

No. 20-828

In the Supreme Court of the United States

FEDERAL BUREAU OF INVESTIGATIONS, *et al.*,
Petitioners,

v.

YASSIR FAZAGA, *et al.*

On Writ of Certiorari to the United States Court of
Appeals for the Ninth Circuit

**BRIEF OF PROJECT FOR PRIVACY &
SURVEILLANCE ACCOUNTABILITY
AS *AMICUS CURIAE* SUPPORTING
PLAINTIFF-RESPONDENTS**

GENE C. SCHAERR
ERIK S. JAFFE
Counsel of Record
HANNAH C. SMITH
KATHRYN E. TARBERT
JOSHUA J. PRINCE
ANNIKA M. BOONE*
SCHAERR | JAFFE LLP
1717 K Street, NW, Suite 900
Washington, DC 20006
(202) 787-1060
ejaffe@schaerr-jaffe.com

Counsel for Amicus Curiae

September 28, 2021

QUESTION PRESENTED

Whether Section 1806(f) of the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §1801 *et seq.*, displaces the state-secrets privilege and authorizes a district court to resolve, *in camera* and *ex parte*, the merits of a lawsuit challenging the lawfulness of government surveillance by considering the privileged evidence.

TABLE OF CONTENTS

QUESTION PRESENTED..... i

TABLE OF AUTHORITIES.....iii

INTRODUCTION AND INTEREST OF *AMICUS*..... 1

STATEMENT 3

SUMMARY OF THE ARGUMENT..... 4

ARGUMENT 6

I. The Federal Government Has a Long History
of Secretly Abusing Individual Rights. 7

II. Where a Right Has Been Infringed, There
Must Be a Remedy. 11

III. An Imperfect Remedy Is Better Than No
Remedy at All, and Any Burden on Seventh
Amendment Rights Is Caused by, and Can
Be Remedied by, the Government. 13

CONCLUSION..... 17

TABLE OF AUTHORITIES

Cases

<i>[Redacted]</i> , No. <i>[Redacted]</i> (FISA Ct. Apr. 26, 2017)	9
<i>[Redacted]</i> , No. <i>[Redacted]</i> (FISA Ct. Oct. 3, 2011).....	8
<i>ACLU v. Clapper</i> , 785 F.3d 787 (2d Cir. 2015)	7, 8
<i>Aetna Ins. Co. v. Kennedy to Use of Bogash</i> , 301 U.S. 389 (1937).....	14
<i>Borough of Duryea v. Guarnieri</i> , 564 U.S. 379 (2011).....	11
<i>Carpenter v. United States</i> , 138 S. Ct. 2206 (2018).....	7
<i>Chase Sec. Corp. v. Donaldson</i> , 325 U.S. 304 (1945).....	2
<i>The Commercen</i> , 14 U.S. 382 (1816).....	15
<i>Curtis v. Loether</i> , 415 U.S. 189 (1974).....	13
<i>Dimick v. Schiedt</i> , 293 U.S. 474 (1935).....	2, 13
<i>Grand Chute v. Winegar</i> , 82 U.S. 373 (1872).....	14
<i>Hitchman Coal & Coke Co. v. Mitchell</i> , 245 U.S. 229 (1917).....	15

TABLE OF AUTHORITIES (cont'd)

Cases (cont'd)

<i>In re Accuracy Concerns Regarding FBI Matters Submitted to the FISC, 411 F. Supp. 3d 333 (FISA Ct. 2019)</i>	10
<i>In re Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069 (3d Cir. 1980)</i>	14, 15
<i>In re Production of Tangible Things From [Redacted], No. BR 08-13, 2009 WL 9150913 (FISA Ct. 2009).....</i>	9
<i>Jennings v. Rodriguez, 138 S. Ct. 830 (2018).....</i>	16
<i>Local 783, Allied Indus. Workers of Am. v. Gen. Electric Co., 471 F.2d 751 (6th Cir. 1973).....</i>	14
<i>Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)</i>	12
<i>Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070 (9th Cir. 2010)</i>	7
<i>Parsons v. Bedford, Breedlove & Robeson, 28 U.S. (3 Pet.) 433 (1830).....</i>	13
<i>Ross v. Bernhard, 396 U.S. 531 (1970).....</i>	14
<i>Sure-Tan, Inc. v. N.L.R.B., 467 U.S. 883 (1984).....</i>	11
<i>Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308 (2007).....</i>	14

