

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 *AMICI CURIAE* 50 RELIGIOUS
ORGANIZATIONS IN SUPPORT OF RESPONDENTS**

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INTERESTS OF *AMICI CURIAE*¹

Amici are American religious or religiously-affiliated organizations who represent a wide array of faiths and denominations. Led by the Muslim Bar Association of New York, *amici* include congregations and houses of worship, as well as professional, civil liberties, and immigrant rights groups who work with or represent faith communities (“Religious Organizations”).

Amici are: Albuquerque Mennonite Church; American Baptist Churches of Metropolitan New York; American Friends Service Committee; Anshe Chesed; Association of Muslim American Lawyers; Buddhist Council of New York; Campus Ministry of Roman Catholic Archdiocese of New York at Hostos and Bronx Community College of City University of New York; Capital Area Muslim Bar Association; Catholic Charities, Trenton, NJ; Church Council of Greater Seattle; Church of Our Saviour/La Iglesia de Nuestro Salvador; Congregation Beit Simchat Torah; Congregation Shaarei Shamayim; East End Temple; El Paso Monthly Meeting of the Religious Society of Friends; Emgage Action; Episcopal Diocese of Long Island; Faith in New Jersey; First Congregational

¹ Pursuant to Sup. Ct. R. 37.6, counsel for *amici curiae* represent that they have authored the entirety of this brief, and that no person other than the *amici curiae* or their counsel has made a monetary contribution to the preparation or submission of this brief. All parties provided consent for *amici curiae* to file this brief.

Church of Kalamazoo; First Unitarian Church of Portland, Oregon; First Unitarian Congregational Society in Brooklyn; Franciscan Friars of the Province of St. Barbara; Global Justice Institute; Hyattsville Mennonite Church; Islamic Association of Greater Memphis; Islamic Society of Basking Ridge; Jewish Center for Justice; Maryknoll Office for Global Concerns; Memphis Islamic Center; Muslim Urban Professionals; Muslim Advocates; Muslim Bar Association of New York; Muslim Community of New Jersey, Woodbridge Township; Muslim Public Affairs Council; Muslims for Progressive Values; National Association of Muslim Lawyers; National Disaster Interfaith Network; New Jersey Muslim Lawyers Association; New York Disaster Interfaith Services; New York State Council of Churches; Oregon Interfaith Movement for Immigrant Justice; Queens Federation of Churches; Sikh Coalition; Southwest Conference United Church of Christ; St. Stephen's Episcopal Church in Boston; T'ruah: The Rabbinic Call for Human Rights; Unitarian Universalist FaithAction NJ; Unitarian Universalist Mass Action Network; Unitarian Universalist Service Committee; United Methodist Women.

SUMMARY OF ARGUMENT

Amici, religious and religiously affiliated organizations of numerous faiths and denominations, have a unique appreciation of the danger posed to disfavored religions by an overbearing government. This danger has been ever-present throughout American history, even as the identities of the

disfavored religions have changed over time. In this case, the Government targeted Muslim communities in Southern California; but at other points in our country's history, the Government has targeted other religious minorities of a variety of faiths, treating them as enemies of the state often for no reason other than their religious identities.

The First Amendment recognizes the vulnerability of religious minorities to government hostility, and enshrined broad protections of religious liberty. Congress further bolstered these protections when it enacted the Religious Freedom Restoration Act (RFRA). These legal protections are essential to vindicate the rights of religious minorities, who have long been vulnerable to governmental surveillance, discrimination, and persecution.

Respondents seek to enforce their constitutional and statutory rights after the FBI unlawfully surveilled them based solely on their religion. They assert claims for unlawful discrimination under the First Amendment and RFRA, among other causes of action. The Government, however, seeks to prevent Respondents from ever having their day in court. Invoking the state-secrets privilege, the Government asserts that this litigation involves evidence so sensitive it must be dismissed at the pleading stage—without even showing the purportedly sensitive evidence to a reviewing court.

