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15
 16 **IN THE UNITED STATES DISTRICT COURT**
FOR THE NORTHERN DISTRICT OF CALIFORNIA

17
 18 **IN RE NATIONAL SECURITY**
AGENCY TELECOMMUNICATIONS
 19 **RECORDS LITIGATION**

) MDL Docket No. 06-1791 VRW
)
) **PLAINTIFFS' REPLY TO GOVERNMENT**
) **DEFENDANTS' OPPOSITION TO**
) **PLAINTIFFS' MOTION FOR PARTIAL**
) **SUMMARY JUDGMENT; PLAINTIFFS'**
) **OPPOSITION TO GOVERNMENT**
) **DEFENDANTS' FOURTH MOTION TO**
) **DISMISS AND FOR SUMMARY**
) **JUDGMENT**

20 This Document Relates Solely To:

21 *Al-Haramain Islamic Foundation, Inc., et*
al. v. Obama, et al. (C07-CV-0109-VRW)

22 **AL-HARAMAIN ISLAMIC**
FOUNDATION, INC., et al.,

23 Plaintiffs,

24 vs.

25 **BARACK H. OBAMA, President of the**
United States, et al.,

26 Defendants.

) Date: September 23, 2009
) Time: 10:00 a.m.
) Court: Courtroom 6, 17th Floor
) Honorable Vaughn R. Walker
)

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1 **INTRODUCTION**

2 At long last, the time has come for this Court to adjudicate the merits of this lawsuit and
3 confirm, in the words of lead defendant Barack H. Obama, that “[w]arrantless surveillance of
4 American citizens, in defiance of FISA, is unlawful and unconstitutional.” Charlie Savage, *Barack
5 Obama’s Q&A*, BOSTON GLOBE, Dec. 20, 2007.

6 Yet in response to plaintiffs’ arguments challenging the legality of the so-called Terrorist
7 Surveillance Program (TSP) and to the critical question this litigation presents regarding the
8 President’s purported power to disregard an Act of Congress in the name of national security,
9 defendants are silent. The Government Defendants’ Memorandum In Opposition To Plaintiffs’
10 Motion For Partial Summary Judgment And In Support Of The Government’s Fourth Motion To
11 Dismiss And For Summary Judgment (hereafter “Defs.’ Memo.”) does not respond to plaintiffs’
12 arguments on the merits. Defendants make no effort at all to advocate for the TSP’s legality. In
13 refusing to address the merits, defendants have waived any arguments they might have asserted in
14 support of the TSP. The Court is left to adjudicate the TSP’s legality based on plaintiffs’ briefing
15 and the Court’s independent analysis – which should result in a summary judgment of liability.

16 Instead of addressing the merits, defendants restrict their briefing to the issue of plaintiffs’
17 Article III standing. But defendants’ only new argument here is that the Ninth Circuit’s 2007
18 mandate to this Court forecloses an adjudication of plaintiffs’ standing on the non-classified
19 evidence presented in plaintiffs’ amended complaint. That argument disregards the controlling legal
20 standards as well as case law squarely on point, which establishes that an appellate mandate does not
21 foreclose *leave to amend* unless there is a directive to that effect.

22 Defendants largely re-hash arguments they previously asserted unsuccessfully in this Court.
23 Defendants challenge the sufficiency of the non-classified evidence to support summary judgment
24 of standing, even though this Court has already ruled that the non-classified evidence meets the
25 requisite standard of prima facie proof. Defendants argue that standing cannot be proven with
26 circumstantial evidence and reasonable inferences, even though this Court has found such proof to
27 be sufficient. And defendants make no attempt to sustain their burden, on plaintiffs’ motion for
28 partial summary judgment, of producing evidence that might rebut plaintiffs’ evidentiary showing,

1 despite the secure procedures authorized by 50 U.S.C. section 1806(f) and prescribed by this Court
2 for presenting such evidence. Instead, defendants continue to assert the state secrets privilege, even
3 though this Court has ruled that FISA preempts the privilege.

4 Thus, the evidence before this Court demonstrating plaintiffs' Article III standing is
5 undisputed. Defendants have neglected their burden on plaintiffs' motion, hoping to prevail on
6 appeal if and when the Ninth Circuit takes up the issue of FISA preemption. Under the special rules
7 for adjudicating motions for summary judgment of standing, which permit the Court to adjudicate
8 contested factual issues on such motions (that is, without holding a trial on standing), the Court can
9 decide the inferences to be drawn from plaintiffs' evidence. The stage is set for this Court to find
10 standing on the undisputed non-classified evidence and proceed to decide whether the TSP was
11 unlawful.

