

No. 20-828

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IN THE  
**Supreme Court of the United States**

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FEDERAL BUREAU OF INVESTIGATION, *ET AL.*,  
*Petitioners,*

v.

YASSIR FAZAGA, *ET AL.*, *Respondents.*

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On Writ of Certiorari to the U.S. Court of Appeals  
for the Ninth Circuit

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**Brief *Amicus Curiae* of  
Free Speech Defense & Education Fund,  
Free Speech Coalition, Conservative Legal  
Defense and Education Fund, Downsize DC  
Foundation, and Downsize DC.org  
in Support of Respondents**

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## INTEREST OF THE *AMICI CURIAE*<sup>1</sup>

Free Speech Defense and Education Fund, Conservative Legal Defense and Education Fund, and Downsize DC Foundation are nonprofit educational and legal organizations, exempt from federal income tax under Internal Revenue Code (“IRC”) section 501(c)(3). Free Speech Coalition and DownsizeDC.org are nonprofit social welfare organizations, exempt from federal income tax under IRC section 501(c)(4).

These *amici* were established, *inter alia*, for the purpose of participating in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law. Some of these *amici* have filed *amicus* briefs in several cases involving government surveillance of its citizens.

## SUMMARY OF ARGUMENT

The legal issue in this case raises the question posed by the Roman poet Juvenal: “*Quis custodiet ipsos custodes*” — or “Who will guard the guards themselves?” Ruling on the Government’s proposition that a federal court should accept without question a representation by the head of any federal agency that disclosure of his agency’s actions would injure national

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<sup>1</sup> It is hereby certified that counsel for all parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

security, runs the significant risk of deference to lies,<sup>2</sup> even if “noble lies.” Courts cannot dismiss the possibility of false claims designed to achieve a purported greater good, as we know this happened. Not long ago, lawyers for the FBI asserted they “had to mislead the Court regarding the Government’s response ... to avoid compromising national security.” District Judge Cormac J. Carney found it necessary to instruct lawyers for the FBI: “The government cannot, under any circumstance, affirmatively mislead the Court.” *Islamic Shura Council of S. California v. FBI*, 779 F. Supp. 2d 1114, 1117 (C.D. Ca. 2011).

The Government contends that well-established precedent requires the Court to defer to the assertion of the state secrets principle, here requiring dismissal of most of the complaint. That conclusion is based on a misreading of this Court’s decisions. *See* Section I, *infra*. The Government’s position contains no self-limiting principle, allowing the Executive Branch to take control of a process which is the province of the Judicial Branch. *See* Section II, *infra*. This case should be considered in the context of many prior judicial decisions that have made it virtually impossible to obtain judicial relief from “Deep State” surveillance abuses. *See* Section III, *infra*. The track record of the FBI and the Department of Justice in recent years makes it impossible for the Court to

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<sup>2</sup> *See generally* T. Lifson, “Obama goes Nixon, claims executive privilege on F&F,” *American Thinker* (June 20, 2012) (“Holder has lied to the Issa committee twice [about the Fast & Furious gun walking scandal, in December 2011 and June 2012] and retracted his statements after a time lag.”).

accept government representations at face value, and still carry out its role applying the Fourth Amendment and other important constitutional protections to ubiquitous government surveillance. *See* Section IV, *infra*.

## ARGUMENT

### **I. THIS COURT’S DECISIONS NEITHER PREVENT *IN CAMERA EX PARTE* REVIEW BY A COURT NOR REQUIRE AUTOMATIC DISMISSAL OF A CLAIM.**

The statement that opens the Government’s brief contains at least as much argument as does the remainder of its brief. There, the Government struggles mightily to establish from this Court’s limited jurisprudence two principles on which it seeks to have this case decided and dismissed: (i) the mere assertion of the state secrets privilege disgorges the Judicial Branch not just of any duty, but also of any authority, to examine the basis for that assertion; and (ii) that the normal consequence of the assertion of the privilege is that claims against the government would be dismissed. Neither principle can be supported.

From *United States v. Reynolds*, 345 U.S. 1 (1953), the Government asserts as a general rule: “the court should not jeopardize the security which the privilege is meant to protect,’ by unnecessarily ‘insisting upon an examination of the evidence, even by the judge alone, in chambers. Brief for Petitioners (“Pet. Br.”) at 4. And the Government asserts what it wants to be the rule even more forcefully this way: “The privilege

generally forecloses even *in camera* consideration of the evidence.” *Id.* at 37.

In truth, *Reynolds* decision states “The court itself must determine whether the circumstances are appropriate for the claim of privilege and yet do so without forcing a disclosure of the very thing the privileges is designed to protect.” *Id.* at 8. Justice Vinson also explained with respect to the similar privilege against self-incrimination that “a complete abandonment of judicial control would lead to intolerable abuses.” *Id.* He stated that “the court must be satisfied from all the evidence and circumstances and ‘from the implications of the question in the setting in which is raised, that a responsive answer to the question’” would be impossible. If the court is so satisfied, the claim of privilege will be accepted without requiring further disclosure.” *Id.* at 9.

As to the portion of the decision focused on by the Government, Justice Vinson never explains the reason why *ex parte in camera* review presents a risk of disclosure. That statement follows a comment that “**judicial control** over the evidence in a case **cannot be adjudicated to the caprice of executive officers.**” *Id.* at 9-10 (emphasis added). The Court only stated that “we will not go so far as to say that the court may **automatically** require a complete disclosure to the judge before the claim of privilege will be accepted **in any case.** It **may** be possible to satisfy the court” without such a review.” *Id.* at 10 (emphasis added). Lastly, the Court stated that “the showing of necessity which is made will determine **how far the**

**court should probe in satisfying itself** the occasion for invoking the privilege is appropriate.” *Id.* at 11 (emphasis added). Thus, Justice Vinson’s dicta is well short of establishing a general rule prohibiting judicial review of the executive’s assertion assertions of state secrets.

