -- you know, perhaps it should have been written

8   in a sentence or in its own section. You know,

9   I would have probably put it in three sections,

10   I think, if you think of its parts.

11   But -- but it clearly says that if the

12   attorney general finds that disclosure of the

13   information or an adversarial hearing would harm

14   national security, then you adopt the ex parte

15   in camera review process and determine if the

16   surveillance was lawful. So --

17   CHIEF JUSTICE ROBERTS: But -- but --

18   MR. ARULANANTHAM: -- I --

19   CHIEF JUSTICE ROBERTS: I'm sorry. Go

20   ahead.

21   MR. ARULANANTHAM: No, just I -- I --

22   I think this is a statute about domestic

23   electronic surveillance. The whole thing is --

24   I mean, it creates the foreign intelligence

25   surveillance court. It does all these things,

1   as Your Honor obviously knows. I just -- I just

2   don't see this as a mouse hole.

3   If it were trying to displace state

4   secrets privilege in other contexts not related

5   to electronic surveillance, I think there would

6   be a better argument that it doesn't make any

7   sense if they did this here. But the

8   displacement is only in the -- in the sense that

9   it creates all the procedures, the exclusive

10   procedures for how you litigate cases --

11   CHIEF JUSTICE ROBERTS: But I think --

12   MR. ARULANANTHAM: -- about

13   surveillance.

14   CHIEF JUSTICE ROBERTS: -- I -- I

15   think your argument really does hinge on the "or

16   other materials" language. Everything else is

17   consistent with Mr. Kneedler's point that this

18   governs when the government wants to introduce

19   evidence and not affording a vehicle for what

20   the court below did.

21   MR. ARULANANTHAM: No, Your Honor, I

22   -- I -- I would -- I would say there's two parts

23   that really contradict that view.

24   One is the plain language, "any motion

25   and request under any other statute or rule,"

1 which they really have to add words into and say

2 any motion about admissibility or in response

3 to -- I mean, they -- they're having to cram

4 narrow -- narrowing construction onto this very

5 broad text.

6 The second point -- I think this is

7 something Justice Sotomayor said right early

8 on -- is, on their view -- and I think Mr.

9 Kneedler agreed with this -- they can just

10 dismiss 1810 claims. They can just win

11 dismissal of 1810 claims on the state secrets

12 privilege.

13 So Justice Alito had asked about

14 structural considerations earlier. I mean, the

15 structural argument in our favor is

16 extraordinarily strong. I mean, on their view,

17 every 1810 claim they can just pick and the ones

18 they want to dismiss on state secrets, they can

19 dismiss it using the same attorney general

20 declaration that is described in 1806(f).

21 So I think those are our two

22 arguments, strongest arguments, for why that

23 part, the request to obtain part of the case --

24 part of our argument goes for us. Obviously,

25 the "use" argument is different, right? If we

 1   win on that, then we don't have to get into

 2   this.

 3   CHIEF JUSTICE ROBERTS: Thank you.

 4   Justice Thomas?

 5   Justice Breyer?

 6   Justice Alito?

 7   JUSTICE ALITO: Yeah, a technical

 8   argument about the use provision. The use

 9   provision requires the government to give notice

10   that it is going to use the information. And

11   that makes sense when the government wants to

12   introduce this -- it at trial, so it gives

13   notice that it's going to use it at trial, and

14   that allows the other party to move to suppress

15   the evidence.

16   But what sense does it make to require

17   prior notice when what the government is going

18   to do is to invoke the state secrets privilege?

19   You just invoke the state secrets privilege, but

20   you have to send a notice that says we intend to

21   invoke the state secrets privilege and now we

22   invoke the state secrets privilege? Does that

23   make any sense?

24   MR. ARULANANTHAM: I -- I think it

25   does. In -- in this case, it served a useful

1   function. They filed a notice of motion, and

2   then they filed -- filed the motion. And we

3   said -- as a preliminary matter before even

4   briefing it, we tried to make some of these

5   Totten versus Reynolds kinds of arguments to the

6   district court, and we said don't even look at

7   the information; first, decide as a threshold

8   matter whether or not the state secrets evidence

9   -- doctrine can apply here. And we said it may

10   be a necessary evil that you'll have to look at

11   the ex parte information, but if you can avoid

12   doing that, that would be better. We said it's

13   presumptively unconstitutional.