12 Finally, anticipating the likelihood of appellate review in this case, plaintiffs request that, in
13 addition to ruling on the sufficiency of the non-classified evidence to demonstrate plaintiffs' Article
14 III standing, the Court also rule in the alternative on whether the non-classified and classified
15 evidence *together* demonstrates plaintiffs' Article III standing – without any need to give plaintiffs'
16 counsel access to the classified evidence – so that the Ninth Circuit can resolve all standing issues
17 in a single appeal.

18 ARGUMENT

19 I. **BY FAILING TO ADDRESS PLAINTIFFS' ARGUMENTS ON THE MERITS 20 AS TO WHY THE TSP WAS UNLAWFUL, DEFENDANTS HAVE WAIVED 21 OPPOSITION TO PARTIAL SUMMARY JUDGMENT OF LIABILITY.**

22 Sometimes a litigant's brief is more significant for what it *does not* say than for what it says.
23 That is the situation here. After three and one-half years of litigation in which the government has
24 exploited multiple procedural devices to evade an adjudication on the merits, defendants say *nothing*
25 on the ultimate question now posed for decision: Was the TSP unlawful? Or, more broadly: May
26 the President of the United States disregard an Act of Congress in the name of national security?

27 Defendants' silence should come as no surprise. They would look enormously hypocritical
28 if they were now to repudiate the ringing denunciations of the TSP by President Obama, Attorney
General Holder, and an abundance of Obama appointees to the Department of Justice. *See* Plaintiffs'

1 Motion For Partial Summary Judgment at 21, 26-28, Dkt. #99 at 29, 34-36.

2 Given the present procedural posture of this case, however, that silence has consequences.
3 “[F]ailure of a party to address a claim in an opposition to a motion for summary judgment may
4 constitute a waiver of that claim.” *Foster v. City of Fresno*, 392 F.Supp.2d 1140, 1146, n. 7 (C.D.
5 Cal. 2005); *accord, e.g., Seals v. City of Lancaster*, 553 F.Supp.2d 427, 432 (E.D. Pa. 2008) (failure
6 by party opposing summary judgment to address moving party’s claims “constitutes abandonment
7 of those claims”). On this motion for partial summary judgment of liability – where plaintiffs have
8 squarely presented and argued their claims on the merits as to why the TSP was unlawful –
9 defendants’ silence regarding those claims effectively concedes them.

10 Defendants attempt to justify their silence on the ground a decision on the merits purportedly
11 would be merely advisory. *See* Defs.’ Memo. at 30-34, Dkt. #103 at 38-42. But that would be true
12 only if this Court were to find that plaintiffs lack Article III standing. If this Court finds Article III
13 standing, a decision on the merits will *not* be advisory.

14 In situations like this, where a plaintiff moves for summary judgment on both Article III
15 standing and the merits, the defendant’s normal course of action is to address both points: the
16 standing issue, hoping to prevail on that issue alone; *and* the merits issues, in the event defendant
17 does not prevail on the standing issue. A defendant who refuses to address the merits issues takes
18 a big risk – that the court will decide those issues without defendant’s input. Here, defendants have
19 elected to take that risk by foregoing any defense of the TSP. They have little choice, given the
20 positions President Obama and members of his administration have previously taken.

21 Defendants know full well what they are doing and the risk they are taking: Upon a finding
22 of Article III standing, this Court may decide the merits issues without defendants’ input and treat
23 the White Paper’s legal arguments as waived.

24 Plaintiffs have demonstrated in their summary judgment motion why the White Paper’s legal
25 arguments not only are waived but also are meritless. Since plaintiffs filed their motion, the Offices
26 of Inspectors General released their unclassified report on the TSP, which further debunks the White
27 Paper’s argument that “inherent power” authorizes the President to violate FISA. *See* OFFICES OF
28 INSPECTORS GENERAL, UNCLASSIFIED REPORT ON THE PRESIDENT’S SURVEILLANCE PROGRAM (July