From *General Dynamics Corp. v. United States*, 563 U.S. 478 (2011), the Government asserts that this Court: “had long ‘recognized the sometimes-compelling necessity of governmental secrecy by acknowledging a Government privilege against court-ordered disclosure of state and military secrets.” Pet. Br. at 3. The Government further derives from that case this general rule: “Where ‘the very subject matter of the action’ is a ‘matter of state secret,’ the action may be ‘dismissed on the pleadings without ever reaching the question of evidence.’” *Id.* at 5.

Actually, the *General Dynamics* case addressed the very different circumstance of a contract dispute between the government and a government contractor. What was at stake there was which side would leave the court with more money in its pocket — with no allegation of serious constitutional violations such as now before the Court. Dismissing the civil action in *General Dynamics* left each party where it stood. In contrast, dismissing the action here leaves a serious constitutional wrong unaddressed in a way that only encourages further abusive surveillance by the government.

Lastly, from *Totten v. United States*, 92 U.S. 105 (1876), the Government seeks to establish that: “as a

general principle,’ ‘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,’ including state and military secrets.” Pet Br. at 3; *see also id.* at 26. And the Government asserts as a general rule that: “Dismissal is required ... when the ‘maintenance of [the] suit’ would threaten to disclose the privileged information.” *Id.* at 5.

In truth, the four paragraph *Totten* decision was a claim by a contractor against the government, not dissimilar from *General Dynamics*. The result of barring litigation was considered fair because the “service contemplated by the contract was of secret service” and both parties “must have understood that the lips of the other were to be for ever sealed.” *Id.* at 106. There is no contract between the plaintiffs and the FBI to be enforced — only the constitutional rights of the aggrieved plaintiffs to be protected.

Thus, the principles which the Government seeks to extract from these cases are in no way binding here, as those cases arose in very different contexts with little application to this case.

## **II. THE GOVERNMENT URGES THIS COURT TO ADOPT A POSITION OF DEFERENCE TO THE EXECUTIVE BRANCH THAT HAS NO LIMITING PRINCIPLE.**

The issue of the relationship between the provision of the Foreign Intelligence Surveillance Act governing court review (50 U.S.C. § 1806(f)) and the common law

state secrets privilege must not be resolved by adoption of the principle the Government advances. The Government insists that many assertions of the state secrets privilege should be immune from scrutiny even by the judiciary. Pet. Br. at 3-4. Thus, the Government essentially contends that as a practical matter, that there is no limiting principle for the invocation of the privilege by the Executive. This invitation to extraordinary constitutional mischief — especially in today’s previously unimaginable world of high-tech surveillance — should be unequivocally rejected by this Court.

The Court has concluded that the role assigned to the President in Article II of the Constitution warrants not only the exclusion of evidence but also the dismissal of litigation if there is a “reasonable danger that compulsion of the evidence will expose military [or other] matters which, in the interest of national security, should not be divulged,” *United States v. Reynolds* at 10; see *Totten v. United States* at 107 (1876). The Government argues that it has the absolute right to require a court to dismiss a claim based on the Government’s mere assertion that the national security would be at risk if the litigation were to proceed. Pet. Br. at 28. Such a position, if adopted by the Court, would enable the Government to avoid accountability for even the most egregious violations of constitutional rights, and actions that are destructive of the broad public interest.

The flaw in the Government’s position is that, even though the privilege has a “constitutional foundation” (Pet. Br. at 3) the Government contends that the

evaluation of the propriety of any assertion of the privilege should be done in isolation, irrespective of other constitutional values, or even constitutional abuses, that might be involved. And then those abuses — of “even the most compelling necessity” (*id.* at 4) — are hidden under the cloak of what amounts, under the Government’s telling, to a supra-constitutional state secrets privilege.

This Court has never decided that the Government has the absolute right to require dismissal of claims notwithstanding the consequences of ignoring other countervailing concerns, particularly the Government’s own misconduct. Certainly, the state secrets privilege cannot be used to avoid addressing constitutional violations. Consideration of such competing factors was not involved in *Totten*, which first announced the doctrine that litigation could be precluded if national secrets might be disclosed. Similarly, the Court has not considered such countervailing concerns in other cases involving the state secrets privilege. *E.g.*, *General Dynamics Corp. v. United States*; *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 414 (2003); *Dep’t of the Navy v. Egan*, 484 U.S. 518 (1988); *United States v. Reynolds*; *Chicago & S. Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U.S. 103 (1948). Indeed, the Court has not adopted the position that the Government has an absolute right to require dismissal of a claim regardless of the countervailing concerns about the Government’s own misconduct. This Court should emphatically reject the Government’s claim to have such an absolute right.



It would be contrary to the fundamental concept of popular sovereignty and political accountability to allow the Government to secure the dismissal of claims if it results in preventing the disclosure of its constitutional abuses or other actions that offend the public interest. As Justice Alito has noted: “Liberty requires accountability.” *Dep’t of Transportation v. Ass’n of Am. RRs*, 575 U.S. 43, 57 (2015) (Alito, J., concurring). Accountability for misconduct by the Government, particularly violations of constitutional rights, cannot be disregarded once a court receives an invocation of the state secrets privilege. The constitutional rights of Americans must not be sacrificed, as would occur if the Government’s absolute prerogative to demand dismissal of claims is validated.