14   So it served a very important function

15   -- we lost, obviously, that argument. But --

16   but -- but I think it served a very important

17   function here, and -- and, yeah, I do think it's

18   -- it's important for that reason.

19   JUSTICE ALITO: One other question.

20   Under 1806, do you think that the judge must be

21   able to look at all of the evidence to the

22   extent it's necessary to decide whether the

23   surveillance was lawful?

24   MR. ARULANANTHAM: Its applications,

25   orders, and such other materials as are

1   necessary to determine. I don't -- I don't know

2   what the scope of "such other materials" is.

3   You know, the court of appeals predicted -- it

4   didn't decide -- it predicted that the scope of

5   evidence that would be reviewable to determine

6   whether the clearly electronic surveillance for

7   FISA purposes, like him leaving recording

8   devices in a prayer hall and walking away, to

9   decide if that was discriminatory on the basis

10   of religion would be the same information that

11   you would need to decide if, say, his consensual

12   conversations were also in violation of the Free

13   Exercise Clause.

14   But the court said, if that's wrong,

15   then that's fine. Then the district court can

16   say it's wrong --

17   JUSTICE ALITO: But --

18   MR. ARULANANTHAM: -- and then it can

19   separate -- it can -- it can apply normal --

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

21   MR. ARULANANTHAM: -- or state secrets

22   privilege.

23   JUSTICE ALITO: -- what I'm interested

24   in is this. In cases involving the state

25   secrets privilege, isn't it true that the court

1   does not necessarily look at all of the -- of

2   the evidence? There are situations in which the

3   evidence is too sensitive.

4   Think the most secret -- think of the

5   most secret evidence that the -- the government

6   possesses. Yet, 1806 seems to say that the --

7   the court reviews ex parte in camera the

8   evidence -- the -- that evidence if it's -- if

9   it has a bearing on whether the surveillance was

10   lawfully conducted.

11   MR. ARULANANTHAM: Yes. So our

12   position would be that FISA brings the courts

13   into the process. And so, you know, the

14   government can always choose not to rely on some

15   piece of information. It doesn't even want to

16   give it to a court because it's worried the

17   court might leak the information. And they can

18   choose to do that.

19   But, if they -- if they want to use it

20   to show that the surveillance was lawful, they

21   have to give it to the court as long as it's

22   within that "such other materials relating to

23   surveillance."

24   But, you know, that's what I -- that's

25   what we think. I'm not sure the Court has to

 1   address that question here. Obviously, it's,

 2   again, quite premature. And I think the -- the

 3   Court could hold that, you know, if this were

 4   like nuclear weapons in Hawaii or one of these

 5   other things -- I don't know how this would

 6   happen in this case, it's 15 years old -- but --

 7   but, you know, I think the Court could say we're

 8   not deciding whether there might be, you know,

 9   some set of information, maybe it's because that

10   part is in the constitutional core if somehow

11   the president were involved in our case, which

12   seems quite implausible to me, but, you know --

13   and -- and say, well, you know, we're not

14   deciding that little part of it, but, in

15   general, FISA displaces the privilege and what

16   it says is that other such materials relating to

17   the surveillance have to be turned over to the

18   court, not to us, but to the court.

19   JUSTICE ALITO: Wouldn't that be quite

20   something? Because just dealing with some

21   super-secret information in district court -- in

22   district courthouses around the country would

23   create an incredible security problem. Most of

24   the -- most district courts don't have the

25   facilities to deal with information of that

 1   sensitivity.

 2   MR. ARULANANTHAM: Well, I -- we're

 3   only talking about domestic electronic

 4   surveillance of Americans. It doesn't arise --

 5   the -- the claims don't arise if we're talking

 6   about things like, for example, what you -- this

 7   Court was dealing with, you know, last month in

 8   a different state secrets case.

 9   So we're only talking about that.

10   And, obviously, in criminal cases, Justice

11   Alito, already, courts all the time are doing

12   FISA ex parte in camera review where the

13   government is trying to use the information in

14   criminal cases. So I --

15   JUSTICE ALITO: Yeah, only if the

16   government chooses to -- wants to use the

17   information in a criminal case.

18   MR. ARULANANTHAM: Yes, that -- that's

19   true, Your Honor. I -- I -- our view is that

20   Congress thought, in this context, given the

21   history of abuse that had happened in this

22   particular area, it was important to interpose

23   the courts to play their role to ensure that

24   surveillance remained within the confines of the

25   law.