1 10, 2009), Suppl. Decl. of Jon B. Eisenberg, exh. CC. The Inspectors General report reveals that the
2 initial Office of Legal Counsel (OLC) memorandum advocating for the TSP's legality, issued by
3 former Deputy Assistant Attorney General John Yoo on November 2, 2001, asserted the "inherent
4 power" argument, but in 2004 Yoo's successors at OLC concluded that Yoo's analysis was
5 fundamentally flawed. *Id.* at 11-12, exh. CC at 16-17. The report explains:

6 Yoo did not address the section of FISA that creates an explicit exemption from the
7 requirement to obtain a judicial warrant for 15 days following a congressional
8 declaration of war. See 50 U.S.C. § 1811. Yoo's successors in OLC criticized this
9 omission in Yoo's memorandum because they believed that by including this
10 provision in FISA Congress arguably had demonstrated an explicit intention to
11 restrict the government's authority to conduct electronic surveillance during wartime.

12 INSPECTORS GENERAL REPORT at 12, exh. CC at 17. The report adds that Yoo "omitted any
13 discussion of *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)," and that Justice
14 Jackson's formulation in *Youngstown* for determining the extent of presidential power "was an
15 important factor in OLC's subsequent reevaluation of Yoo's opinions." *Id.* at 13, exh. CC at 18.
16 In 2009, former OLC Principal Deputy Assistant Attorney General Steven G. Bradbury formally
17 repudiated Yoo's memorandum as "problematic and questionable" and "not supported by
18 convincing reasoning." *Id.* at 12 n. 12, exh. CC at 17 n. 12. Thus, not even Yoo's successors in the
19 Bush administration were convinced by Yoo's "inherent power" theory. Yoo stands alone and
20 discredited in asserting that theory.

21 **II. THE NINTH CIRCUIT'S MANDATE DOES NOT FORECLOSE THIS**
22 **COURT FROM ADJUDICATING PLAINTIFFS' ARTICLE III STANDING**
23 **ON THE AMENDED COMPLAINT.**

24 For all its 35 pages, defendants' memorandum includes but a single new argument: that the
25 Ninth Circuit's mandate in its decision of November 16, 2007, forecloses this Court from proceeding
26 to adjudicate plaintiffs' Article III standing on the non-classified evidence asserted in plaintiffs'
27 amended complaint. The Ninth Circuit's opinion states that, without the Sealed Document, "Al-
28 Haramain cannot establish that it has standing and its claims must be dismissed, unless FISA
preempts the state secrets privilege." *Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190,
1205 (9th Cir. 2007). Defendants contend this statement forecloses a summary judgment based on
non-classified evidence, so that "dismissal is now required." Defs.' Memo. at 16, Dkt. #103 at 24.

1 Defendants cite no legal authority for this proposition. They ignore the controlling standards
2 for determining whether an appellate mandate forecloses subsequent proceedings in the district court,
3 and they ignore case law that is squarely on point and is directly adverse to their position.

4 The controlling standards are set forth in *United States v. Kellington*, 217 F.3d 1084 (9th Cir.
5 2000): “According to the rule of mandate, although lower courts are obliged to execute the terms of
6 a mandate, they are free as to ‘anything not foreclosed by the mandate.’” *Id.* at 1092 (quoting
7 *Herrington v. County of Sonoma*, 12 F.3d 901, 904 (9th Cir. 1993)). Further, “under certain
8 circumstances, ‘[a]n order issued after remand may deviate from the mandate . . . if it is not counter
9 to the spirit of the circuit court’s decision’” *Id.* at 1093 (quoting *Lindy Pen Co. v. Bic Pen*
10 *Corp.*, 982 F.2d 1400, 1404 (9th Cir. 1993)). In construing the mandate, the lower court may
11 consider, among other things, “the procedural posture” from which the mandate arose. *Id.* “Courts
12 are often confronted with issues that were never considered by the remanding court.” *Id.* (quoting
13 *Biggins v. Hazen Paper Co.*, 111 F.3d 205, 209 (1st Cir. 1997)).

