No. 20-828

IN THE

Supreme Court of the United States

FEDERAL BUREAU OF INVESTIGATION, ET AL.,
Petitioners,

v.

YASSIR FAZAGA, ET AL.,
Respondents.

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

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

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QUESTION PRESENTED

Whether § 1806(f) of the Foreign Intelligence Surveillance Act of 1978 displaces the state-secrets privilege and authorizes a district court to consider privileged evidence to resolve—in camera and ex parte, and in violation of the due process and jury trial rights of individual defendants—the merits of a lawsuit challenging the lawfulness of government surveillance.

PARTIES TO THE PROCEEDING

Petitioners are the United States of America; the Federal Bureau of Investigation ("FBI"); Christopher A. Wray, in his official capacity as Director of the FBI; and Kristi K. Johnson, in her official capacity as the Assistant Director of the FBI's Los Angeles Division. Petitioners are defendants in the district court.

Respondents J. Stephen Tidwell and Barbara Walls are defendants in the district court sued in their individual capacities.

Respondents Paul Allen, Kevin Armstrong, and Pat Rose are defendants in the district court sued in their individual capacities.

Respondents Yassir Fazaga, Ali Uddin Malik, and Yasser Abdelrahim are plaintiffs in the district court.

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INTRODUCTION

In holding that the state-secrets privilege is displaced by the Foreign Intelligence Surveillance Act's ("FISA") in camera, ex parte procedures for adjudicating challenges to the legality of electronic surveillance, the U.S. Court of Appeals for the Ninth Circuit adopted an interpretation of FISA that threatens to deprive individual defendants sued alongside the government of their constitutional rights. The canon of constitutional avoidance should have foreclosed that interpretation.

Respondents J. Stephen Tidwell and Barbara Walls, FBI agents who are co-defendants in their

individual capacities with petitioners in the district court, agree with the government that the court of appeals' interpretation of FISA is untenable. The plain text of that statute shows that the in camera, ex parte procedures of § 1806(f) are intended to govern adjudications relating to the admissibility of evidence obtained through electronic surveillance in defined circumstances. The statute nowhere suggests that Congress intended FISA's procedures to displace the state-secrets privilege at all, much less to permit a district court to adjudicate an individual defendant's personal liability through secret proceedings in which the defendant himself has no apparent right to participate.

The Due Process Clause guarantees Tidwell and Walls the right to be heard in their own defense, and the Seventh Amendment guarantees their right to a jury determination of factual disputes material to their liability. The court of appeals' contrary interpretation of FISA—which sharply diverges from how in camera, ex parte procedures are used in any comparable context—threatens to violate these rights. At a minimum, it raises grave constitutional questions. This Court should avoid those questions by limiting FISA's in camera, ex parte procedures to the evidentiary purposes for which they were intended.

OPINIONS BELOW

The court of appeals' amended opinion, order denying rehearing, and opinions respecting denial of rehearing are reported at 965 F.3d 1015 (Pet. App. 1a-135a). The court of appeals' initial panel opinion is reported at 916 F.3d 1202. The district court's opinion dismissing in part based on the state-secrets privilege is reported at 884 F. Supp. 2d 1022 (Pet. App. 136a-180a). The district

court's opinion dismissing the FISA claim in part is reported at 885 F. Supp. 2d 978 (Pet. App. 181a-195a).

JURISDICTION

The court of appeals entered judgment on February 28, 2019, and denied rehearing on July 20, 2020. On March 19, 2020, this Court extended the deadline to file petitions for writs of certiorari to 150 days from the date of the lower court judgment or order denying rehearing. The petition for certiorari was filed on December 17, 2020, and granted on June 7, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment provides in relevant part:

> No person shall be … deprived of life, liberty, or property, without due process of law.

U.S. Const. amend. V.

The Seventh Amendment provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. Const. amend. VII.

Relevant provisions of FISA, 50 U.S.C. §§ 1801, 1806, 1809, 1810, are reprinted in the appendix to the petition for certiorari. Pet. App. 196a-212a.

STATEMENT OF THE CASE

Respondents Yassir Fazaga, Ali Uddin Malik, and Yasser Abdelrahim ("Plaintiffs") allege that, during a counterterrorism investigation in southern California, petitioners and several individual-capacity defendants (including Tidwell and Walls) targeted Plaintiffs for surveillance not for valid investigative purposes, but because of their religion. Plaintiffs filed an eleven-count complaint on behalf of a putative class asserting, among other claims, that by targeting Plaintiffs for surveillance based on their adherence to and practice of the religion of Islam, the FBI and other defendants violated Plaintiffs' rights under the Establishment and Free Exercise Clauses of the First Amendment and the Equal Protection Clause of the Fifth Amendment (the "Religion Claims"). JA 61.

The complaint alleged that Tidwell served during the relevant time as the FBI Assistant Director in Charge of the Los Angeles Field Office with supervisory authority over operations in the Central District of California and that Walls was the FBI Special Agent in Charge of the Santa Ana, California, branch office. JA 67-68. As to Tidwell and Walls, Plaintiffs offered generalized assertions in eleven paragraphs of the 260-paragraph complaint, based "[u]pon information and belief," that Tidwell and Walls authorized the investigation and generally oversaw the activities of other agents who carried it out. JA 67-68, 81, 85, 109-111, 113-114, 119, 144. But as the court of appeals later noted, Plaintiffs did not allege that Tidwell and Walls were "personal[ly] involve[d]" in the specific acts of surveillance that gave rise to the complaint. Pet. App. 35a. Purporting to state a cause of action under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), Plaintiffs sought

compensatory and punitive damages against Tidwell and Walls in their individual capacities. JA 146.

Recognizing that litigating the Religion Claims and other counts in the complaint would require inquiry into the persons who were (or were not) subjects of the investigation, the reasons for the investigation, and the sources and methods used by the FBI during the investigation, the Attorney General of the United States asserted the state-secrets privilege over those categories of information. Pet. App. 163a-164a. The government moved to dismiss on the ground that litigating Plaintiffs' claims, even with the privileged evidence excluded, would present an unacceptable risk of disclosing state secrets, thereby jeopardizing national security. Pet. App. 148a-149a; *see Mohamed* v. *Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1079 (9th Cir. 2010) (en banc).