The Government's position threatens to erode the rights of religious minorities. Application of the

state-secrets privilege, as opposed to the procedures of the Foreign Intelligence Surveillance Act (FISA), will make it substantially more difficult for religious minorities to seek legal recourse and vindicate their religious-liberty rights where, as here, they find themselves in the crosshairs of the Government solely because of their faith. Just by invoking national security, the Government could withhold key evidence without a court ever reviewing it. And according to the Government, the state-secrets privilege requires a court to dismiss the action entirely if the mere “maintenance” of the litigation threatens to disclose purportedly privileged information—again without the court ever reviewing that information and even if such information is not sought by the plaintiff. Such an outcome impinges on the role of the courts as enforcers of religious freedom, and would block religious minorities from holding overreaching government officials to account for unlawful electronic surveillance of religious minorities.

For the reasons set forth herein and in Respondents’ and other *amici*’s briefs, *amici* urge the Court to affirm the judgment of the Ninth Circuit.

ARGUMENT

I. THE FIRST AMENDMENT AND RFRA ENSHRINE PROTECTIONS FOR RELIGIOUS MINORITIES

The First Amendment, among other guarantees, provides members of religious minorities with the freedom to practice their religion without

fear of governmental interference. As this Court has long recognized, the “very purpose” of the First Amendment and the rest of the Bill of Rights was to remove “certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.” *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). The First Amendment’s Religion Clauses, in particular, were “enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility.” *Emp. Div., Dep’t of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 902–03 (1990) (O’Connor, J., concurring).

The Framers understood quite well the dangers that a government can pose to disfavored religious minorities and the importance of enshrining religious liberty into law. In the “[c]enturies immediately before and contemporaneous with the colonization of America,” government-supported persecution of religious minorities was rampant: “Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews.” *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 8–9 (1947). In fact, in what is now known as the “Great Migration,” thousands of Puritans fled to America specifically because they

feared King Charles I's unrestrained threat to religious minorities.²

Even in the new world, “many of the old world practices and persecutions” remained. *Everson*, 330 U.S. at 10. Practitioners of minority faiths “were persecuted because they steadfastly persisted in worshipping God only as their own consciences dictated.” *Id.* Indeed, Rhode Island's founder, the Protestant dissenter Roger Williams, had been banished from the Massachusetts Bay Colony for his religious views.³

But eventually, by 1791, “[f]reedom of religion was universally said to be an unalienable right” among the states.⁴ With the ratification of the First Amendment and its Free Exercise Clause, the government committed “itself to religious tolerance,” such that “upon even slight suspicion that proposals for state intervention stem[med] from animosity to religion or distrust of its practices, all officials [would] pause to remember their own high duty to the Constitution and to the rights it secures.” *Church of the Lukumi Babalu Aye, Inc. v. City of*

² New England Historical Society, *The Great Migration of Picky Puritans, 1620-40*, <http://www.newenglandhistoricalsociety.com/the-great-migration-of-picky-puritans-1620-40/>.

³ Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1424-25 (1990).

⁴ McConnell, *supra*, at 1456.

Hialeah, 508 U.S. 520, 547 (1993). In short, while the Free Exercise Clause protects the religious freedom of all, it is “specially concerned with the plight of minority religions.” *Zelman v. Simmons-Harris*, 536 U.S. 639, 679 n.4 (2002) (Thomas, J., concurring) (quoting Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1159 (1991)).

Congress enacted RFRA in 1993 to further strengthen legal protections for religious minorities. See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 706 (2014) (“RFRA was designed to provide very broad protection for religious liberty.”). The law was passed in response to the Court’s decision in *Employment Division v. Smith*, “which held that the First Amendment tolerates neutral, generally applicable laws that burden or prohibit religious acts even when the laws are unsupported by a narrowly tailored, compelling governmental interest.” *Tanzin v. Tanvir*, 141 S. Ct. 486, 489 (2020) (describing *Smith*, 494 U.S. at 885–90 and citing 42 U.S.C. § 2000bb(a)). In passing RFRA, the legislature rejected this weaker standard as incompatible with our country’s long history of safeguarding religious freedom. Congress sought “to restore the compelling interest test” applied by the Court before *Smith* and “to provide a claim or defense to persons whose religious exercise is substantially burdened by government.” 42 U.S.C. § 2000bb(b); see also *Tanzin*, 141 S. Ct. at 492 (“RFRA made clear that it was reinstating both the pre-*Smith* substantive protections of the First Amendment *and* the right to vindicate those protections by a claim.”). Indeed,

“Congress enacted RFRA in order to provide *greater protection* for religious exercise than is available under the First Amendment.” *Holt v. Hobbs*, 574 U.S. 352, 357 (2015) (emphasis added).