TABLE OF AUTHORITIES (cont'd)

Cases (cont'd)

<i>United States v. U.S. Dist. Court for E. Dist. of Mich.</i> , 407 U.S. 297 (1972)	7
<i>Von Hoffman v. City of Quincy</i> , 71 U.S. 535 (1866).....	12

Constitutional Provisions

U.S. Const. amend. I.....	11
---------------------------	----

Statutes

Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §1801 <i>et seq.</i>	i, 7
50 U.S.C. §1806(f).....	i, 6

Other Authorities

Ryan Lucas, <i>Ex-FBI Lawyer Sentenced To Probation For Actions During Russia Investigation</i> , NPR (Jan. 29, 2021, 2:58 PM).....	10
---	----

INTRODUCTION AND INTEREST OF *AMICUS*¹

Yassir Fazaga and the other plaintiff-respondents have raised serious constitutional questions about whether the government targeted them and other Muslims, not because it had probable cause to do so, but because of their religion. *Fazaga Br. 1*. This case, at bottom, asks how parties whose constitutional rights have been violated by the government can vindicate those rights if the government invokes the state-secrets doctrine. Ironically, the individual-capacity respondents (“federal respondents”) raise much the same question, claiming that any accommodation of the state-secrets privilege invoked by the government would deprive *them* of their Seventh Amendment rights as well. In both instances of claimed constitutional violations, the responsibility must be with the government to provide a remedy. Whether through Foreign Intelligence Surveillance Act (FISA) procedures or otherwise, constitutional rights must carry a remedy or else they are meaningless.

This case is of particular concern to *Amicus Project for Privacy & Surveillance Accountability (PPSA)*, a nonprofit, nonpartisan organization that focuses on a range of privacy and surveillance issues, because the proper resolution of the question presented goes to the heart of its mission: helping private citizens vindicate

¹ All parties have consented to the filing of this brief. No counsel for a party authored it in whole or in part, nor did any person or entity, other than *Amicus* and its counsel, make a monetary contribution to fund its preparation or submission. *Amicus* is not publicly traded and has no parent corporations, and no publicly traded corporation owns 10% or more of *Amicus*.

their rights when the government violates them in the name of national security. Time and again, government actors have demonstrated that, when they can act secretly, they will behave poorly. And the harms stemming from such behavior are magnified if the government or its agents can avoid accountability entirely by an all-too-clever two-step process of invoking obscure evidentiary rules and then—because of the invocation of those rules—hiding behind the Seventh Amendment’s right to a jury trial.

As *Amicus* explains more fully below, this Court has never before treated the Seventh Amendment jury right as absolute. Though it is true that “trial by jury has always been” the “normal and preferable mode of disposing of issues of fact in civil cases at law,” the Court has recognized “some exceptions.” *Dimick v. Schiedt*, 293 U.S. 474, 485-486 (1935). And one such exception should be for instances where, as here, the jury would be unable to hear evidence because of its national-security implications. Recognizing such an exception would serve the dual purpose of both preserving national security *and* allowing those whose constitutional rights are violated by the federal government to obtain relief for those violations.

To hold otherwise, as the federal respondents urge this Court to do, would completely close the courthouse door to Fazaga and others like him whenever national security is implicated. But that would allow the Seventh Amendment to destroy the First or the Fourth, or both. *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 313 (1945) (“[I]t is troublesome to sustain as a ‘right’ a claim that can find no remedy for its invasion.”). If the invocation of the

state-secrets doctrine would lead to any derogation of Seventh Amendment rights, then the individual federal defendants should seek their remedy against the government for invoking the privilege, not self-servingly against the plaintiff-respondents whose rights the agents and the government are credibly alleged to have violated.

Because the government agents should not be able to violate individual rights and then avoid accountability by asserting that their own right to a jury trial trumps plaintiff-respondents' rights to any trial at all, this Court should recognize that the Seventh Amendment yields when the government successfully asserts the state-secrets privilege.

STATEMENT

This case began when the FBI infiltrated the Muslim community in Orange County, California by paying an informant to pretend he was a convert to Islam. That much is undisputed. *Fazaga Br. 1*. The plaintiff-respondents, including their Imam Yassir Fazaga, allege that this surveillance was done for no other reason than because they were Muslim. *Id.* at 1, 7. Worse still, the informant was instructed to focus his energies on the devout. The more Muslim a person was, the “more suspicious” the FBI considered him. J.A. 184. The informant was also instructed to “gather as much information on as many people in the Muslim community as possible.” J.A. 173-175.