In the past, the Government has invoked the state secrets privilege, only to have it later discovered that no such secrets actually were involved. A leading example is the *Reynolds* case, where subsequent disclosures demonstrated that the claim of secrets that must be protected was unwarranted and the privilege likely was asserted to hide embarrassing facts about the Government’s handling of the matter.<sup>3</sup>

Although this case originated under a prior Administration, during the 2020 presidential campaign, candidate Joe Biden sent a letter to the law firm representing the families of victims of the September 11, 2001 terrorist attacks, pledging that, if

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<sup>3</sup> Hampton Stephens, “Supreme Court Filing claims Air Force, government fraud in 1953 case: Case could affect ‘state secrets,’” *Inside the Air Force* (Mar. 14, 2003).

elected, he would order that the state secrets privilege be tailored narrowly. On September 11, 2021, President Biden ordered the release of a previously withheld FBI report concerning the possible involvement of Saudi Arabian nationals in those attacks.<sup>4</sup> Yet here, the government takes the broadest possible reading of the state secrets privilege.

In every instance of an invocation of the state secrets privilege, it is the courts' "obligation to review [claims of state secret privilege] with a very careful, indeed a skeptical, eye, and not to accept [such claims] at face value." *Abilt v. CIA*, 848 F.3d 305, 312 (4th Cir. 2017). In this putative class action proceeding, the constitutional rights of many individuals are at stake. Only a careful evaluation of all legitimate concerns and not simply the national security interest, as vital as it may be, can produce the appropriate decision regarding the application of the privilege.

Even if the Court were to determine that section 1806(f) does not supplant the common law state secrets privilege, it should not allow the Government to invoke the privilege without a review by a court of whether the invocation is appropriate under the circumstances. An *in camera*, *ex parte* evaluation is necessary to ensure accountability. The Government argues that procedures involved in an *in camera* review "plainly do not guard against the risk that even *in camera* consideration could inadvertently or indirectly reveal state secrets and harm the national security." Pet. Br.

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<sup>4</sup> Laura Sullivan, "[Biden Declassifies Secret FBI Report Detailing Saudi Nationals' Connections to 9/11](#)," NPR (Sept. 12, 2021).

at 38. This bald representation should be dismissed. There is no empirical support for such a claim. Courts are equipped to judge the relative risks involved in evaluating the appropriateness of a state secrets privilege. Although executive agencies may be in a better position than courts to evaluate the risk to national security of disclosure of sensitive information (*see Salisbury v. United States*, 690 F.2d 966, 970 (D.C. Cir. 1982)), it would amount to a negation of accountability to require courts to defer uncritically to executive agencies when evidence of Government misconduct is offered. It is never in the national security interest of the nation for the government to violate the United States Constitution.

Because the state secrets privilege is a judicially established doctrine, the Court has the prerogative to fashion the principles, standards, and procedures to be applied in evaluating the invocation of the privilege. This case provides the Court with an opportunity to articulate an appropriate limiting principle to guide courts in the review of assertions of the privilege.

### **III. MANY JUDICIAL DECISIONS HAVE VIRTUALLY IMMUNIZED GOVERNMENT SURVEILLANCE FROM ACCOUNTABILITY TO THE FOURTH AMENDMENT.**

The FBI's current effort to bar judicial scrutiny of its surveillance activities cannot be viewed in isolation. Rather, it is the latest and most dangerous effort to deprive the American people of information about or relief from the federal Government's pervasive surveillance of their lives. The Government brief

makes clear that the FBI views this case in that context:

Congress frequently creates **statutory causes of action without guaranteeing that all prospective plaintiffs will be able to litigate their claims to judgment**. Various impediments, such as standing, sovereign immunity, the state-secrets privilege, or other generally applicable doctrines, may stand in the way of resolving the merits of a statutory or constitutional claim in particular cases—especially where litigation would threaten the national security. *See, e.g., Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 401-402, 407-408 (2013) (affirming the dismissal of a challenge to alleged electronic surveillance for lack of Article III standing)... [Pet. Br. at 34 (emphasis added).]

Similarly, Respondents accurately explain that if the position advanced by the Government prevails, it would give the Government the final arrow in its quiver necessary to undermine the protections provided by Congress in 50 U.S.C. § 1810:

Whereas standing, sovereign immunity, and other doctrines make civil rights litigation more difficult in some contexts, FISA surveillance *by definition* occurs for national security purposes and virtually always involves secret information. Defendants’ construction of Section 1806(f) would **give the Government a tool to dismiss nearly all 1810 suits**, even where (as

here) Plaintiffs can establish standing and face no sovereign immunity or other barriers. [Brief for the Respondents (“Resp. Br.”) at 51 (bold added).]

Some of these *amici* have filed *amicus* briefs in *Clapper*<sup>5</sup> and several of the other cases in which federal courts, including this Court, have insulated widespread executive branch constitutional violations from challenges — especially Fourth Amendment challenges. Associate Justice and Attorney General Robert Jackson explained that few judicial remedies existed for executive violations of the Fourth Amendment: “[o]nly occasional and more flagrant abuses come to the attention of the courts, and then only those where the search and seizure yields incriminating evidence and the defendant is at least sufficiently compromised to be indicted.” *Brinegar v. United States*, 338 U.S. 160 (1949) (Jackson, J., dissenting) at 181. Justice Jackson warned, “there are ... many unlawful searches ... about which courts do nothing, and about which we never hear.” *Id.* This problem is exponentially magnified where, as here, Government officials act in secret, their activities never being exposed to the light of day.

In *United States v. Jones*, 565 U.S. 400 (2012), Justice Sotomayor warned that, because much electronic surveillance “proceeds surreptitiously, it evades the ordinary checks that constrain abusive law

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<sup>5</sup> See Clapper v. Amnesty Int’l, Amicus Brief of Gun Owners Foundation, et al. in Support of Respondents (Sept. 12, 2012).

enforcement practices” and “alter[s] the relationship between citizen and government in a way that is inimical to democratic society.” *Id.* at 416 (citation omitted) (Sotomayor, J., concurring).<sup>6</sup> Justice Sotomayor questioned the “appropriateness of entrusting to the Executive, in the absence of any oversight from a coordinate branch, a tool so amenable to misuse, especially in light of the Fourth Amendment’s goal to curb arbitrary exercises of police power and prevent ‘a too permeating police surveillance’...” *Id.* (citation omitted). “In a regime of surreptitious electronic surveillance when government agents simply eavesdrop on a phone call or read an email, there is no battered-in door or ransacked file cabinet to alert the victim.” *Brinegar* at 182.