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1          CHIEF JUSTICE ROBERTS:  Justice

2    Sotomayor?

3          JUSTICE SOTOMAYOR:  Counsel, you

4    disclaim wanting to use this information.  The

5    government hasn't made a motion to use it.  It

6    made a motion to dismiss.

7          You concede that whether or not that

8    motion to dismiss is appropriate under Reynolds

9    and General Dynamics and all that case law

10   shouldn't be addressed by us, correct?

11         MR. ARULANANTHAM:  No, Your Honor.  I

12   -- I believe it's within the question presented,

13   and the Court has the authority -- and we did

14   argue it below.  We said --

15         JUSTICE SOTOMAYOR:  Yes, but --

16         MR. ARULANANTHAM:  -- we put it in the

17   BIO.  So --

18         JUSTICE SOTOMAYOR:  -- but you agree

19   --

20         MR. ARULANANTHAM:  -- our position

21   is --

22         JUSTICE SOTOMAYOR:  -- that it hasn't

23   been properly briefed before us, and the Ninth

24   Circuit didn't look at that?

25         MR. ARULANANTHAM:  No, the Ninth
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1   Circuit didn't look at that because en banc 6-5

2   in the Jefferson decision, it -- it ruled that

3   Totten and Reynolds were on a continuum.

4   JUSTICE SOTOMAYOR: Right. But -- but

5   -- but --

6   MR. ARULANANTHAM: And this is before

7   General Dynamics.

8   JUSTICE SOTOMAYOR: Exactly. So --

9   MR. ARULANANTHAM: Right. So -- so it

10   --

11   JUSTICE SOTOMAYOR: -- that hasn't

12   been really addressed by them, not the way

13   you've argued it before us?

14   MR. ARULANANTHAM: No, Your Honor, it

15   was foreclosed --

16   JUSTICE SOTOMAYOR: All right. So --

17   MR. ARULANANTHAM: -- under circuit

18   precedent. So we didn't make this exact -- this

19   argument there.

20   JUSTICE SOTOMAYOR: So, if you were to

21   lose -- and I know you desperately don't want

22   to, but assume my assumption that all we hold is

23   that no one's invoked 1806 here, and we send it

24   back for the Court below to decide how state

25   secrets interacts with a motion to dismiss.

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 1            Is that the narrowest ruling that we
 2   could issue?
 3            MR. ARULANANTHAM:  Yes, Your Honor.  I
 4   think holding that either, as I had discussed
 5   with Justice Kavanaugh, either that you
 6   shouldn't have dismissed on the pleadings or
 7   that we want the Ninth Circuit to decide if you
 8   should have dismissed on the pleadings, I would
 9   just point -- just note, I guess, that the en
10   banc Ninth Circuit foreclosed our argument about
11   the scope of the Reynolds privilege here.
12            It was before General Dynamics, so
13   perhaps we could argue, hey, look, you know --
14            JUSTICE SOTOMAYOR:  Exactly.  So if we
15   tell them look at your holding in light of
16   General Dynamics --
17            MR. ARULANANTHAM:  Yes, Your Honor.
18            JUSTICE SOTOMAYOR:  -- they should do
19   that anyway?
20            MR. ARULANANTHAM:  Yes, Your Honor.
21   Yes, Your Honor.  That would be the -- the
22   narrowest.
23            JUSTICE SOTOMAYOR:  Thank you.
24            CHIEF JUSTICE ROBERTS:  Justice Kagan?
25            JUSTICE KAGAN:  So this question
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 1   doesn't assume you lose. Suppose, you know,

 2   just on this question of the relationship

 3   between the two questions, suppose that the

 4   easiest question in this case, I think, is the

 5   question of when dismissal is appropriate and

 6   that the Ninth Circuit decision was in some

 7   important way premised on an incorrect

 8   understanding of when dismissal is appropriate

 9   in a state secrets case.

10   And suppose too that I find the 1806

11   questions quite difficult. And if the entire

12   discussion of the Ninth Circuit was premised on

13   this error about state secrets dismissals, one

14   wouldn't have to get into that. That would seem

15   an attractive solution to me.