II. RELIGIOUS MINORITIES ARE HISTORICALLY VULNERABLE TO GOVERNMENTAL PERSECUTION AND SURVEILLANCE

Despite the protections of the First Amendment and RFRA, members of minority religious groups have been frequent targets of governmental mistreatment over the course of American history. The pernicious discrimination experienced by a diverse array of religious minorities—frequently in the name of national security—underscores the importance of ensuring that all religious groups now and in the future can enforce their legal rights against the government.

Consider, for instance, the history of Catholics in America. Even in the colonial era, “with few exceptions, Roman Catholics did not enjoy the guarantees of religious liberty that were gradually extended to other sects.”⁵ In 1741, a New York man was convicted and hanged “on the suspicion that he was a Roman Catholic priest.”⁶ The so-called “Blaine Amendment” of the nineteenth century aimed to

⁵ Walter J. Walsh, *The First Free Exercise Case*, 73 *Geo. Wash. L. Rev.* 1, 4 (2004).

⁶ *Id.* at 5.

deprive Roman Catholic schools of government funding and “were added to about three-quarters of [] state constitutions.”⁷ This Court has recognized that the Blaine Amendment was “born of bigotry and arose at a time of pervasive hostility to the Catholic Church and to Catholics in general.” *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2259 (2020) (internal quotations omitted). And as late as 1925, a Texas state court had to make clear that the Equal Protection Clause prohibited the “systematic exclusion of Catholics from grand jury service.” See *Casarez v. State*, 857 S.W.2d 779, 784 n.4 (Ct. App. Tx. 1993) (describing *Juarez v. State*, 102 Tex. Crim. 297, Crim. App. 1925).

Or consider the experience of Mormons. In 1838, Governor Lilburn Boggs of Missouri ordered that “Mormons must be treated as enemies and must be exterminated or driven from the state, if necessary, for the public good.”⁸ Days later 20 Mormons were massacred by a 250-person mob,⁹ and Mormons in Missouri and Illinois eventually needed to flee to Utah.

Jews, too, have long been the targets of harassment and persecution in the United States. A

⁷ Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 Harv. L. Rev. 155, 187–89 (2004)

⁸ Jonathan A. Wright, *Separation of Church and State* 103 (2010).

⁹ *Id.*

Rhode Island statute that “barred Jews from citizenship . . . was not abandoned until 1842.”¹⁰ And the national origins quota system, which played a major role in the United States turning away Jewish refugees fleeing the Holocaust, was designed in part to limit Jewish immigration.¹¹

Religious minorities have also regularly been the target of government surveillance. Throughout the 20th century, the FBI targeted several different minority religious groups, ranging from the congregations of the Church of God in Christ during World War I, to Jews during the Cold War, to pacifist Catholic priests during the Vietnam War.¹²

While many faiths have been singled out at different stages of U.S. history, today the American-Muslim community is at particular risk. In the long wake of the September 11, 2001 terrorist attacks, American Muslims, and those perceived to be Muslims, experienced a dramatic spike in hate crimes.¹³ And post-9/11, each successive administration has targeted members of the

¹⁰ McConnell, *supra* note 3, at 1425.

¹¹ Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A ‘Magic Mirror’ into the Heart of Darkness*, 73 Ind. L.J. 1111, 1129 (1998).

¹² See Sylvester A. Johnson and Steven Weitzman, *The FBI and Religion* 2, 9.