Massive surveillance by the FBI and the rest of the Intelligence Community, done in secret, may never be seen or challenged. In those circumstances, its fruit can still be misused for nefarious purposes ranging from analysts investigating girl friends,<sup>7</sup> to seeking political advantage for candidates favored by the “Deep State,” to manipulation of Government officials through threatened exposure of secret sins.<sup>8</sup> It cannot

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<sup>6</sup> See *United States v. Jones*, Amicus Curiae Brief of Gun Owners of America, et al. in Support of Respondent (Oct. 3, 2011).

<sup>7</sup> See, e.g., A. Selyukh, “NSA Staff Used Spy Tools on Spouses, Ex-Lovers: Watchdog,” *Reuters* (Sept. 27, 2013); G. Harlan Reynolds, “NSA spying undermines separation of powers,” *USA Today* (Feb. 10, 2014).

<sup>8</sup> See R. Kessler, “FBI Director Hoover’s Dirty Files,” *Daily Beast* (July 13, 2017).

be that, even in those cases when plaintiffs have standing and the truth comes out, federal courts deprive Americans of a remedy.

The FBI would prefer to bar Plaintiffs from asserting their claims of constitutional violations because to do so would require the Government to divulge alleged “state secrets.” Presumably, these “secrets” would consist of particulars about how the Constitution was being violated — including exactly what communications were seized and exactly how they are searched.

Paradoxically, the larger and more serious the constitutional violation, the more compelling becomes the Government’s need to hide its behavior. If section 1806(f) is undermined as a remedy, the Fourth Amendment ceases to be a law that constrains government surveillance. As C.S. Lewis noted, “there is no foretelling what may come to seem, or even to be, ‘useful,’ and ‘**necessity**’ was always ‘the tyrant’s plea.’”<sup>9</sup> It would amaze the Framers that the Government could employ an atextual doctrine to circumvent judicial scrutiny of the Fourth Amendment’s express prohibition against illegal searches and seizures. Secrecy as to the details about exactly how the violation was carried out cannot bar judicial scrutiny of the violation itself.

District Judge Colleen McMahon lamented about the impossibility of a trial judge applying rules

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<sup>9</sup> C.S. Lewis, God in the Dock: Essays on Theology and Ethics, (Wm. B. Eerdmans Publishing Co.: 1972) (emphasis added).

designed by higher courts that allow the Government to prevail in litigation simply by classifying its actions:

The Alice-in-Wonderland nature of this pronouncement is not lost on me; but after careful and extensive consideration, I find myself stuck in a paradoxical situation in which I cannot solve a problem because of contradictory constraints and rules — a veritable Catch-22. I can find no way around the thicket of laws and precedents that effectively allow the Executive Branch of our Government to proclaim as perfectly lawful certain actions that seem on their face incompatible with our Constitution and laws, while keeping the reasons for its conclusion a secret. [*New York Times Co. v. U.S. Dep't of Justice*, 915 F. Supp. 2d 508, 515-16 (S.D.N.Y. 2013).]

Any risk to national security of potentially harmful effects from disclosures pales in comparison to the significant risk of allowing the Government to do violence to the Fourth Amendment-protected property interests of the people. Indeed, if there is a credible national security interest to be pursued in cases such as this, it is to preserve the security in our “persons, houses, papers, and effects” protected by the Fourth Amendment ban on unreasonable searches and seizures. *See Jones* at 404-05.

The problem is longstanding. Dissenting from the Court’s determination that a particular search and seizure was reasonable, Justice Jackson charged that



the Supreme Court had been treating Fourth Amendment rights as “secondary.” *Brinegar v. United States* at 180 (Jackson, J., dissenting). Based on his experience, Justice Jackson knew, and asserted, that Fourth Amendment rights could not be disregarded, but rather:

belong in the catalog of **indispensable freedoms**. Among deprivations of rights, none is so effective in **cowing a population, crushing the spirit of the individual and putting terror in every heart**. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every **arbitrary** government. And one need only briefly to have **dwelt and worked among a people possessed of many admirable qualities but deprived of these rights** to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police. [*Id.* at 180-81 (emphasis added).]

No doubt, the object of Justice Jackson’s 1949 specific reference to his having “dwelt and worked among a people possessed of many admirable qualities” yet living under “arbitrary government” is unmistakable. Justice Jackson had returned just three years previously from several months of service as U.S. Chief Counsel for the prosecution of Nazi war criminals. From that experience in Germany, he brought back with him a fresh understanding of the significance of the Fourth Amendment to the

preservation of a free people. He had studied the loss of freedom by the German people, and wrote his *Brinegar* dissent to reveal the corrosive effect of a government which does not respect the property rights of the people.

Whitney Harris, Executive Trial Counsel to Justice Jackson at Nuremberg, later explained how liberties were lost in Germany: “[t]he Weimar Constitution contained positive guarantees of basic civil rights. Chief among these were personal freedom ... inviolability of the home [and] secrecy of letters and other communications...”<sup>10</sup> However, Harris continued, the Weimar Constitution also contained:

a special provision ... under which the Reich President was authorized to **suspend basic civil rights** “if the **public safety** and order in the German Reich are considerably disturbed or endangered....”