16   But that leaves an opinion on the

17   books which may well be wrong, that the Ninth

18   Circuit's view of 1806, in fact, is incorrect.

19   So what should I do?

20   MR. ARULANANTHAM: I think the Court

21   could affirm on the alternative ground, but that

22   would still leave the Ninth Circuit opinion on

23   the books, I guess, is your -- your point, Your

24   Honor.

25   I guess -- I -- I suppose the Court

 1   could say, under these circumstances, where --

 2   you know, our first argument to the Ninth

 3   Circuit was the dismissal was premature.

 4   Perhaps the Court should say: We

 5   think that the court should have addressed that

 6   question first and, for that reason, we vacate

 7   the -- the decision and ask the Court to -- to

 8   address that -- that question first.

 9   I'm not sure -- I mean, under that

10   view, you wouldn't say whether it was right or

11   whether it was wrong. You were saying that

12   under these circumstances, given the

13   significance of the issues or, you know, for

14   whatever other reasons, we think it more

15   appropriate to address the question whether the

16   dismissal here was premature.

17   The district court did not look at the

18   actual underlying evidence. The district court

19   didn't explain why, when we said we would move

20   on our summary -- for summary judgment on the

21   religion claims, didn't say why that would still

22   somehow lead to inevitably the disclosure of

23   information, you know, unless -- unless they --

24   they carried the risk and it was -- it was them

25   that caused the risk.

 1   So I suppose Your Honor could -- could

 2   take that approach. I feel like your question

 3   sort of did assume we would lose on FISA in the

 4   end, but, you know, I mean, our -- our -- our

 5   view is that the Court could also affirm on

 6   either of those two grounds, but I guess Your

 7   Honor already knew that.

 8   So now have I answered your question?

 9   I sense -- yeah?

10   CHIEF JUSTICE ROBERTS: Justice

11   Gorsuch.

12   JUSTICE GORSUCH: I just want to make

13   sure I understand your answer to the question.

14   So it might be possible, I -- I think

15   you're saying, to vacate and remand the case and

16   say it was premature for the Ninth Circuit to

17   determine that FISA displaced state secrets

18   without first asking what state secrets is and

19   how it applies to this case?

20   MR. ARULANANTHAM: Yes, Your Honor,

21   and we would say, as Justice Sotomayor had

22   suggested, particularly in light of General

23   Dynamics.

24   JUSTICE GORSUCH: Okay.

25   MR. ARULANANTHAM: And -- and there's

 1   two -- if I -- if I -- if I may, Your Honor,

 2   there's two aspects to that. One is whether

 3   dismissal is available in light of General

 4   Dynamics, and the other is the prematurity part,

 5   whether you can do it on the pleadings or you

 6   have to let the case play out.

 7   JUSTICE GORSUCH: Got it. Thank you.

 8   CHIEF JUSTICE ROBERTS: Justice

 9   Kavanaugh.

10   JUSTICE KAVANAUGH: One follow-up on

11   the Article II discussion we were having earlier

12   -- I appreciate your answers on that -- just so

13   I'm clear about what I'm suggesting.

14   I agree with you there would be real

15   doubts about whether the executive's power,

16   Article II power, to conduct domestic

17   surveillance would be exclusive and preclusive

18   under Category 3 of the Jackson framework, so I

19   -- I agree that would be doubtful in my view,

20   although we haven't said that.

21   But, at a minimum, I think the

22   government is saying, in this separation of

23   powers back and forth between the executive and

24   Congress, what the executive is due is that

25   Congress speak clearly, directly, give some

    1   clearer indication of an intent to intrude on

    2   the state secrets privilege than we have here.

    3   And the Chief Justice's questions

    4   about a few words and Justice Alito's questions,

    5   which I would certainly second, the district

    6   court -- that this kind of information,

    7   depending on what it is, is not the kind of

    8   information you want floating around even in the

    9   White House to people, much less floating around

    10   the country, depending on what it is, of course.

    11   So, on that question, that Article II

    12   influences the reading is kind of what I'm

    13   getting at with Article II, not the

    14   exclusive/preclusive.

    15   MR. ARULANANTHAM: Uh-huh. Yeah, I

    16   think there are other statutes that have already

    17   crossed this bridge. FOIA Exemption 1 and the

    18   post EPA v. Mink congressional action on that is

    19   one.

    20   CIPA, even FISA, other provisions of

    21   FISA which require very extremely sensitive

    22   programs that the government is running to be

    23   disclosed to this Court.

    24   So, in that sense, I -- I don't think

    25   there's a -- when -- when we're talking about

 1   domestic electronic surveillance and only ex

 2   parte review and all that, that's sort of the

 3   answer I gave before.