Tidwell and Walls likewise moved to dismiss all claims against them on several grounds, including that the government's assertion of the state-secrets privilege required dismissal at least of the Religion Claims against them. As Tidwell and Walls argued, those claims are predicated on, and would require adjudication of, allegations that Tidwell and Walls knew of and approved unlawful investigative acts and surveillance based solely on Plaintiffs' religion. But the government's assertion of the privilege precludes Tidwell and Walls from defending themselves fully and effectively against those contentions.

For example, Plaintiffs contend that Tidwell and Walls and the other defendants engaged in "a broad[] pattern of dragnet surveillance" that "ensured that … Plaintiffs and numerous other people were surveilled solely due to their religion" and that they provided surveillance tools and instructions that "ensured that the

surveillance tools would target people solely due to their religion." JA 92-93. Absent the government's assertion of the state-secrets privilege, Tidwell and Walls would seek to defend themselves by showing that they had non-discriminatory, national-security and law-enforcement-related reasons for investigating specific individuals and that any investigative methods they authorized were appropriately tailored to advance the government's legitimate counterterrorism goals. But the government's assertion of the privilege removes that information from the case, precluding Tidwell and Walls from accessing and introducing relevant, potentially dispositive evidence regarding the counterterrorism operations they allegedly oversaw. *See General Dynamics Corp.* v. *United States*, 563 U.S. 478, 485 (2011); *United States* v. *Reynolds*, 345 U.S. 1, 10-11 (1953). Tidwell and Walls accordingly contended that dismissal was required because the privilege precluded them from fully and fairly defending themselves against the Religion Claims. *See Jeppesen*, 614 F.3d at 1083; *In re Sealed Case*, 494 F.3d 139, 149 (D.C. Cir. 2007).

Following "careful deliberation" conducted with "rigorous judicial scrutiny" and a "skeptical eye," Pet. App. 138a, 179a, the district court agreed with the Attorney General that "[f]urther litigation of [Plaintiffs'] claims" would risk disclosure of information "vital to our country's national security," Pet. App. 138a-139a. With the exception of one claim, the district court held that the government's assertion of the state-secrets privilege bars adjudication of this action. Pet. App. 136a-180a.[1] Rejecting Plaintiffs' assertion that FISA

[1] The district court dismissed all claims against petitioners and dismissed all claims against Tidwell and Walls except for

preempts the state-secrets privilege, Pet. App. 155a-156a, the court concluded that dismissal was required because the privileged information "provides essential evidence for Defendants' full and effective *defense* against Plaintiffs' claims—namely, showing that Defendants' purported 'dragnet' investigations were not indiscriminate schemes to target Muslims, but were properly predicated and focused." Pet. App. 173a-174a.

The court of appeals reversed the state-secrets determination. *Fazaga* v. *FBI*, 916 F.3d 1202, 1230-1234 (9th Cir. 2019), *amended on reh'g*, 965 F.3d 1015 (9th Cir. 2020). The court did not deny that the government had properly invoked the privilege, that disclosure of the privileged information would jeopardize national security, or that the assertion of the privilege threatened to preclude Tidwell and Walls from fully and fairly defending themselves. But the court concluded that, where they apply, the in camera, ex parte procedures set forth in FISA, 50 U.S.C. § 1806(f), provide the "exclusive procedure for evaluating evidence that threatens national security in the context of electronic surveillance-related determinations" and "overrides … the state secrets evidentiary dismissal option." *Fazaga*, 916 F.3d at 1231-1232.

Section 1806(f) requires a district court to review surveillance materials in camera and ex parte to determine the lawfulness of the surveillance in certain circumstances when the Attorney General attests that disclosure or an adversary hearing would harm the

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Plaintiffs' FISA claim for unlawful surveillance under 50 U.S.C. § 1810. Pet. App. 179a-180a, 181a-195a. The district court did not reach Tidwell and Walls's alternative defenses that qualified immunity bars the Religion Claims against them and that no *Bivens* remedy is available in this context.

national security. 50 U.S.C. § 1806(f). The court of appeals determined that this provision "speak[s] … directly to the question otherwise answered by the dismissal remedy sometimes required by" the state-secrets privilege, because it supplies an "alternative mechanism for the consideration of electronic state secrets evidence" that eliminates the need for dismissal. 916 F.3d at 1231-1232. The court further concluded that these procedures apply in this case because the government seeks to use evidence allegedly derived from electronic surveillance as a basis to dismiss the action. *Id.* at 1235, 1238.

The court acknowledged that its holding would "severe[ly] curtail[]" the "usual protections afforded by the adversarial process and due process," because Plaintiffs' claims "w[ould] not go forward under the open and transparent processes to which litigants are normally entitled." 916 F.3d at 1226; *see id.* at 1232 (acknowledging that following FISA's procedures will "severe[ly] compromise[] … the adversarial process"). For Plaintiffs, the court observed, this harm was ameliorated by the fact that "it is Plaintiffs who have invoked the FISA procedures" and were thus "willing to accept those restrictions" as an alternative to dismissal. *Id.* at 1226. As to the individual-capacity defendants, however, the court brushed aside any concerns arising from the use of § 1806(f)'s in camera, ex parte proceedings to adjudicate Plaintiffs' claims. In a footnote, the court acknowledged the argument that adjudicating the private defendants' liability through those procedures would violate their due process and Seventh Amendment rights. *Id.* at 1238 n.31. But the court dismissed those arguments as "unpersuasive" on the grounds that the constitutionality of FISA's procedures has been upheld "with regard to criminal defendants" and

"[i]ndividual defendants in a civil suit are not entitled to more stringent protections than criminal defendants." *Id.* The court accordingly reinstated the Religion Claims against Tidwell and Walls to the extent they allege conduct "motivated by intentional discrimination against Plaintiffs because of their Muslim faith." *Id.* at 1244.[2]