The morning after the [burning of the Reichstag] Hitler obtained from [President] Von Hindenburg the decree of the Reich President **suspending the bill of rights** of the Weimar Constitution...:

“[personal freedom ... inviolability of the home [and] secrecy of letters and other communications] are suspended until further notice [and] **violations** of the privacy of postal,

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<sup>10</sup> W. Harris, Tyranny on Trial: The Trial of the Major German War Criminals at the End of World War II At Nuremberg, Germany, 1945-1946 (Southern Methodist Univ. Press: 1954), p. 45.

**telegraphic, and telephonic communications**, and warrants for house-searchers, orders for **confiscations as well as restrictions on property**, are also **permissible** beyond the legal limits otherwise prescribed.”

This decree made possible the seizure of political opponents without danger of judicial interference. It was utilized to **destroy all effective political opposition....** The voice of the people had been stilled. Neither constitutional liberties nor power of government would be returned to them under Hitler. [*Tyranny on Trial*, pp. 45-47 (emphasis added).]

Justice Jackson urged the courts not to defer to the Executive Branch with respect to Fourth Amendment violations:

[T]he right to be secure against **searches and seizures** is **one of the most difficult to protect**. Since the **officers are themselves the chief invaders**, there is **no enforcement outside of court**. [*Brinegar* at 181 (Jackson, J., dissenting) (emphasis added).]

If the FBI’s position is sustained by this Court, it solidifies the position of civil servants as a ruling class over those to whom they ought to be accountable: the People of the United States — who are the sovereigns under our constitutional republic.

**IV. HISTORY DEMONSTRATES THAT THE COURT CANNOT REASONABLY ASSUME ALL ATTORNEY GENERAL CLAIMS OF STATE SECRETS ARE VALID.**

The Government asks this Court to assume the validity of the Attorney General’s assertion of the state secrets privilege to support dismissal of most of Plaintiffs’ claims. *See* Pet. Br. at 4 (“[S]ince 2009, even where another head of department wishes to claim the privilege, the Department of Justice conducts a high-level review that results in the ‘personal approval of the Attorney General’ before it asserts the state-secrets privilege in litigation.... These procedures serve to ensure that the privilege is invoked only when — and to the extent — necessary to safeguard the national security.”).

**A. The FBI Has Repeatedly Conducted Surveillance Based on False Premises for Political Purposes.**

In many instances, it is difficult to know for certain if reports of FBI targeting of political opponents are accurate, but some reports appear to be highly credible. A September 2010 report by the Office of the Inspector General of the U.S. Department of Justice (“OIG”) concluded: “FBI agents misled officials and the public, violated their own policy manual, used poor judgment, and engaged in sloppy police work when they investigated certain left-leaning, high-profile, domestic advocacy groups in the years immediately following

9/11.”<sup>11</sup> The OIG criticized FBI surveillance of Greenpeace, People for the Ethical Treatment of Animals (“PETA”), and The Catholic Worker. *Id.* The report found that the FBI had no reason for opening an investigation into one surveilled PETA supporter, and improperly classified political protests and nonviolent civil disobedience by the other groups as “terrorist” activities. *Id.* “Moreover, the OIG accused FBI witnesses of continuing ... to thwart a full and complete investigation into the matter by offering ‘incomplete and inconsistent accounts of events.’” *Id.* More recently, it was reported that FISA court Judge James E. Boasberg ruled that “[m]any of the FBI’s [surveillances of American citizens] were not legally justified because they did not involve a predicated criminal investigation or other proper justification for the search, as required by law.”<sup>12</sup>

Liberal groups have complained of such activities for years. In a 2019 article, *The Intercept* identified Bush Administration political targeting: “Since 2010, the FBI has surveilled black activists and Muslim Americans, Palestinian solidarity and peace activists, Abolish ICE protesters, Occupy Wall Street, environmentalists, Cuba and Iran normalization

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<sup>11</sup> A. Cohen: “OIG: FBI Inappropriately Tracked Domestic Advocacy Groups,” *The Atlantic* (Sept. 20, 2010).

<sup>12</sup> T. Aaronson, “A Declassified Court Ruling Shows How the FBI Abused NSA Mass Surveillance Data,” *The Intercept* (Oct. 10, 2019).

proponents, and protesters at the Republican National Convention.”<sup>13</sup>

Nor are left-leaning groups alone in being the target of FBI surveillance. At a House Intelligence Committee meeting on April 15, 2021, ranking member Rep. Devin Nunes (R-CA) told FBI Director Christopher Wray and other intelligence officials:

The Democrats see political benefits in characterizing wide swaths of American citizens particularly Republicans and conservatives as politically suspect, politically violent and deserving of government surveillance.... I hope you plan on spending a reasonable amount of time in upcoming years on activities other than investigating conservatives and spying on Republican presidential campaigns.<sup>14</sup>

Republicans point in particular to the FBI’s role in the 2016-17 investigation of alleged collusion between the 2016 Donald Trump campaign and the Russian government, codenamed “Operation Crossfire Hurricane.” The purpose of Crossfire Hurricane was stated in a now-declassified memo: “to determine if anyone in the Trump campaign is in a position to have received information either directly or indirectly from

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<sup>13</sup> A. Speri, “The FBI has a long history of treating political dissent as terrorism,” *The Intercept* (Oct. 22, 2019).

<sup>14</sup> R. Scarborough, “Devin Nunes warns intel chiefs against targeting Americans, ‘particularly Republicans,’” *Washington Times* (Apr. 16, 2021).

the Russian Federation regarding the anonymous release of information during the campaign that would be damaging to Hillary Clinton.”<sup>15</sup> In that operation, the FBI designated an informant, Stefan Halper. “The FBI urged Halper to rely on surreptitious recordings to gather information, lie about wanting to work for the Trump campaign and gave him questions to be asked of those with whom he came in contact.”<sup>16</sup>

The operation came under further scrutiny after the disclosure of a number of romantic and politically charged text messages between agent Peter Strzok and FBI lawyer Lisa Page. “In August 2016, within one week of the Justice Department's decision to open the Russia probe, Strzok sent messages to Page that said ‘F Trump’ and ‘I can protect our country at so many levels.’ ... Strzok told Page in March, ‘God Hillary should win 100,000,000-0.’”<sup>17</sup> Strzok’s texts only inflamed the perception of political surveillance by the FBI. Eventually the Bureau terminated him. “He was fired for the damage he did to the FBI’s reputation, and

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<sup>15</sup> J. Davis, “Newly Released Docs: FBI’s Spying on Trump Campaign Was More Wide-Ranging Than Previously Disclosed,” *Western Journal* (Feb. 25, 2021).