 4   JUSTICE KAVANAUGH: Yeah.

 5   MR. ARULANANTHAM: The one other thing

 6   I would say on it, Your Honor, is we're talking

 7   here about rules for litigation, and all of this

 8   is about when they file something in court and,

 9   you know, all of that.

10   And it's very well recognized that

11   Congress has the power to set up a set of rules

12   for litigation, whether it be evidentiary rules

13   or other related procedures. Vance v. Terrazas,

14   you know, talks about this even in a context

15   where there may not be power over the original

16   -- I think, in there, it's the denaturalization

17   context. When you then talk about making the

18   evidentiary rules, Congress's power is even

19   heightened.

20   And so, here, we're not talking about

21   whether the government has the power in the

22   first place to do some thing. We're talking

23   about where they've already done it and now

24   we're setting remedies up.

25   1806(f) and 1810 are mechanisms, and

1   even if you believe them that it's about

2   government's use, the whole thing is about what

3   happens in court. And so I think there also

4   were far afield from what I would think of as

5   potential core Article II concerns.

6   JUSTICE KAVANAUGH: Thank you.

7   CHIEF JUSTICE ROBERTS: Justice

8   Barrett.

9   JUSTICE BARRETT: I do have a

10   question. It's a follow-up to something Justice

11   Alito asked you earlier. He said to posit, you

12   know, you have religion claims in the suit, and

13   the suit is about whether the surveillance

14   violated or discriminated on the basis of

15   religion. But review of the application and the

16   related documents shows that there was no

17   religious discrimination. It was based on, you

18   know, very good evidence that the targets were

19   terrorists.

20   You said in that circumstance, like,

21   okay, well, then they've asserted the state

22   secrets privilege, let the chips fall where they

23   may, that dismissal's not an appropriate remedy

24   under the state secrets privilege. Did I

25   misunderstand that?

 1   MR. ARULANANTHAM: Yes, Your Honor. I

 2   said there's two options. What you just

 3   described is the traditional common law rule,

 4   and it was the rule certainly in 1978.

 5   JUSTICE BARRETT: You mean that it

 6   proceeds forward just without the --

 7   MR. ARULANANTHAM: Without the

 8   privileged evidence --

 9   JUSTICE BARRETT: Okay. But my

10   question is then, what happens to the individual

11   defendants? Let's say the evidence that they

12   can use to defend themselves against the claim

13   that they religiously discriminated is in this

14   body of evidence that's protected by the state

15   secrets doctrine. And you're saying dismissal's

16   not a remedy, so they just go in with their

17   hands tied behind their back and they just are

18   sitting ducks?

19   MR. ARULANANTHAM: Yes. So -- so two

20   thoughts, Your Honor. Under common law, that is

21   certainly the result, and there are --

22   JUSTICE BARRETT: Except, under common

23   law, if you have a privilege like

24   attorney-client and it's exclusively a common

25   law privilege, it can be pierced if it would

 1   violate the due process rights, right? But,

 2   if -- if the state secrets privilege is not

 3   entirely common law, if it has a constitutional

 4   element, I'm not sure that the due process

 5   rights of the defendants could pierce it.

 6   MR. ARULANANTHAM: Yes, I'm -- I'm --

 7   I'm just thinking of common law cases that are

 8   actually cited in Professor Donohue's brief.

 9   Republic of China is one. Northrop v. McDonnell

10   Douglas, where the defendant wants the

11   information and they say the chips fall where

12   they may. But -- so -- so --

13   JUSTICE BARRETT: Can that happen if

14   there's a constitutional element to the

15   privilege?

16   MR. ARULANANTHAM: So, I mean, if

17   we're talking about Article II, no, but you're

18   asking about a due process element?

19   JUSTICE BARRETT: Well, I'm asking,

20   like, chips fall where they may, and you're --

21   you're saying that that's fine even if it

22   violates the due process rights of the

23   individual defendants?

24   MR. ARULANANTHAM: Well, I think --

25   so, again, there's another option, and I want to

1   make sure I get to talk about the other

2   option --

3   JUSTICE BARRETT: Okay.

4   MR. ARULANANTHAM: -- right, which is

5   Justice Scalia's -- or then Judge Scalia's

6   option, but -- but, yes, I think it's often

7   going to be true -- I mean, if -- if the Due

8   Process Clause requires that someone needs the

9   evidence, then, obviously, that would trump the

10   -- the common law. That -- that just seems --

11   so --

12   JUSTICE BARRETT: So that assumes the

13   state secrets privilege is only common law?