Upon learning about this blatant violation of their First and Fourth Amendment rights, the plaintiff-respondents sued the federal government and several of its agents. The government immediately moved to

dismiss the religion claims, invoking the state-secrets privilege. Pet. App. 15a. That motion was granted, but the plaintiff-respondents succeeded on appeal in having those claims reinstated. *Id.* at 92a-98a. The Ninth Circuit explained that, rather than dismissing the case, FISA allowed the district court to conduct an *ex parte in camera* review of the information subject to the privilege. *Id.* at 46a-55a. The federal respondents argue that allowing the judge to conduct such a review—and to decide facts based on its resolution—would violate their Seventh Amendment right to a jury trial. Allen Br. 9-12; Tidwell Br. 22-30.

SUMMARY OF THE ARGUMENT

I. This case is the latest in a series of examples of the federal government violating the constitutional rights of Americans in the name of national security or other interests. Such abuses are well-documented both historically and by more recent opinions of the Foreign Intelligence Surveillance Court (FISC), and they often happen in secret. Condoning or excusing such unconstitutional conduct is the surest way to encourage more of it.

II. Many Americans will never learn that their rights have been abused. But where, as here, there is at least a credible allegation that they have, there must be a remedy for those abuses. Otherwise, the right does not exist. To allow the government to insulate its unconstitutional behavior behind a veil of secrecy would free it and its agents from the foundational and supreme law of the land. Such unbounded power is not a legitimate exercise of government authority.

III. The federal respondents ironically suggest that allowing this case to continue after invocation of the state-secrets doctrine would violate their Seventh Amendment rights. Of course, denying *plaintiff-respondents* the right to any trial at all, much less a jury trial, would be a far greater infringement of constitutional rights than merely allocating a limited set of sensitive facts to *in camera* review.

Seventh Amendment rights, moreover, are not so rigidly absolute as to require throwing the baby out with the bathwater. To be sure, courts should tread carefully when deciding that certain issues of fact cannot properly be decided by a jury, but this Court's precedents allow for bypassing juries in exceptional cases. Cases involving claims that national security trumps the Constitution certainly qualify as exceptional. Where a jury cannot hear evidence because of genuine national security concerns, as alleged here, this Court should hold that other procedures can be substituted without violating the Seventh Amendment.

Whether such alternatives involve using existing FISA procedures for protecting national security information, requiring security-cleared lawyers and/or juries, or something else, the doctrine of constitutional avoidance alone suggests that any available procedural alternatives should be broadly construed to allow for a less restrictive means of addressing national security concerns than entirely eliminating the opportunity for a trial of credible constitutional claims. And to the extent there is any infringement or violation of the Seventh Amendment, the government

itself bears responsibility for it and should provide the remedy, not force the cost onto plaintiff-respondents.

ARGUMENT

Amicus expresses no opinion on the way that Section 1806(f)—the FISA provision directly at issue here—interacts with the state-secrets privilege. Instead, *Amicus* writes to highlight the absurdity of the federal respondents’ self-serving assertion that the Seventh Amendment acts as a shield to liability whenever the government asserts the state-secrets privilege to hide evidence of constitutional violations. For if it were true that government agents can avoid any accountability for their secret unconstitutional activities by invoking the Seventh Amendment, then the rights of countless Americans are worth nothing more than the paper on which they are written. But even if this Court credits the federal respondents’ Seventh Amendment arguments, any violation or infringement would weigh equally on the other side of the ledger, and would be the government’s fault, not the plaintiff-respondents’. The government, not the plaintiff-respondents, thus should provide any remedy or indemnity necessary to make its agents whole for any harm from their inability to present their arguments to a jury.

I. The Federal Government Has a Long History of Secretly Abusing Individual Rights.

As this Court has recognized, government surveillance poses unique threats to individual privacy: “Unlike the nosy neighbor who keeps an eye on comings and goings,” the government is “ever alert, and [its] memory is nearly infallible.” *Carpenter v. United States*, 138 S. Ct. 2206, 2219 (2018). That fact is nowhere more troubling than in the national-security space, where government surveillance is largely conducted “in secret,” *ACLU v. Clapper*, 785 F.3d 787, 793 (2d Cir. 2015), and where the “fundamental principles of our liberty” collide with “national security.” See *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1073 (9th Cir. 2010). In that space alone, the government can largely circumvent constitutional limitations to its power because they will rarely have to account for their *ultra vires* activities. Despite such secrecy, evidence of government abuse does occasionally leak out. This case is accordingly only the latest in a long string alleging such abuses.