<sup>16</sup> “Newly Released Docs: FBI’s Spying on Trump Campaign Was More Wide-Ranging Than Previously Disclosed,” *Team Tucker Carlson* (Feb. 25, 2021).

<sup>17</sup> D. Clark, “FBI fires agent Peter Strzok, who sent anti-Trump texts,” *NBC News* (Aug. 13, 2018).

rightly so,” stated former FBI counterintelligence officer Frank Figliuzzi.<sup>18</sup>

The FBI determined to surveil Trump advisor and former Naval Officer Carter Page as a alleged Russian agent, primarily on the basis of a dossier submitted by former British spy Christopher Steele. It is now known that not only was Page not a Russian agent, but that he had served as a source providing information about the Russians to the CIA. Yet in submitting the required affidavit to the FISA court to surveil Page, the Bureau made:

“significant errors.” Those “errors” included blatant exaggerations of Steele’s proven reliability, the failure to note that his work was opposition research commissioned by the Democratic National Committee even after that became clear, the omission of the fact that Steele himself was “desperate” to prevent Trump’s election, and a false denial of Steele’s contacts with the press. The FBI also neglected to mention that people who had worked with Steele questioned his judgment, that Steele’s “primary sub-source” had directly contradicted claims in his “dossier,” that Page had reported his contact with a Russian intelligence agent to the CIA, and that Page said he had never met

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<sup>18</sup> K. Dilanian & H. Jackson, “FBI agent who helped launch Russia investigation says Trump was ‘compromised’,” *Yahoo* (Sept. 7, 2020).



key figures in the purported conspiracy described by Steele.<sup>19</sup>

As the Bureau was preparing to file the FISA affidavits, FBI attorney Kevin Clinesmith deliberately falsified an email about Page. On June 15, 2017, Clinesmith sent an email to inquire whether Page had ever served as a CIA source in Russia. He received a reply on June 19. Clinesmith altered the email to include the words “not a source,” and forwarded the altered email to his supervisor for inclusion as supporting evidence for the Bureau’s FISA affidavit against Page.<sup>20</sup> On August 19, 2020, Clinesmith pleaded guilty to “making a false statement within both the jurisdiction of the executive branch and judicial branch.” *Id.*

The FBI compounded the perception of surveillance for political purposes when then-Director James Comey stated that the Steele dossier was “not all of it or a critical part of” the information for the Bureau’s affidavit seeking to surveill Page. But a review by Inspector General Michael Horowitz concluded that the Steele dossier in fact “played a central and essential role” in the Bureau’s affidavit. *See* Sullum, *supra*. “FBI personnel fell far short of the requirement in FBI policy that they ensure that all factual statements in

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<sup>19</sup> J. Sullum, “The FBI’s Systematic Dishonesty,” *Reason* (Dec. 18, 2019).

<sup>20</sup> “FBI Attorney Admits Altering Email Used for FISA Application During ‘Crossfire Hurricane’ Investigation,” *U.S. Dept. of Justice* (Aug. 19, 2020).

a FISA application are “scrupulously accurate,” Horowitz concluded.” *Id.*

The FISA court issued an unusual rebuke to the Bureau, and “called the FBI’s conduct ‘antithetical to the heightened duty of candor’ that applies in such cases.” *Id.* On January 10, 2020, NBC News ran an opinion piece headlined, “FBI abuses in domestic surveillance of the Trump campaign eerily echo Red Scare raids.” The article explained that the FISA court noted that “agents’ requests to spy on Page were often based on assumptions ‘contradicted by information in their possession.’”<sup>21</sup> “That such transgressions ever happened should alarm everyone concerned with civil liberties and national security.” *Id.* “This is disastrous for public trust in the FBI.” *Id.*

In September 2021, Special Counsel John Durham obtained an indictment against attorney Michael Sussmann, formerly an attorney for the DOJ, for allegedly lying to the FBI about his ties to the Hillary Clinton campaign.<sup>22</sup> Sussmann met with senior FBI General Counsel James A. Baker on September 19, 2016, to make the case to Baker that the FBI should investigate alleged ties between the Trump campaign and Russia. *Id.* Asked by Baker if he was working for a client, Sussmann denied it. *Id.* In 2017, however, he changed his story in congressional testimony, stating

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<sup>21</sup> B. Rivers, “FBI abuses in domestic surveillance of the Trump campaign eerily echo Red Scare raids,” *NBC News* (Jan. 10, 2020).

<sup>22</sup> C. Downey, “Durham Grand Jury Indicts Clinton-Linked Attorney Involved in Russia Probe,” *MSN.com* (Sept. 16, 2021).

that he was working for an unnamed cybersecurity expert. *Id.* Additionally, he billed the time spent preparing for the meeting to the Hillary Clinton campaign, which, along with the Democratic Party, was a client of his law firm, Perkins Coie.<sup>23</sup>

As FISA Judge Rosemary Collyer noted: “the frequency with which representations made by FBI personnel turned out to be unsupported or contradicted by information in their possession, and with which they withheld information detrimental to their case, calls into question whether information contained in other FBI applications is reliable.”<sup>24</sup>

**B. FBI Surveillance Agents Have Repeatedly Acted as *Agents Provocateurs*.**

Perhaps even more troubling than surveillance of political dissenters, as occurred here, the FBI has a long record of using confidential informants to incite illegal activity among fringe groups. *See Resp. Br.* at 1. This technique benefits the FBI, allowing it to exaggerate security threats to justify its role, and sometimes, it allows the FBI to claim credit for swooping in and preventing a terrorist act of which it

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<sup>23</sup> *Id.*; L. Bell, “Durham Indictment Indicates Real Purpose Behind Michael Sussman’s Alleged Lies,” *Newsmax* (Sept. 20, 2021).