¹³ Craig Considine, *The Racialization of Islam in the United States: Islamophobia, Hate Crimes, and ‘Flying while Brown’*, Religions 8 (9): 165 (Aug. 26, 2017).

American-Muslim community for unwarranted surveillance and discrimination. To list a few examples:

- Under the Bush administration, the Patriot Act enabled the Department of Homeland Security (DHS) to monitor the private communications of American Muslims without a court order.¹⁴ Federal agents insisted that even “benign private communication with actors in Muslim-majority countries,” such as “sending remittances back to family or friends” or “completing the religious pilgrimage to Saudi Arabia,” could create a “suspicion of terror activity” that justified the warrantless surveillance of American Muslims.¹⁵
- President Obama’s administration initiated the “Countering Violent Extremism” (CVE) program in 2011. Although “couched in neutral terms,” this program “in practice [] focused almost exclusively on American-Muslim communities.”¹⁶ CVE empowered DHS to “strategically map[] and then tap[] informants within mosques, student

¹⁴ Khaled A. Beydoun, *Acting Muslim*, 53 Harv. C.R.-C.L. L. Rev. 1, 29 (2018).

¹⁵ *Id.* at 30.

¹⁶ Faiza Patel, Meghan Koushik, Brennan Center for Justice, *Countering Violent Extremism* (Mar. 16, 2017), <https://www.brennancenter.org/our-work/research-reports/countering-violent-extremism>.

organizations . . . and other places for religious and political discussion and gathering.”¹⁷ DHS maintained this focus notwithstanding the fact that, since the 9/11 attacks, “nearly twice as many people have been killed by white supremacists, antigovernment fanatics and other non-Muslim extremists than by radical Muslims,” as reported in the New York Times.¹⁸

- Under the Trump administration, CVE—which the President said he intended to rename the “Countering Islamic Extremism” program¹⁹—focused at least 85% of its grants on targeting minority groups, particularly Muslims.²⁰

¹⁷ Beydoun, *supra* note 14, at 35 (citation and internal quotation marks omitted).

¹⁸ Scott Shane, “Homegrown Extremists Tied to Deadlier Toll Than Jihadists in the U.S. Since 9/11,” N.Y. Times (June 24, 2015), <https://www.nytimes.com/2015/06/25/us/tally-of-attacks-in-us-challenges-perceptions-of-top-terror-threat.html>.

¹⁹ Dustin Volz, *U.S. Senators Denounce Trump Plan to Focus Counter-Extremism Program on Islam*, Reuters (Feb. 9, 2017), <https://www.reuters.com/article/us-usa-trump-extremists-program-idUSKBN15O2QT>.

²⁰ Faiza Patel, Andrew Lindsay, and Sophia DenUyl, Brennan Center for Justice, *Countering Violent Extremism in the Trump Era* (June 15, 2018), <https://www.brennancenter.org/analysis/countering-violent-extremism-trump-era>.

Just as other faith traditions have been special targets of discrimination in decades past, each new era brings with it the risk that some other religious group will be singled out for derision and disfavor. *Amici* of all faiths thus understand that if federal agents can invoke the state-secrets privilege to short circuit any claim of unlawful religious discrimination, then little stands in the way of continued surveillance and harassment of disfavored religious groups in the future.

III. THE GOVERNMENT'S INVOCATION OF THE STATE-SECRETS PRIVILEGE INFRINGES ON RELIGIOUS LIBERTY

This case directly implicates the longstanding history of an overbearing government surveilling disfavored religious minorities. Respondents allege that the FBI paid a confidential informant to infiltrate several mosques in Orange County, attend daily prayers, classes and special events, and broadly surveil other attendees, including by wearing audio and video recording devices. Pet. App. 9a-10a. As alleged, the informant's handlers "repeatedly made clear that they were interested simply in Muslims," and they directed the informant to "get as many files on this community as possible." Pet. App. 10a. Respondents assert claims for unlawful discrimination on the basis of religion, in violation of the First Amendment, RFRA, and other federal laws, in addition to claims for unlawful searches in violation of the Fourth Amendment. Pet. App. 14a. In response to these serious allegations of religious discrimination and unlawful surveillance, the Government asks the Court to reverse the decision

below and dismiss Respondents' claims at the pleading stage, based on the Government's mere invocation of the state-secrets privilege.