Tidwell and Walls sought rehearing en banc, as did the other defendants. Tidwell and Walls noted that the panel opinion appeared to contemplate that the district court should apply § 1806(f)'s in camera, ex parte procedures not simply to determine the admissibility of evidence, but to resolve the defendants' ultimate liability for alleged religious discrimination. C.A. Reh'g Pet. 2-3, 11. And they underscored that the panel had left it unclear whether the individual-capacity defendants would be permitted to participate in these secret proceedings, or if so, whether they would be permitted to have the assistance of counsel. *Id.* Tidwell and Walls

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[2] Despite its state-secrets holding, the court of appeals sustained the district court's dismissal of the other claims against Tidwell and Walls on qualified-immunity grounds and further held that qualified immunity bars the FISA claim against them, emphasizing the complaint's failure to "plausibly allege [Tidwell and Walls's] personal involvement" in the challenged surveillance conduct. 916 F.3d at 1224; *see also id.* at 1219, 1245-1246, 1248. The court further held that the Religion Claims were displaced by the Privacy Act and the Religious Freedom Restoration Act to the extent that those claims rest on allegations of neutral and generally applicable government action. *Id.* at 1243-1244. But the court declined to resolve whether *Bivens* supported a cause of action for intentional religious discrimination. The court acknowledged that "there are likely to be few, if any, remaining *Bivens* claims" given the "narrow availability of *Bivens* remedies under current law," but reinstated and remanded the Religion Claims anyway subject to that defense. Pet. App. 65a n.31.

contended that adjudicating the claims against them through such in camera, ex parte proceedings would violate their constitutional rights under the Due Process Clause and Seventh Amendment or would at least raise serious constitutional questions. *Id.* at 2-3, 8, 12-14. As a result, they argued, the canon of constitutional avoidance lent further support to petitioners' argument that the panel had erred by interpreting FISA to displace the state-secrets privilege. *Id.*

The court of appeals issued an amended opinion denying rehearing, adhering to the conclusion that FISA displaces the state-secrets privilege. Pet. App. 37a-67a. The court did not deny that its holding indeed called for the district court to adjudicate the defendants' ultimate liability in secret proceedings, instead reiterating as the panel had previously held that "the district court should, using § 1806(f)'s *ex parte* and *in camera* procedures, review any materials relating to the surveillance as may be necessary, including the evidence over which the Attorney General asserted the state secrets privilege, to determine whether the electronic surveillance was lawfully authorized and conducted"—including whether the surveillance "violated any of the constitutional and statutory provisions asserted by Plaintiffs in their complaint." Pet. App. 92a-93a (quotation marks and citation omitted). The court of appeals suggested that the district court could potentially disclose relevant privileged materials to *Plaintiffs* where "'necessary to make an accurate determination of the legality of the surveillance.'" Pet. App. 93a (quoting 50 U.S.C. § 1806(f)). But the court gave no indication that the individual-capacity *defendants* would be afforded the same benefit, and it nowhere disclaimed that Tidwell and Walls and the other individual-capacity defendants and their counsel would

be excluded from the secret proceedings. *Id.*; *cf.* 50 U.S.C. § 1806(f) (permitting disclosure of surveillance materials only to "aggrieved person[s]").

Moreover, in analyzing the statutory question, the court continued to give no weight to the due process and Seventh Amendment questions raised by its interpretation of FISA. Pet. App. 37a-67a. Although the amended opinion reiterated the panel's prior acknowledgment that the proceedings it contemplated would "severe[ly] curtail[] … the usual protections afforded by the adversarial process and due process," Pet. App. 39a, it repeated in a footnote the panel's cursory dismissal of Tidwell and Walls's due process argument. Pet. App. 65a-66a n.31. The court revised its treatment of the Seventh Amendment argument, deeming it "premature"—and discarding it as irrelevant to the statutory-interpretation question—because "any hypothetical interference with a jury trial would arise" only if, among other things, the district court determined that Plaintiffs could state a cause of action under *Bivens*; found after review of the privileged evidence that unlawful surveillance had occurred; and concluded that the claims could not be resolved on summary judgment. Pet. App. 65a n.31. The court stated that the Seventh Amendment arguments could be raised on remand if those contingencies occurred. *Id.*

This Court granted the government's petition for certiorari to consider whether FISA displaces the state-secrets privilege.

SUMMARY OF ARGUMENT

The court of appeals erred in concluding that FISA displaces the state-secrets privilege or authorizes

adjudication of a defendant's liability on the merits through in camera, ex parte procedures.

Courts have long held that when the state-secrets privilege is properly invoked, the privileged information must be excluded from the case; and if litigating the case without the privileged information would still risk harm to national security—and preclude the defendants from fully and fairly defending themselves—the case should be dismissed. Allowing litigation to proceed in such circumstances would be the "height of injustice" for a defendant whose hands are thus tied and would pose an unacceptable risk of disclosure of state secrets. *General Dynamics Corp.* v. *United States*, 563 U.S. 478, 487 (2011); *see id.* at 484-486; *United States* v. *Reynolds*, 345 U.S. 1, 11 & n.26 (1953).

FISA does not displace these principles and does not authorize district courts to adjudicate the merits of a lawsuit through in camera, ex parte proceedings. As petitioners thoroughly explain, the plain language of § 1806(f) and its adjacent subsections confirms that Congress intended FISA's procedures to apply only for the limited purpose of resolving certain questions of admissibility and discoverability of evidence derived from electronic surveillance. The statutory text nowhere suggests that those procedures should be used to adjudicate a defendant's liability on the merits in secret, as the court of appeals held.

Even if the court of appeals' interpretation of FISA were plausible, the canon of constitutional avoidance should have foreclosed it. Where a court must choose between competing plausible interpretations of a statute, the court should not assume that Congress intended an interpretation that raises serious constitutional questions. *Clark* v. *Martinez*, 543 U.S. 371, 381 (2005).