<sup>24</sup> B. Fredericks, “FISA Court rips FBI over lack of candor in Trump campaign eavesdropping,” *New York Post* (Dec. 17, 2019).

had detailed knowledge — because it was instigated by its own informants.

In 2012, a federal judge dismissed most of the FBI's case against seven members of the right-wing Hutaree militia group in Michigan. The FBI had planted informants who apparently suggested violent action to the defendants. “[FBI informant Steve] Haug repeatedly talked to [militia member David] Stone about building pipe bombs and getting other sophisticated explosives. The FBI rented a warehouse in Ann Arbor where the agent would invite him and others to store and discuss weapons.”<sup>25</sup>

More recently, FBI informants have been accused of stoking talk of kidnapping Michigan Governor Gretchen Whitmer. “Prosecutors recently revealed that there were a dozen confidential informants working on the case.”<sup>26</sup> “[S]ome of the informants the government used appeared to play a far greater role in the plot than had been previously reported. In fact, the informants had a hand in nearly every aspect of the twisted machination, including its inception.” *Id.* One informant “helped organize a series of cross-country meetings with extremists,” and “paid for hotel rooms and food as an incentive to get people to come.” *Id.* Another, an Iraq War veteran, “encouraged members

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<sup>25</sup> Associated Press, “Charges dismissed in Michigan militia case,” *FoxNews* (Mar. 27, 2012).

<sup>26</sup> B. Chakraborty, “FBI informants had bigger role in Whitmer kidnap plot than thought: report,” *Washington Examiner* (July 21, 2021).

to work with other suspects and even offered to foot the bill to get people to and from meetings. He is also accused of urging the alleged mastermind of the kidnapping plot to carry it out before laying the trap for him to be arrested.” *Id.* Not surprisingly, this “information on the extent of the FBI’s involvement has raised questions as to whether there would have even been a conspiracy to take down the Democratic governor without their help.” *Id.*

“Since 9/11, informants have increasingly not just supplied the FBI with information, but acted as agents provocateurs.... By far, the Muslim community has been a disproportionate victim of agents provocateurs.”<sup>27</sup> According to a 2019 report:

The FBI, along with its informants, concocts fictitious terror plots. The informants propose to people targeted by the FBI that they participate in the fictitious plot. Oftentimes, they exceed mere suggestion and go to great lengths to entice people to participate. Once people agree to take part in the nonexistent FBI-concocted terror scheme, they are arrested. A 2014 Human Rights Watch report reviewing post-9/11 terrorism convictions estimated that “almost 30 percent of those cases were sting operations in which the informant played an active role in the underlying plot....”<sup>28</sup>

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<sup>27</sup> C. Gibbons, “Still Spying on Dissent: The Enduring Problem of FBI First Amendment Abuse,” *Rights and Dissent* (2019) at 14.

<sup>28</sup> *Id.* at 14-15.

The FBI is using confidential informants to manufacture terror plots. It is preying on vulnerable people.<sup>29</sup> It is providing incentives to individuals to agree to participate in actions they would never have taken part in without the FBI. All of this is sinister enough. But the overwhelming majority of these stings involve Muslim communities. The FBI sends *agents provocateurs* into these communities to fish for potential victims.<sup>30</sup>

### **C. The FBI Is Not a Trusted Government Agency.**

The concern over violations of basic civil liberties by the FBI has only intensified with each new revelation. “In a [May 2021] letter posted to Twitter by the House Judiciary GOP, [Republican Reps. Jim Jordan and Andy Biggs] argued that the FBI had been ‘seriously and systemically abusing its warrantless electronic surveillance authority,’ and was engaged in ‘illegal spying activities.’ Further, the two congressmen wrote that, ‘These concerns are particularly disturbing in light of prior misconduct thoroughly detailed by the DOJ Office of Inspector General (OIG), suggesting a

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<sup>29</sup> Other components of the Justice Department use the same tactic. See John Diedrich & Raquel Rutledge, “ATF uses rogue tactics in storefront stings across nation,” *Milwaukee Journal Sentinel* (Dec. 7, 2013).

<sup>30</sup> *Id.* at 16.

pattern of abuses and deficiencies in the FBI's FISA processes.”<sup>31</sup>

The FBI has earned a reputation for directly lying to the American people, and even the FISA court. As Judge Collyer stated in her FISA court rebuke of the Bureau for its fabricated affidavits in the Trump collusion investigation, “The frequency with which representations made by FBI personnel turned out to be unsupported or contradicted by information in their possession, and with which they withheld information detrimental to their case, calls into question whether information contained in other FBI applications is reliable.”<sup>32</sup>

The FBI's self-inflicted wounds have wrecked its credibility with the American people.

Indeed, public support for the FBI has plunged. A PBS NewsHour survey in April showed a 10-point drop—from 71% to 61%—in the prior two months among Americans who thought the FBI was “just trying to do its job” and an 8-point jump—from 23% to 31%—among those who thought it was “biased against the Trump Administration.”<sup>33</sup>

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<sup>31</sup> A. Thornebrooke, “GOP Reps Demand Answers After FBI Exposed for ‘Widespread’ Surveillance Abuses,” *Western Journal* (May 5, 2021).

<sup>32</sup> See B. Rivers, *supra*.