1. In the 1970s, for example, the FBI, CIA, and NSA all came under public scrutiny for their suspicious surveillance activities. *Clapper*, 785 F.3d at 792. That scrutiny led this Court to both recognize the “constitutional basis of the President’s domestic security role” and the need for that role to be “exercised in a manner compatible with the Fourth Amendment.” *United States v. U.S. Dist. Court for E. Dist. of Mich.*, 407 U.S. 297, 320 (1972). In response to such questionable surveillance, Congress passed the Foreign Intelligence Surveillance Act of 1978 (FISA)

to provide some means for judges to review the government's secret surveillance activities. *Clapper*, 785 F.3d at 793.

FISA's passage, however, did not make unlawful surveillance a relic of the past. Rather, nearly 45 years later, evidence shows that government surveillance abuses continue. In *Clapper*, for example, the Second Circuit held that the NSA exceeded its authority when it gathered bulk telephone metadata on Americans, which was revealed only after Edward Snowden infamously leaked information on that collection. See *Clapper*, 785 F.3d at 787, 795. As part of that program, Verizon was required to produce call records each day for "all telephone calls made through its systems or using its services where one or both ends of the call are located in the United States." *Id.* at 796 (emphasis in original).

2. Despite the uproar surrounding the NSA's domestic surveillance, government abuses seem to have continued unabated. And not only are abuses continuing, but the government also seems quite willing to lie about them when any suspicion arises.

One example is the NSA's history of misrepresenting the scope of its data collections to FISC. In a 2011 opinion, for example, Judge Bates criticized the NSA for including a "substantial misrepresentation regarding the scope of a major collection program" for the "third [time] in less than three years."²

² Mem. Op. at 16 n.14, [*Redacted*], No. [*Redacted*] (FISA Ct. Oct. 3, 2011), <https://tinyurl.com/2z7nbecj>.

Having reviewed the subsequently revealed information on how data was actually used, FISC concluded that the NSA had “so frequently and systemically violated” the required standard for seeking business records that one “critical element of the overall [business record] regime ha[d] never functioned effectively.” *In re Production of Tangible Things From [Redacted]*, No. BR 08-13, 2009 WL 9150913, at *5 (FISA Ct. 2009). The NSA’s failure to “accurately report” to FISC led to “daily violations of the minimization procedures * * * designed to protect [redacted] call detail records pertaining to telephone communications of U.S. persons located within the United States who are not the subject of any FBI investigation.” *Id.* at *4.

Later opinions highlight just how pervasive this practice of over-collecting data is. In 2011, FISC held that the government’s minimization procedures were “statutorily and constitutionally deficient with respect to their protections of U.S. person information[.]”³ And in 2016, NSA disclosed that it had been violating its own protective procedures with “much greater frequency” than it had previously disclosed.⁴ As the government reviewed the scope of the abuses, it became clear that the “problem was widespread during all periods under review.”⁵

³ Mem. Op. & Order at 17, *[Redacted]*, No. [Redacted] (FISA Ct. Apr. 26, 2017), <https://tinyurl.com/4jd7bbh2> (citation omitted).

⁴ *Id.* at 19.

⁵ *Ibid.*

3. Other Executive Branch agencies have also misled FISC in connection with various surveillance matters, the most publicized example of which happened during the 2016 election. There, the government submitted four applications seeking to surveil Carter Page, a U.S. citizen with ties to the Trump Campaign.

To support the applications, an FBI lawyer altered an email to read that Page, who had previously worked with the CIA, had *not* in fact been a government source.⁶ Because of those alterations, the Page applications included information “unsupported or contradicted by information” in the FBI’s possession, including “several instances” where the FBI withheld information “detrimental to their case for believing that Mr. Page was acting as an agent of a foreign power” from the National Security Division. *In re Accuracy Concerns Regarding FBI Matters Submitted to the FISC*, 411 F. Supp. 3d 333, 336 (FISA Ct. 2019). As FISC well explained, “[w]hen FBI personnel mislead NSD in the ways described above, they equally mislead the FISC.” *Id.* at 335. FISC ultimately held that the sheer number of errors in the Page applications was “antithetical to the heightened duty of candor” and “call[ed] into question whether information contained in other FBI applications is reliable.” *Id.* at 337.