14   MR. ARULANANTHAM: Yes, but if -- oh,

15   you're asking what if you have a conflict

16   between the Due Process Clause and the Article

17   II element of the state secrets privilege? I --

18   I don't -- I -- I don't know. I think, you

19   know, again, whatever the answer is, it would be

20   within the scope of the statute because it's in

21   accordance with the requirements of law. But --

22   JUSTICE BARRETT: It's just hard to

23   see letting the chips fall where they may if

24   it's then the individual defendants who are

25   deprived of access to information that they need

 1   to defend themselves against the claim that they

 2   discriminated on the basis of religion when

 3   let's imagine, in Justice Alito's hypothetical,

 4   it's utterly clear from all the materials that

 5   there was no religious discrimination.

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

 7   still want to talk about the other option.

 8   JUSTICE BARRETT: Yeah.

 9   MR. ARULANANTHAM: But the -- the last

10   thing I'll say before I do that is -- and this

11   is discussed to some extent in Tenet and cases

12   like that -- the government can always

13   indemnify, right? I mean, that -- when we're

14   talking about people who are working for the

15   government, which is typically what's going to

16   happen in an 1810 case, you know, if you're

17   talking about the mirror image problem, do you

18   let the harm of the due process problem you're

19   talking about or the Seventh Amendment problem

20   you're talking about fall on this side of the

21   ledger or on our side of the ledger? You know,

22   we're out of luck even if they blatantly broke

23   the law, where they have --

24   JUSTICE BARRETT: The due process --

25   MR. ARULANANTHAM: -- the possibility

 1   --

 2   JUSTICE BARRETT: -- rights, as

 3   Justice Alito pointed out, are not the same for

 4   defendants and plaintiffs.

 5   MR. ARULANANTHAM: Yes. The Seventh

 6   Amendment rights are certainly the same. But

 7   let me get to the --

 8   JUSTICE BARRETT: Yeah. Please.

 9   MR. ARULANANTHAM: -- let me get to

10   the other -- the other point. I mean, then

11   Judge Scalia and, actually, building even on a

12   prior case, Ellsberg, said that the court is --

13   and this has become an In re Sealed Case, the

14   D.C. Circuit's rule, and it is the rule adopted

15   by the decision below in this case -- is that in

16   that situation, the court can look at the

17   information, as Justice Alito had imagined,

18   decide that, yes, there is no basis for finding

19   that these people were discriminated against and

20   rule for the defendants.

21   And -- and that actually is what

22   happened in Molerio, where the person had a

23   claim that they thought -- a First Amendment

24   claim that they thought the court held would --

25   should survive summary judgment. But they said:

 1   But we've seen the evidence and we know that

 2   claim is wrong. And so they nonetheless ruled

 3   for the defendant.

 4   And I think that option would

 5   certainly be available under the court of

 6   appeals' decision in this case, so I think, if

 7   you -- if you affirmed, that option would still

 8   be --

 9   JUSTICE BARRETT: Then you're okay

10   with that option?

11   MR. ARULANANTHAM: -- available to

12   them. Yes, we haven't challenged it -- we

13   haven't challenged it here. And -- but, you

14   know, the -- the very last thing I would say

15   about that is our clients, they may have had

16   real targets, but the instructions that the

17   informant says he got and what he did was he

18   went all over the place and he talked --

19   JUSTICE BARRETT: Well, I mean, I'm

20   not talking just about the facts of your case,

21   obviously, because how we interpret the statute

22   or what we might say or not say about the state

23   secrets privilege has ramifications beyond your

24   case.

25   MR. ARULANANTHAM: Understood, Your

1   Honor.

2   JUSTICE BARRETT: Thank you, counsel.

3   CHIEF JUSTICE ROBERTS: Thank you,

4   counsel.

5   Rebuttal, Mr. Kneedler.

6   REBUTTAL ARGUMENT OF EDWIN S. KNEEDLER

7   ON BEHALF OF THE PETITIONERS

8   MR. KNEEDLER: Thank you, Mr. Chief

9   Justice. Several points.

10   First of all, we think it makes sense

11   the proper disposition of the case is to review

12   what the Ninth Circuit did decide, not what it

13   did not decide. The Ninth Circuit did not

14   decide whether the district court's dismissal of

15   only the First Amendment claim was proper on the

16   basis of the state secrets privilege because it

17   said the state's privilege was -- state secrets

18   privilege was displaced by FISA.