<sup>33</sup> E. Lichtblau, “The FBI Is in Crisis. It’s Worse Than You Think,” *Time* (May 3, 2018).

Some legal experts and defense advocates see the string of recent not guilty verdicts as a sign that jurors and judges are less inclined to take what the FBI says in court at face value. Data examined by TIME support that conclusion. The number of convictions in FBI-led investigations dropped last year for the fifth consecutive year—from 11,461 in 2012 to 10,232....

Moreover, TIME’s analysis shows a surprisingly low rate of success for the thousands of cases the FBI investigates and sends to the Justice Department for possible prosecution. Over that same time period, the Justice Department has ultimately won convictions in fewer than half the cases the FBI referred for prosecution....  
[*Id.*]

Fox News legal analyst and contributor Gregg Jarrett has openly called for the resignation or termination of FBI Director Christopher Wray in the wake of the Inspector General’s December 2019 report detailing the agency’s deceptive reports to the FISA Court. “Under Wray, promises of transparency and reform proved to be nothing more than an illusion, replaced by a deliberate cover-up of FBI malfeasance.... Americans are right to be fearful of the FBI. The agency’s chronic abuses of law and process ... present a frightening example of how power corrupts.... It is time for Wray to go—one way or another.”<sup>34</sup>

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<sup>34</sup> G. Jarrett, “Gregg Jarrett: Flynn cover-up — FBI’s Wray must go. Americans need director they can trust,” *Fox News* (May 5,



The Cliven Bundy case in Nevada resulted in yet another judicial rebuke of the FBI:

Federal judge Gloria Navarro slammed the FBI and Justice Department on Monday, Jan. 8, for “outrageous abuses” and “flagrant misconduct” in the prosecution of Cliven Bundy and sons, the Nevada ranchers who spurred a high-profile standoff with the FBI and Bureau of Land Management in 2014. Navarro condemned the “grossly shocking” withholding of evidence from defense counsel in a case that could have landed the Bundys in prison for the rest of their lives. Navarro, who had declared a mistrial last month, dismissed all charges against the Bundys. Navarro was especially riled because the FBI spent three years covering up or lying about the role of their snipers in the 2014 standoff.<sup>35</sup>

Then in 2019, after the discovery of the FBI’s false affidavits to the FISA Court stating that Carter Page was a Russian agent, Judge Rosemary Collyer wrote “a blistering order [that] accused the bureau of providing false information and withholding materials....”<sup>36</sup> “The FBI’s handling of the Carter Page applications,

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2020).

<sup>35</sup> J. Bovard, “Fed’s misconduct in Cliven Bundy case stems from Ruby Ridge,” *The Hill* (Jan. 14, 2018).

<sup>36</sup> J. Kruzell, “Judge blasts FBI over misleading info for surveillance of Trump campaign adviser,” *The Hill* (Dec. 17, 2019).

as portrayed in the OIG report, was antithetical to the heightened duty of candor...” the judge wrote. *Id.*

Criticism of the FBI is not limited to the left and the right — it has gone mainstream. Just one week ago, on September 21, 2021, the *Wall Street Journal* Editorial Page rang out with a call to: “Abolish the FBI.”<sup>37</sup> The last straw that led to this op-ed by Holman Jenkins of the editorial board, was special counsel John Durham’s indictment of “Michael Sussmann, then a lawyer for the Democrat-linked firm Perkins Coie.”

In delivering to the FBI fanciful evidence of Trump-Russia collusion a few weeks before the 2016 election, Mr. Sussmann is alleged to have lied to the FBI’s chief lawyer, James Baker, claiming he was acting on his own behalf and not as a paid agent of the Clinton campaign....

Mr. Durham provides ample reason in his own indictment for why the FBI would have known exactly whom Mr. Sussmann was working for.... [W]e are free to suspect the FBI would have found it useful to be protected from inconvenient knowledge about the Clinton campaign’s role.

Yet to date, the FBI is almost never held accountable for anything. Twenty-nine years ago FBI sniper Lon Horiuchi shot Vicky Weaver in the face at Ruby Ridge, Idaho, while she was holding her baby. “The FBI initially claimed that killing Mrs. Weaver

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<sup>37</sup> H.W. Jenkins, Jr., “Abolish the FBI,” *Wall Street Journal* (Sept. 21, 2021).

was justified and then later covered up key details and claimed it was accidental. FBI chief Louis Freeh pretended his agents had done nothing seriously wrong.... [T]he feds paid a \$3 million wrongful death settlement to the Weaver family.”<sup>38</sup> “When an [FBI] agent ... was indicted for murder by an Idaho prosecutor ... [t]he Solicitor General of the United States urged the courts to dismiss the indictment because, ‘these federal law enforcement officials are privileged to do what would otherwise be unlawful if done by a private citizen.’”<sup>39</sup>

The *Wall Street Journal* op-ed cited *supra*, concludes its long train of offenses with the following:

By now, after its performance in the 2016 election, the evidence might seem conclusive that the agency is a **failed experiment**, however able and dedicated many of its agents.

Its culture at the top seems **incapable of using the powers entrusted to it with discretion and good judgment** or at least without reliable expectation of embarrassment. The agency should be scrapped and something new built to replace it. [Emphasis added.]

Agencies cannot be trusted to assert the state secrets privilege without skeptical judicial oversight,

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<sup>38</sup> J. Bovard, “Ruby Ridge and the FBI License to Kill” *JimBovard.com* (Aug. 22, 2021).

<sup>39</sup> T. Lynch, ed., In the Name of Justice (CATO Institute: 2009) at xxvi (citation omitted).

especially those without “discretion and good judgment.”

### CONCLUSION

For the reasons set forth in the Respondents’ Brief, and those above, the Court should affirm the decision of the Court of Appeals.

Respectfully submitted,

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