Here, the court of appeals' determination that FISA requires the district court to determine Tidwell and Walls's liability on the Religion Claims through in camera, ex parte procedures—potentially without even allowing Tidwell and Walls or their counsel to participate—intrudes on Tidwell and Walls's rights under the Due Process Clause and the Seventh Amendment by depriving them of a meaningful opportunity to be heard (and to have their counsel heard) on the claims against them and depriving them of a jury determination of material factual disputes. *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976); *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 40-41 (1989). At the very least, the court of appeals' anomalous determination raises grave constitutional concerns. Indeed, neither courts nor Congress have sanctioned the use of in camera, ex parte procedures to resolve the merits of a dispute in any comparable context.

The cases on which the court of appeals relied in dismissing Tidwell and Walls's due process concerns do not support the court's decision. Those cases considered the use of ex parte procedures only for purposes of deciding questions of admissibility or discoverability of evidence. They did not contemplate the use of such procedures to resolve a defendant's ultimate liability. The court of appeals similarly erred in casting aside the Seventh Amendment concern as "premature." Pet. App. 65a n.31. Regardless of whether a jury-trial violation actually materializes in this case, the canon of constitutional avoidance required the court of appeals to take account of the possibility that its interpretation of the statute would cause such a violation to occur. *Clark*, 543 U.S. at 380-381.

To avoid these constitutional questions, this Court should reject the court of appeals' approach and hold that FISA does not displace the state-secrets privilege.

ARGUMENT

I. FISA Does Not Purport To Displace The State-Secrets Privilege Or Authorize Secret Adjudication Of The Merits Of A Lawsuit

A. The State-Secrets Privilege And Its Dismissal Remedy Serve Vital Interests For Private Defendants That Congress Would Not Lightly Have Disturbed

With roots in both the constitutional separation of powers and the common law of evidence, the state-secrets privilege has long served to protect sensitive national-security information against disclosure in litigation. *United States* v. *Reynolds*, 345 U.S. 1, 6-7 (1953). Where the privilege has been asserted and the court independently concludes that the government has satisfied the rigorous requirements for invoking it, *id.* at 7-10, the privileged information is excluded from the trial, and the government cannot be compelled to produce it. *Id.* at 11; *see also General Dynamics Corp.* v. *United States*, 563 U.S. 478, 484-485 (2011). Moreover, in some contexts, where the "very subject matter of the action … [i]s a matter of state secret," the government's assertion of the privilege may require dismissal of the suit entirely. *Reynolds*, 345 U.S. at 11 n.26 (citing *Totten* v. *United States*, 92 U.S. 105 (1876)). In such situations, "when full litigation … 'would inevitably lead to the disclosure of' state secrets," the assertion of the privilege means that "neither party can obtain judicial relief." *General Dynamics*, 563 U.S. at 486

(quoting *Totten*, 92 U.S. at 107); *see also Tenet* v. *Doe*, 544 U.S. 1, 8 (2005) ("Public policy forbids the maintenance of *any suit* in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential." (quotation marks and brackets omitted; emphasis in original)).

Consistent with these principles, the courts of appeals have uniformly recognized that if the removal of privileged information from a case precludes a defendant from defending himself or herself, the action must likewise be dismissed. *See Mohamed* v. *Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1079 (9th Cir. 2010) (en banc); *In re Sealed Case*, 494 F.3d 139, 148-151 (D.C. Cir. 2007); *El-Masri* v. *United States*, 479 F.3d 296, 309-311 (4th Cir. 2007); *Tenenbaum* v. *Simonini*, 372 F.3d 776, 777-778 (6th Cir. 2004); *Kasza* v. *Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998).

That rule, which has never been questioned by this Court, plays a particularly important role in cases, like this one, where private defendants are sued alongside the government. In such cases, dismissal appropriately avoids not only the risk that litigation of the case would lead to disclosure of state secrets, but also the manifest unfairness that would result if the government's assertion of the privilege precluded the private defendants from fully and fairly defending themselves. As this Court has recognized, it would be the "height of injustice" to allow the government's invocation of the state-secrets privilege to deprive a defendant of an available defense. *General Dynamics*, 563 U.S. at 487; *cf. Philip Morris USA* v. *Williams*, 549 U.S. 346, 353 (2007) (Due Process Clause prohibits "punishing an individual without first providing that individual with an opportunity to present every available defense" (quotation marks omitted)). Rather, when "full litigation of [a] defense"

is foreclosed by the risk of disclosure of state secrets, the "traditional course is to leave the parties where they stood when they knocked on the courthouse door." *General Dynamics*, 563 U.S. at 486-487.

The district court correctly applied these principles in dismissing the Religion Claims against Tidwell and Walls. Pet. App. 172a-175a. The crux of those claims is that Tidwell and Walls engaged in unconstitutional intentional religious discrimination by targeting Plaintiffs for surveillance because of their religion. Pet. App. 74a-79a. But Tidwell and Walls are entitled to test and disprove that contention by showing, for example, that they did not undertake or approve any investigative actions based on religion; that they had non-discriminatory reasons for investigating specific individuals; and that any methods they used or authorized were narrowly tailored to advance the government's legitimate counterterrorism interests. *See, e.g.*, *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 531-532 (1993). The state-secrets privilege prevents them from fully and effectively presenting that defense.

Plaintiffs contended below that dismissal was unwarranted unless the privileged evidence would show not only the reasons for conducting a counterterrorism investigation, but also "why [Tidwell and Walls] had to focus their investigation on a religion, treating the mere fact that someone practices Islam as suspicious in and of itself." Pls.' C.A. Br. 36-37. But that argument proves the point by assuming the truth of Plaintiffs' allegation that Tidwell and Walls in fact acted in that manner. Tidwell and Walls are entitled to contest that assertion, but cannot fully and fairly do so because they can neither access nor introduce relevant information

covered by the state-secrets privilege. *See* Pet. App. 173a-174a.

The body of law the district court applied in dismissing the Religion Claims against Tidwell and Walls thus strives as much as possible to balance the interests of all parties by requiring courts to carefully scrutinize the government's assertion of the privilege; allowing a plaintiff's claim to go forward when it can be fully and fairly litigated without undue threat of harm to national security; precluding litigation where it would pose an unacceptable risk of disclosure of state secrets; and safeguarding private defendants when the government's assertion of the privilege deprives them of the ability to defend themselves. Pet. App. 137a-138a, 149a-155a. In considering whether FISA displaces that body of law, this Court should not presume that Congress would have lightly interfered with that balance or replaced it with a scheme that fails to accommodate all of the relevant interests.