The Court should reject the Government's request and affirm the decision below. As the Court of Appeals explained, the state-secrets privilege enables government officials to suppress crucial evidence without a court ever reviewing it, even "alone, in chambers." *United States v. Reynolds*, 345 U.S. 1, 10 (1953); *see also* Pet. App. 39a-42a. And if the Government's position is credited, a court must *dismiss* the action entirely based simply on the Government's contention that mere "maintenance" of the lawsuit would result in disclosure of the purportedly privileged information. Pet. Br. at 5 (quoting *Totten v. United States*, 92 U.S. 105, 107 (1876)). Because of its drastic outcomes, the state-secrets privilege must be applied sparingly. *See Reynolds*, 345 U.S. at 7-8. And when Congress, in its judgment, has passed a clear alternative to the common law state-secrets privilege, that judgment must be honored. *See United States v. Texas*, 507 U.S. 529, 534 (1993). As the Court of Appeals recognized, the FISA statute provides precisely the type of detailed statutory scheme that balances the conflicting privacy and national security interests implicated by electronic surveillance. Pet. App. 46a-50a. As a consequence, FISA displaces the state-secrets privilege here, and this Court should affirm.

Holding otherwise would significantly curtail the rights of religious minorities subject to discriminatory governmental surveillance. If the

Government's position is credited, religious minorities would be denied the only avenue of civil redress for unlawful electronic surveillance. Such an outcome would be particularly troubling because electronic surveillance is cheaper and more prevalent than ever before.²¹ And government surveillance, by its very nature, is often rationalized as necessary to protect vague "national security" interests. Allegations of unlawful government surveillance of a religious minority will therefore routinely be met, as here, with a claim of "national security" and invocation of the state-secrets privilege.

The First Amendment, however, exists to protect those religious minorities that the government disfavors. "Popular religious views are easy enough to defend. It is in protecting unpopular religious beliefs that we prove this country's commitment to serving as a refuge for religious freedom." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1737 (2018) (Gorsuch, J., concurring). In particular, giving executive branch officials the power to decide whether national-security interests outweigh the rights of religious minorities is contrary to the "very purpose" of the Bill of Rights, which places freedom

²¹ See, e.g., Ali Watkins, *How the N.Y.P.D. Is Using Post-9/11 Tools on Everyday New Yorkers*, N.Y. Times (Sep. 8, 2021), <https://www.nytimes.com/2021/09/08/nyregion/nypd-9-11-police-surveillance.html>; Byron Tau, *The Business of Homeland Security Thrives in the Two Decades Since 9/11*, Wall St. J. (Sep. 6, 2021), <https://www.wsj.com/articles/9-11-triggered-a-homeland-security-industrial-complex-that-endures-11630834202>.

of worship and other religious rights “beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.” *Barnette*, 319 U.S. at 638. To be sure, religious liberty is not absolute. A government policy that impinges on religious liberty may be lawful if (and only if) it satisfies the requirements of strict scrutiny—that is, if it “advances ‘interests of the highest order’ and is narrowly tailored to achieve those interests.” *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021) (quoting *Lukumi*, 508 U.S. at 546). But whether the Government can pass strict scrutiny is for a neutral court to decide—not the very executive department that engaged in the allegedly unlawful conduct. That is the counter-majoritarian logic of the Bill of Rights in general and the First Amendment in particular.

Application of the state-secrets privilege to circumstances like those presented here would undercut enforcement of religious-liberty rights, shutting the courthouse doors to meritorious religious discrimination claims based on nothing more than the executive branch’s say-so. *Amici* respectfully request that the Court decline to do so, and instead affirm the decision below and afford Respondents the modest procedural safeguards provided by FISA.

CONCLUSION

For the reasons set forth above and in Respondents’ and other *amici*’s briefs, the Court should affirm the judgment of the Ninth Circuit.

September 28, 2021

Respectfully submitted,

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