It is impossible to know how many misrepresentations like those in the Carter Page

⁶ Ryan Lucas, *Ex-FBI Lawyer Sentenced To Probation For Actions During Russia Investigation*, NPR (Jan. 29, 2021, 2:58 PM), <https://tinyurl.com/nksf8u2s>.

applications have allowed the government to circumvent the Fourth Amendment's warrant requirement and surveil U.S. citizens without probable cause. But, if the government made such representations with even a small percentage of the frequency with which it misrepresented the scope of its sweeping data-collection efforts, then it has happened far too regularly. And whatever the facts of a particular violation of the government's legal and constitutional duties may be, its history of secretly abusing individual rights under the cloak of claimed national-security interests is well established.

II. Where a Right Has Been Infringed, There Must Be a Remedy.

For those countless Americans whose rights have been violated by secret government surveillance or, as here, manipulative infiltration of a religious group, there must be some way to vindicate those rights.

Recognizing the maxim that for every right there is a remedy, the Founders included in the First Amendment the "right of the people * * * to petition the Government for a redress of grievances." U.S. Const. amend. I. That right includes the right to access the courts, *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 896-897 (1984), and is one of the "rights essential to freedom." *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 382 (2011).

The federal respondents argue that this case should not be allowed to proceed at all because, if it were to proceed to trial, those facts bearing on national security might be decided by the district court rather than a jury. In other words, to protect *their* claimed

right to a jury trial on a limited set of facts that the government seeks to keep secret, the federal respondents argue that plaintiff-respondents' right to recover for violations of their First Amendment rights must be sacrificed instead.

Beyond the irony of making an argument that would sacrifice the constitutional rights of plaintiffs-respondents to the federal respondents' own supposed rights, the full consequence of the federal respondents' self-serving approach sweeps far more broadly. If they are right, then neither the Fourth nor the First Amendment will serve as a meaningful limitation to government power in cases where the federal government raises the specter of national security. But as this Court has recognized, a "right without a remedy is as if it were not. For every beneficial purpose it may be said not to exist." *Von Hoffman v. City of Quincy*, 71 U.S. 535, 554 (1866). Indeed, if the laws "furnish no remedy for the violation of a vested legal right," the United States would "cease to deserve" the "high appellation" of a government of laws, and not of men. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

III. An Imperfect Remedy Is Better Than No Remedy at All, and Any Burden on Seventh Amendment Rights Is Caused by, and Can Be Remedied by, the Government.

While the government has a legitimate and important interest in preserving genuine state secrets and safeguarding national security, the rights of individuals must also be safeguarded. And the best way to do that would be to recognize the Seventh Amendment right to a jury trial must yield when a jury would be unable to hear evidence bearing on the national security. But that does not equally mean the right to *any* form of trial also must yield. Indeed, it is a far less-restrictive alternative to allow a jury to hear whatever facts it can hear consistent with national security and then allow the remainder to be heard by a judge under suitable protective procedures.

1. This result is consistent with this Court's existing Seventh Amendment case law. This Court has interpreted the Seventh Amendment's "right of trial by jury" to apply to "all suits which are not of equity and admiralty jurisdiction, whatever might be the peculiar form which they may assume to settle legal rights." *Curtis v. Loether*, 415 U.S. 189, 193 (1974) (quoting *Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. (3 Pet.) 433, 447 (1830)). Though the right to a jury is unquestionably important, it is not absolute. To the contrary, the right to a jury, like other fundamental rights, can be curtailed if such curtailment survives being "scrutinized with the utmost care." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935). The right turns "on the nature of the issue to be tried rather than the character of the overall

action.” *Ross v. Bernhard*, 396 U.S. 531, 538 (1970). And one relevant consideration in determining whether a jury trial is required is “the practical abilities and limitations of juries.” *Id.* at 538 n.10.

Accordingly, this Court has already recognized some limitations to the right to a jury trial. It has held, for example, that the right “may be deprived” in “exceptional cases and for specified causes[.]” *Grand Chute v. Winegar*, 82 U.S. 373, 375 (1872). It is well established, for example, that, “gatekeeping judicial determinations prevent submission of claims to a jury’s judgment without violating the Seventh Amendment.” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 327 n.8 (2007) (citation omitted). Similarly, as the plaintiff-respondents recognize, judges can, where appropriate, grant motions for summary judgment or directed verdicts without violating the Seventh Amendment. *Fazaga BIO 33* (citations omitted). And, of course, the right can be waived. *Aetna Ins. Co. v. Kennedy to Use of Bogash*, 301 U.S. 389, 393 (1937).