B. Section 1806(f) Applies Only To Decide Admissibility Issues In Certain Circumstances

The court of appeals' sole basis for reversing the dismissal of the Religion Claims against Tidwell and Walls was its holding that FISA "displaces the dismissal remedy of the common law state secrets privilege as applied to electronic surveillance generally." Pet. App. 38a. Without denying that dismissal otherwise would have been warranted, the court instructed the district court to "us[e] § 1806(f)'s *ex parte* and *in camera* procedures" to review the surveillance materials—"*including* the evidence over which the Attorney General asserted the state secrets privilege"—to determine whether the surveillance violated Plaintiffs'

constitutional rights as alleged in the Religion Claims. Pet. App. 92a-93a (emphasis added).

As petitioners have thoroughly demonstrated, that holding misinterprets FISA, conflicts with this Court's precedent, and intrudes on the separation of powers and the Executive's ability to protect the national security. Pet. 14-32. "When interpreting a statute, we look first and foremost to its text." *United States* v. *Alvarez-Sanchez*, 511 U.S. 350, 356 (1994). Here, FISA's plain text does not support the court of appeals' interpretation, and this Court should reject that reading in favor of a common-sense interpretation of the statute as written.

FISA establishes a framework for authorizing and conducting electronic surveillance and collection of foreign intelligence information under conditions of secrecy necessary to protect national security. *See* 50 U.S.C. § 1801 *et seq.* The subsections of § 1806 make clear that FISA's in camera, ex parte procedures are meant to apply to determine the admissibility of evidence that the government derived from electronic surveillance and related discoverability issues when the government intends to use that evidence against an aggrieved person who was subject to FISA-authorized surveillance. Section 1806(f) establishes three circumstances in which the district court shall "review in camera and ex parte the application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted." None applies here, and none indicates any congressional intent to displace the state-secrets privilege in a case like this one.

Under subsections (c) and (d), FISA's in camera, ex parte procedures apply, first, when either the United States or a State or political subdivision provides notice to the court and the aggrieved person that it "intends to enter into evidence or otherwise use or disclose" information derived from electronic surveillance "against an aggrieved person." 50 U.S.C. § 1806(c), (d). Second, under subsection (e), the FISA procedures apply when the aggrieved person "against whom" evidence derived from electronic surveillance "is to be … introduced or otherwise used or disclosed" moves to suppress the evidence on the grounds that the surveillance was unlawful. *Id.* § 1806(e). And third, the FISA procedures apply when the aggrieved person moves in certain circumstances to "discover, obtain, or suppress" evidence derived from electronic surveillance or related applications or orders. *Id.* § 1806(f). In any of those circumstances, subsection (f) requires the district court to "review in camera and ex parte" the materials related to the surveillance to determine its lawfulness. *Id.* If the court concludes that the surveillance was unlawful, subsection (g) provides for suppression of evidence derived from the surveillance. *Id.* § 1806(g).

Together, these provisions show that the purpose of the in camera, ex parte procedure is to determine issues relating to the admissibility of evidence the government intends to use against an aggrieved person. That is why the statute requires notice to the aggrieved person, allows him to move to suppress the evidence, and provides for suppression as a remedy if the evidence is found to have been improperly obtained. As petitioners have correctly explained, these procedures do not apply where, as here, the government does not intend to "disclose" or "use" the privileged information against the aggrieved person or "enter [it]

into evidence," but instead seeks to exclude the information from the case entirely. Pet. 18-19, 23-27.[3]

Moreover, even where these provisions apply, nothing in FISA's text indicates any congressional intent to override the state-secrets privilege. The court of appeals thought that § 1806(f) "speak[s] … directly" to the circumstances covered by the privilege because it gives courts authority they would otherwise lack to use in camera, ex parte procedures to evaluate surveillance-related evidence that threatens national security. Pet. App. 49a. Ordinarily, the court reasoned, the lack of any "legally sanctioned mechanism" for reviewing such evidence leaves a court no option but to dismiss an action that turns on privileged information, because the court cannot review the evidence without risk of disclosure and attendant jeopardy to national security. Pet. App. 51a; *see also* Pet. App. 49a-50a. But by authorizing courts to "compromise[] … the adversary process" by holding secret proceedings, the court concluded, FISA renders it unnecessary to dismiss the action or to exclude the privileged evidence from the case. Pet. App. 50a-51a.

There is no indication in the statute, however, that Congress intended in FISA to "compromise [] … the adversary process" to the point of allowing a court to adjudicate a defendant's liability through secret proceedings in circumstances when the state-secrets privilege would otherwise exclude evidence from the case and potentially require dismissal. Indeed, this Court in

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[3] Likewise, Plaintiffs have not moved to suppress or moved for discovery of any of the secret evidence under subsections (e) or (f). *Cf.* Pet. App. 131a (Bumatay, J., dissenting from denial of rehearing) (explaining that § 1806(f) is "limited to procedural motions pertaining to the admissibility of evidence").

Reynolds had already rejected the idea, decades before FISA's enactment, that secret proceedings—"even by the judge alone, in chambers"—could suffice to safeguard "the security which the privilege is meant to protect." 345 U.S. at 10; *see also Tenet*, 544 U.S. at 11 ("*in camera* judicial proceedings simply cannot provide the absolute protection we found necessary [in *Totten*]" where full litigation would pose an "unacceptable" risk of disclosure of state secrets). As petitioners have further demonstrated, by providing a framework to govern foreign intelligence surveillance activities and a mechanism to securely evaluate the admissibility of resulting evidence, Congress nowhere indicated any intention to disturb the state-secrets privilege as courts have long applied it. The text of § 1806(f) does not support such an interpretation.