19   And there's no doubt the privilege

20   existed clearly under Reynolds at the time that

21   FISA was enacted. So there is certainly no

22   reason to think that FISA displaced that

23   well-established privilege.

24   The question of what the consequence

25   of that privilege is not the privilege itself;

1   it's what happens if the privilege is validly

2   asserted and the evidence is removed from the

3   case. So I think, Justice Gorsuch, the question

4   is what Congress would have thought about the

5   state secrets privilege itself, not the

6   consequences of a successful assertion of it.

7   And as to whether 1806(f) displaces

8   the state secrets privilege, I think, for a

9   number of reasons, it clearly does not. For

10   example, it provides for the attorney general to

11   control things, not the head of the agency,

12   which is the -- who invokes the state secrets

13   privilege.

14   And, true, FISA was enacted to address

15   abuses of domestic surveillance, but other

16   provisions of FISA addressed that with the --

17   with the FISC and the applications for

18   approvals. But what -- what Congress did in

19   1806(f) and -- and the related provisions was to

20   codify in statute a procedure that had been

21   developed at common law or by courts for the

22   suppression of evidence that was -- that was

23   obtained by electronic surveillance. And that

24   would arise only if the attorney general decided

25   to -- to put forward the evidence, as Justice

1   Alito described.

2   And there are many other things that

3   make that clear. Subsection (f) refers to two

4   motion -- types of motion, a motion to suppress

5   or a motion to obtain discovery of either the

6   application and order or the materials or the

7   evidence in order to suppress. And then

8   subsection (g), when it says that the court

9   grants that motion, it doesn't say grant

10   judgment. It says grant the order to suppress

11   or otherwise grant the motion, which means the

12   motion to exclude the evidence may be suppressed

13   or it may be something less than suppressed,

14   something more than suppressed. So it's all

15   wrapped up in the -- in -- in the procedures for

16   suppression.

17   On the question of dismissal, we think

18   that -- that it is artificial to separate Totten

19   from Reynolds. Reynolds -- Reynolds itself had

20   a footnote about Totten after it discusses the

21   fact that national security information can be

22   excluded. It says: See Totten. And then it

23   describes Totten as a case where the -- the case

24   was -- was not permitted to go forward even at

25   the pleadings stage because it was obvious from

1   the face of the pleadings that the -- that the

2   case could not go forward because it concerned a

3   state -- a state secret.

4   But there are other situations in

5   which it is central to the case, a state secret,

6   such as here. They allege that plaintiffs --

7   that defendants violated their First Amendment

8   rights. But the evidence might well furnish a

9   basis for defending against that. That is

10   central to the case in the same way that the

11   contract in -- in Totten and in Tenet was

12   central to the case.

13   And General Dynamics, in fact,

14   contains a -- a number of passages that are

15   helpful, supportive of the idea that dismissal

16   can be an appropriate remedy.

17   For example, Respondents say that as

18   plaintiffs they're happy to make their case and

19   then let the chips fall where they may, putting

20   to one side the threat of blackmail, gray mail

21   against the government in that sort of

22   situation, forcing it to settle or maybe even

23   accept an injunction against us -- against it.

24   But General Dynamics says it seems to

25   be unrealistic to separate, as the Court of

1   Federal Claims did, the claims from the defense

2   and to allow the former to proceed while the

3   latter is barred. Claims and defenses together,

4   it -- it's those that establish the

5   justification or lack of justification for

6   judicial relief.

7   The point is, if the -- if the issue

8   cannot be fairly, soundly, safely adjudicated

9   without risking disclosure of national security

10   information, then it can be -- it can and should

11   be dismissed, whether this arises by the

12   government's assertion of a defense in rebuttal,

13   it's not even an affirmative defense, it is a

14   defense -- a factual defense, or whether it --

15   it goes to the plaintiff's -- to the plaintiff's

16   case.

17   And, in fact, in General Dynamics --

18   no, I think it's in Tenet versus Doe, the Court

19   also relies on Weinberger, where the case was

20   dismissed because the defense could not be

21   properly asserted due to state secrets

22   information.

23   CHIEF JUSTICE ROBERTS: Thank you, Mr.

24   Kneedler, counsel. The case is submitted.

25

1   (Whereupon, at 12:07 p.m., the case

2   was submitted.)

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