Consistent with *Winegar*, lower courts have also recognized that in “exceptional” circumstances, a party may be “required to forego his constitutional right to a trial by jury.” *Local 783, Allied Indus. Workers of Am. v. Gen. Electric Co.*, 471 F.2d 751, 756 (6th Cir. 1973). The Third Circuit, for example, has held that while courts do not have “a substantial amount of discretion to deny jury trials,” some issues are so complex that “it renders the suit beyond the ability of a jury to decide by rational means with a reasonable understanding of the evidence and applicable legal rules.” *In re Japanese Elec. Prods.*

Antitrust Litig., 631 F.2d 1069, 1088 (3d Cir. 1980). Although the court held that the question whether a case is so complex as to render a jury trial inappropriate will be fact intensive, it held that “a litigant should have the opportunity to make that showing.” *Id.* at 1086.

2. This case presents a legitimate exceptional circumstance. Unlike in the *Japanese Electronic Products* case, which recognized that there may be issues that the jury was incapable of *understanding*, this case involves both those questions and questions that—for national-security reasons—the jury is incapable of *hearing*. Whatever level of discretion district courts have to deny a jury trial, their discretion should at least be broad enough to allow courts to decide limited factual issues that no party could properly present to a jury at all. To hold otherwise would be to allow the Seventh Amendment rights of the federal respondents to trump the rights of the plaintiff-respondents to present their case to a jury or even a judge as they seek to vindicate their First Amendment rights.

Instead, the Seventh Amendment, “like other rights that exist in civilized society,” should “always be exercised with reasonable regard for the conflicting rights of others.” *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 254 (1917). Thus, as Chief Justice Marshall recognized long ago, “[i]n every case of conflicting rights, each must yield something to the other.” *The Commercen*, 14 U.S. 382, 405 (1816) (opinion of Marshall, C.J.).

3. While allowing a judge to decide facts shrouded by the state-secret privilege is far from a perfect

solution, it is the only solution that would allow individuals credibly claiming violation of their constitutional rights to seek redress in the federal courts. The alternative would be to allow the government acting in the name of national security to violate rights with impunity. And while *Amicus* takes no position on the proper construction and application of FISA and its procedures, it notes that the doctrine of constitutional avoidance strongly favors as broad a reading of those procedures as possible to avoid the conclusion that there is no available means of redressing the grievances in this case. *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018) (“Under the constitutional-avoidance canon, * * * a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems.”).

Furthermore, even if this Court concludes that FISA procedures cannot reach that far, it should make clear that courts are not powerless to craft their own remedies to any conflicts between national security and the Constitution. Just as courts can seal documents or issue other protective orders, courts should be empowered to craft other potential remedies in cases like this. That could involve security-cleared counsel and/or juries, adverse evidentiary inferences where the privilege is invoked, or treating the invocation of the state-secrets doctrine as a waiver of Seventh Amendment rights imputed to the individual federal respondents with *their* remedy lying against their government employer.

In sum, courts should be able to explore all available options. Whatever the remedy, the power of

the federal judiciary to hear cases and controversies surely provides sufficient flexibility to avoid the sacrifice of numerous constitutional rights on the altar of the state-secrets doctrine and the claimed competing rights of those credibly alleged to have committed the underlying constitutional violations in the first place.

CONCLUSION

Agents of the federal government should not be able to avoid accountability for their violations of constitutional rights by hiding behind the Seventh Amendment when the government raises the state-secrets privilege. This Court should hold that where national security would preclude a jury from hearing evidence, judges may hear that evidence and decide facts related to it.

Respectfully submitted,

GENE C. SCHAERR

ERIK S. JAFFE

Counsel of Record

HANNAH C. SMITH

KATHRYN E. TARBERT

JOSHUA J. PRINCE

ANNIKA M. BOONE*

SCHAERR | JAFFE LLP

1717 K Street, NW, Suite 900

Washington, DC 20006

(202) 787-1060

ejaffe@schaerr-jaffe.com

Counsel for Amicus Curiae

September 28, 2021 *D.C. Bar application pending