II. THE COURT OF APPEALS' INTERPRETATION RAISES GRAVE CONSTITUTIONAL QUESTIONS

Even if FISA's text could be read to support the court of appeals' interpretation, this Court should "shun an interpretation that raises serious constitutional doubts" and adopt instead the "alternative that avoids those problems." *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 836 (2018). When statutory text is subject to "competing plausible interpretations," the "reasonable presumption" is that "Congress did not intend the alternative which raises serious constitutional doubts." *Clark* v. *Martinez*, 543 U.S. 371, 381 (2005). Here, by construing FISA to require the district court to decide the merits of the case under in camera, ex parte procedures, the court of appeals adopted an interpretation that would violate Tidwell and Walls's rights under the Due Process Clause and the Seventh Amendment—or, at the very least, would raise serious constitutional

concerns. To avoid these questions, this Court should reject the court of appeals' approach.

A. Adjudicating The Religion Claims Through In Camera, Ex Parte Procedures Would Violate The Due Process Clause

"The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976) (quotation marks omitted); *see also, e.g.*, *Philip Morris USA*, 549 U.S. at 353. In this case, Plaintiffs seek to hold Tidwell and Walls liable for intentional religious discrimination and seek compensatory and punitive damages. Fundamental fairness demands that Tidwell and Walls be permitted a full and fair opportunity to defend themselves against such a judgment and the opprobrium it would carry.

The court of appeals' decision forecloses this opportunity. Under the court's interpretation, FISA requires the district court to "consider[] … all parties' factual submissions and legal contentions regarding the background of the surveillance" and to "determine the lawfulness of [that] surveillance" through in camera, ex parte procedures. Pet. App. 94a-95a. The court's decision appears to preclude Tidwell and Walls from participating in the adjudication of their own liability, or at least preclude their counsel from participating. The court made no suggestion that Tidwell and Walls would be permitted to access or introduce relevant privileged evidence or have any opportunity to explain—or have the benefits of counsel in explaining—why privileged evidence before the court exculpates them. FISA's text likewise does not contemplate the participation of any private litigant other than the aggrieved person who was the subject of the surveillance. 50 U.S.C.

§ 1806(f). When Tidwell and Walls raised these concerns on rehearing, the court of appeals did not deny that this would be the consequence of its holding. To the contrary, it acknowledged that adjudicating the merits of Plaintiffs' claims in this manner will "severe[ly] curtail[] … the usual protections" of "due process" to which Tidwell and Walls would otherwise be entitled. Pet. App. 39a.

"[F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights." *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring). This Court has therefore repeatedly concluded that using ex parte procedures to effectuate a deprivation of property rights can violate due process. *See United States* v. *James Daniel Good Real Property*, 510 U.S. 43, 52-62 (1993) (ex parte seizure of real property violates due process); *Connecticut* v. *Doehr*, 501 U.S. 1, 11-18 (1991) (ex parte pre-judgment attachment violates due process); *Fuentes* v. *Shevin*, 407 U.S. 67, 80-84 (1972) (ex parte procedure for issuing writ of replevin violates due process). The courts of appeals have likewise adhered to "the firmly held main rule that a court may not dispose of the merits of a case on the basis of *ex parte*, *in camera* submissions." *Abourezk* v. *Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986) (Ginsburg, J.), *aff'd*, 484 U.S. 1 (1987); *see also Ludwig* v. *Astrue*, 681 F.3d 1047, 1052 (9th Cir. 2012) (adjudicating liability through in camera, ex parte procedures is "anathema in our system of justice" and "not [to] be tolerated" "absent some compelling justification" (quotation marks omitted)).[4]

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[4] *See also, e.g.*, *Ward* v. *U.S. Postal Serv.*, 634 F.3d 1274, 1279-1280 (Fed. Cir. 2011) (consideration of ex parte communications material to either the merits of underlying charge or the penalty to

Although the court of appeals below has acknowledged these due process concerns in other contexts, *see Ludwig*, 681 F.3d at 1052, it dismissed Tidwell and Walls's due process argument—declining even to find a serious constitutional *question* warranting application of the avoidance canon—on the ground that "courts have upheld the constitutionality of FISA's *in camera* and *ex parte* procedures with regard to criminal defendants." Pet. App. 65a n.31; *see also* Pet. App. 66a n.31 ("Individual defendants in a civil suit are not entitled to more stringent protection than criminal defendants."). The decisions on which the court relied, however, held only that FISA's in camera, ex parte procedures may be used to determine admissibility of evidence without violating due process. *See United States* v. *Abu-Jihaad*, 630 F.3d 102, 129 (2d Cir. 2010) (in camera, ex parte procedures used to adjudicate motion to suppress); *United States* v. *Damrah*, 412 F.3d 618, 624 (6th Cir. 2005) (same); *United States* v. *Ott*, 827 F.2d 473, 475 (9th Cir. 1987) (same); *United States* v. *Nicholson*, 955 F. Supp. 588, 592 (E.D. Va. 1997) (same); *see also United States* v. *Belfield*, 692 F.2d 141, 143 (D.C. Cir. 1982) (rejecting challenge to use of in camera, ex

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be imposed violates due process); *Vining* v. *Runyon*, 99 F.3d 1056, 1057-1058 (11th Cir. 1996) (per curiam) (holding that "the district court erred in using information obtained in its *ex parte*, *in camera* examination of [evidence] to judge the merits of [a] Title VII claim"); *American-Arab Anti-Discrimination Comm.* v. *Reno*, 70 F.3d 1045, 1070 (9th Cir. 1995) (given "the danger of injustice when decisions lack the procedural safeguards that form the core of constitutional due process, the *Mathews* balancing suggests that use of undisclosed information in adjudications should be presumptively unconstitutional"); *In re Application of Eisenberg*, 654 F.2d 1107, 1112 (5th Cir. 1981) ("Our adversarial legal system generally does not tolerate ex parte determinations on the merits of a civil case.").

parte procedures to determine whether evidence derived from electronic surveillance was discoverable by defendant). They did not hold—and had no occasion to hold—that in camera, ex parte procedures may be used to determine ultimate issues of liability. In each case, the criminal defendant had the opportunity to review evidence relevant to the determination of guilt and to participate fully in the defense on the merits. These cases do not support the procedure outlined by the court of appeals here, and they do not obviate the serious due process question implicated by the court' holding.

One court has suggested there may be "extraordinary circumstances" in which in camera, ex parte procedures may be used to "decide the merits of a dispute." *Abourezk*, 785 F.2d at 1061 (citing *Molerio* v. *FBI*, 749 F.2d 815 (D.C. Cir. 1984)). At issue there, however, was simply the court's use of in camera, ex parte procedures to evaluate whether the state-secrets privilege had been properly invoked—which in turn confirmed that the assertion of the privilege required dismissal because the privileged material would have established a valid defense. The distinction between that case and this one underscores the fundamental unfairness of the court of appeals' approach here.

In *Molerio*, the plaintiff alleged that the FBI had refused to hire him based on his father's political activities, in violation of the First Amendment, and introduced sufficient evidence to create a genuine factual dispute on the point. 749 F.2d at 824-825 (Scalia, J.). The government asserted that the reason the plaintiff was not hired was a state secret that could not be disclosed, and in support of that assertion, it submitted an in camera affidavit stating the reason for the hiring decision. *Id.* at 819. The court examined the affidavit to

satisfy itself that the privilege had been properly invoked and that disclosure of the reason would in fact risk impairing national security. *Id.* at 825. In doing so, the court learned that the reason the plaintiff had not been hired "had nothing to do" with the plaintiff's father's political activities. *Id.* The court concluded that the case had to be dismissed because the reason the plaintiff was not hired "d[id] not implicate any First Amendment concerns," and allowing the case to go forward without the privileged information "would involve an attempt, however well intentioned, to convince the jury of a falsehood." *Id.*

Molerio thus did no more than apply the generally accepted principle that when information excluded from the case due to the government's invocation of the privilege would have established a valid defense, it would be inequitable to allow the claim to proceed. 749 F.2d at 825; *see In re Sealed Case*, 494 F.3d at 148-149 (discussing *Molerio*); *supra* pp. 14-16. While it was the court's in camera, ex parte examination of state-secrets evidence the government willingly submitted that led the court to that conclusion, that adjudication in no way amounted to the secret, ex parte determination of liability—premised on compelled disclosure of evidence the government seeks to exclude, and to which Tidwell and Walls will apparently have no access—that the court of appeals directed the district court to undertake in this case.

To the contrary, by dismissing the Religion Claims against Tidwell and Walls, the district court here took the course suggested by *Molerio*, dismissing the case to avoid not only the risk of disclosure of state secrets, but also the fundamental unfairness that would result from forcing Tidwell and Walls to defend themselves without the information protected by the privilege. *Supra* Part

I.A. By reinstating the claims and requiring them to be adjudicated to judgment in secret proceedings in which Tidwell and Walls (and their counsel) have no apparent right to participate, the court of appeals endorsed a procedure that cannot be reconciled with the Due Process Clause. At a minimum, its approach raises significant due process concerns that counsel against its interpretation of FISA.

B. Adjudicating The Religion Claims Through In Camera, Ex Parte Procedures Would Violate The Seventh Amendment

The Seventh Amendment guarantees "'the right of trial by jury'" in "suits in which *legal* rights [a]re to be ascertained and determined." *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 40-41 (1989) (emphasis in original). Where it applies, the Seventh Amendment requires that the jury must retain the power to render "the ultimate determination of the issues of fact" regarding a party's liability. *Slocum* v. *New York Life Ins. Co.*, 228 U.S. 364, 382 (1913).

Tidwell and Walls's Seventh Amendment rights apply to the Religion Claims. As a general rule, in "suits sounding in tort for money damages, questions of liability [a]re decided by the jury, rather than the judge." *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 718 (1999). Constitutional claims alleging "discrimination … on the basis of … the exercise of First Amendment rights" are analogous to common-law "tort action[s] for the recovery of damages for personal injuries." *Wilson* v. *Garcia*, 471 U.S. 261, 273-276 (1985). This Court has accordingly recognized that the jury-trial right attaches in *Bivens* actions. *Carlson* v. *Green*, 446 U.S. 14, 22 (1980); *see also Nurse* v. *United States*, 226 F.3d 996, 1005 (9th Cir. 2000).

Because the Seventh Amendment applies, only a jury may decide disputed questions of fact regarding Tidwell and Walls's liability. The Seventh Amendment preserves for the jury that which is necessary "to assure a fair and equitable resolution of factual issues." *Colgrove* v. *Battin*, 413 U.S. 149, 157 (1973); *accord Markman* v. *Westview Instruments, Inc.*, 517 U.S. 370, 377 (1996). Accordingly, "'when a right is in controversy'" and the relevant facts are in dispute, they must be resolved by a jury. *City of Monterey*, 526 U.S. at 712-713 (plurality op.) (distinguishing cases finding no jury right where "liability was undisputed") (quoting *Bonaparte* v. *Camden & Amboy R.R. Co.*, 3 F. Cas. 821, 829 (C.C.D. N.J. 1830) (No. 1617)).

Judges may resolve ultimate questions of liability when there are no disputed facts and the relevant question is purely one of law. *See, e.g.*, *Galloway* v. *United States*, 319 U.S. 372, 389-390 (1943) (directed verdict); *Fidelity & Deposit Co. of Md.* v. *United States*, 187 U.S. 315, 319-320 (1902) (summary judgment). But judges may resolve factual disputes only when those disputes are not material to the merits of the claims. *See, e.g.*, *Lee* v. *Willey*, 789 F.3d 673, 678 (6th Cir. 2015) (judges may "decid[e] threshold issues of judicial administration"); *Small* v. *Camden Cnty.*, 728 F.3d 265, 269-270 (3d Cir. 2013) (similar). For example, judges may make "finding[s] upon … issue[s] of fact" to assure themselves of subject-matter jurisdiction without offending the Seventh Amendment. *McNutt* v. *General Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 190 (1936). But the "ultimate determination of issues of fact" relevant to liability must be decided by a jury. *Ex parte Peterson*, 253 U.S. 300, 310 (1920).

The court of appeals' interpretation of FISA threatens to violate the jury-trial right. The court of

appeals instructed the district court to apply FISA's in camera, ex parte procedures to resolve the lawfulness of the surveillance—including whether it violated Plaintiffs' constitutional rights. Pet. App. 92a-93a. But that is the ultimate issue in dispute. And the lawfulness of the surveillance will turn in part on factual questions, including whether plaintiffs were subject to investigation at all; whether any investigation was conducted in the manner alleged; and the reasons why specific individuals were targeted for surveillance. Consistent with the Seventh Amendment, any genuine dispute regarding those factual issues must be resolved by a jury. But in camera, ex parte procedures cannot accommodate a jury.

The court of appeals was wrong to dismiss the Seventh Amendment concern as "premature." Pet. App. 65a n.31. The court posited that a jury-trial violation would not actually materialize unless several contingencies occurred and that any Seventh Amendment issue would be better raised in the future should a violation arise. *Id.* That analysis "misconceives—and fundamentally so—the role played by the canon of constitutional avoidance." *Clark*, 543 U.S. at 381. It "is not a method of adjudicating constitutional questions by other means," but a way of "*avoid*[*ing*] the decision of constitutional questions." *Id.* And to do so, a court "deciding which of two plausible statutory constructions to adopt … must consider the necessary consequences of its choice," including consequences that might "not … pertain to the particular litigant before the Court." *Id.* at 380-381.

Here, even if the contingencies the court of appeals cited do not come about in this case, a jury-trial violation—or at the very least a significant Seventh Amendment question—would result as the direct

consequence of the court's interpretation of FISA in a case where those contingencies did occur. The court therefore should have taken that consequence into account in construing the statute. Because it is "reasonable [to] presum[e]" that Congress did not intend § 1806(f) to apply in a way that would "raise[] serious constitutional doubts" under the Seventh Amendment, *Clark*, 543 U.S. at 381-382—and because a plausible alternative interpretation is available, *supra* Part II—the court of appeals' conclusion that FISA displaces the state-secrets privilege should be rejected.

C. That Courts Do Not Use In Camera, Ex Parte Procedures To Resolve Disputes On The Merits In Comparable Contexts Underscores The Constitutional Concerns

Questions of how to handle confidential information in litigation recur in many contexts. Yet in no comparable circumstances have courts or Congress directed that ultimate questions of liability should be adjudicated through in camera, ex parte procedures at the expense of the constitutional rights of individual litigants. That the court of appeals' interpretation of § 1806(f) departs so dramatically from other contexts aggravates the serious constitutional questions.

In the criminal context, the Classified Information Procedures Act, 18 U.S.C. app. 3 § 1 *et seq.* ("CIPA"), "'establishes procedures for handling classified information" that "harmonize a defendant's right to a fair trial with the government's right to protect classified information." *United States* v. *Sedaghaty*, 728 F.3d 885, 903 (9th Cir. 2013) (quoting *United States* v. *Aref*, 533 F.3d 72, 78 (2d Cir. 2008)). Where the government moves to limit disclosure of classified information to the defendant on the ground that disclosure would harm

national security, the court upon request by the government "shall examine" the information "in camera and ex parte" to resolve the government's motion. 18 U.S.C. app. 3 § 6(c)(2); *see id.* § 4. And CIPA imposes other requirements to ensure that classified information that is "helpful or material to the defense" may be available to the defendant within limits that protect the government's interests. *See, e.g.*, *United States* v. *Stewart*, 590 F.3d 93, 131 (2d Cir. 2009) (citing *Roviaro* v. *United States*, 353 U.S. 53 (1957)). What CIPA does not contemplate, and courts have not authorized in any comparable situation, is any in camera, ex parte adjudication of guilt based on the classified information. *See, e.g.*, *United States* v. *Mejia*, 448 F.3d 436, 459 (D.C. Cir. 2006) (CIPA procedures pose "no question … of convictions based upon secret evidence furnished to the fact-finder but withheld from the defendants").

In the civil context, courts similarly hold that if privileged information is not discoverable, it must be withheld, even if relevant, and should form no part of the litigation. *See EEOC* v. *BDO USA, LLP*, 876 F.3d 690, 695 (5th Cir. 2017) (privilege "has the effect of withholding relevant information from the fact-finder" (quotation marks omitted)); *Clarke* v. *American Commerce Nat'l Bank*, 974 F.2d 127, 129 (9th Cir. 1992) (same); *Haines* v. *Liggett Grp., Inc.*, 975 F.2d 81, 84 (3d Cir. 1992) (same). Because "[o]ur system of justice does not encompass *ex parte* determinations on the merits of cases in civil litigation," a court commits reversible error when it "relie[s] on documents which it had previously determined to be privileged and as to which it had denied [the other party's] discovery motion." *Association for Reduction of Violence* v. *Hall*, 734 F.2d 63, 67 (1st Cir. 1984); *accord In re Kellogg Brown & Root, Inc.*, 796 F.3d 137, 148 (D.C. Cir. 2015) ("[T]he

District Court may not, in resolving the motion for summary judgment, make any inference in [a party's] favor based on the contents of the privileged documents."). Courts may assess questions of admissibility in camera and ex parte, *see*, *e.g.*, *In re City of New York*, 607 F.3d 923, 948 (2d Cir. 2010), but not the merits.

There is no reason to think that Congress in FISA intended to establish such an aberrant scheme as the court of appeals envisioned, particularly in a statutory section dealing only with the "[u]se of information," not with liability, 50 U.S.C. § 1806. And the court of appeals should not have assumed that the constitutional issues Tidwell and Walls raised could be so easily dismissed when the scheme it adopted contrasts so conspicuously with other uses of ex parte procedures that courts have found permissible. This Court should therefore adopt petitioners' sound interpretation of § 1806(f), which is consistent with established practices and avoids serious due-process and Seventh Amendment concerns.

CONCLUSION

The court of appeals' decision should be reversed.

Respectfully submitted.

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