14 The question this Court must ask is: Did the Ninth Circuit consider and intend to foreclose
15 the possibility that plaintiffs could establish their Article III standing without the Sealed Document?
16 The answer is *no*. At the time of the appellate decision, nobody – not the Ninth Circuit panel, not
17 the defendants, not even the plaintiffs – had suggested that plaintiffs might try to establish their
18 Article III standing without the Sealed Document. The case was in the early procedural posture of
19 an interlocutory appeal on the question whether the state secrets privilege precluded the litigation
20 at its inception, at a time when publicly-available evidence of plaintiffs’ electronic surveillance was
21 sketchy at best. As this litigation has progressed, however, a wealth of evidence has slowly trickled
22 into the public domain, to the point where now – in contrast to the case’s posture at the time of the
23 appellate litigation – it is evident that plaintiffs can establish their Article III standing without the
24 Sealed Document. Plainly that is something the Ninth Circuit never considered – something wholly
25 outside the scope of the appellate mandate. And it is consistent with the spirit of the mandate to the
26 extent the Ninth Circuit acknowledged that “litigation can proceed . . . if the plaintiffs can prove ‘the
27 essential facts’ of their claims without resort to material touching upon military secrets.” *Al-*
28 *Haramain*, 507 F.3d at 1204 (quoting *United States v. Reynolds*, 345 U.S. 1, 11 (1953)).

1 Beyond these governing standards, moreover, the Ninth Circuit has specifically held that the
2 rule of mandate does not preclude leave to file an amended complaint unless there is a directive to
3 that effect: “Absent a mandate which explicitly directs to the contrary, a district court upon remand
4 can permit the plaintiff to ‘file additional pleadings, vary or expand the issues’” *Nguyen v.*
5 *United States*, 792 F.2d 1500, 1502 (9th Cir. 1986) (quoting *Rogers v. Hill*, 289 U.S. 582, 587-88
6 (1933); see also *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 259 (1895) (lower court was free to
7 grant plaintiff leave to amend on remand, “the case being thus left open by the opinion and mandate
8 of this court, and by the general rules of practice in equity”)). Thus, in *Nguyen*, a mandate ordering
9 entry of summary judgment for the defendant required the district court to enter summary judgment
10 but did not preclude the court from granting the plaintiff leave to file an amended complaint
11 immediately thereafter: “Absent a mandate explicitly or impliedly precluding amendment, the
12 decision whether to allow leave to amend is within the trial court’s discretion.” *Nguyen*, 792 F.2d
13 at 1503. Likewise here, the appellate mandate did not foreclose this Court from granting leave to
14 amend and proceeding accordingly, for the opinion included no directive precluding leave to amend.

15 Further, the Ninth Circuit has indicated that the rule of mandate does not require any
16 particular form of dismissal where an appellate decision mandating a dismissal does not specify its
17 form. *Cassett v. Stewart*, 406 F.3d 614, 621-22 (9th Cir. 2005) (appellate directive to dismiss
18 petition for writ of habeas corpus did not preclude dismissal *with* prejudice, for want of instruction
19 to dismiss *without* prejudice). Here, the Ninth Circuit said only that, unless FISA preempts the state
20 secrets privilege, plaintiffs’ “claims must be dismissed.” *Al-Haramain*, 507 F.3d at 1205. The court
21 never said the dismissal must be *without leave to amend*. That left this Court free to dismiss *with*
22 leave to amend – which is what the Court did.

23 Defendants’ rule of mandate argument comes late, for they are attacking this Court’s
24 judgment of July 2, 2008, that plaintiffs’ FISA claim is “DISMISSED with leave to amend.” *In re*
25 *National Security Agency Telecommunications Records Litigation*, 564 F.Supp.2d 1109, 1137 (N.D.
26 Cal. 2008). If defendants wished to challenge that judgment as precluded by the Ninth Circuit’s
27 mandate, they should have long ago sought appellate review on that basis. Their rule of mandate
28 argument, however, is as meritless now as it would have been previously.

1 **III. PLAINTIFFS HAVE SUSTAINED THEIR BURDEN ON THEIR MOTION**
2 **FOR PARTIAL SUMMARY JUDGMENT.**

3 **A. Plaintiffs' successful prima facie showing of "aggrieved person" status**
4 **on their previous motion under section 1806(f) sustains their burden on**
5 **this motion for partial summary judgment.**

6 Defendants contend that although this Court ruled on January 5, 2009, that plaintiffs' non-
7 classified evidence constitutes prima facie proof of their electronic surveillance, that evidence is
8 nevertheless insufficient to sustain plaintiffs' burden on the pending motion for partial summary
9 judgment. According to defendants, the non-classified evidence "may have been sufficient to
10 survive a motion to dismiss at the pleading stage" but "fails at the summary judgment stage." Defs.'
11 Memo. at 19, Dkt. #103 at 27.

12 Defendants seem not to fully understand the Court's ruling. The Court did indeed hold that
13 plaintiffs' evidence is sufficient to survive a motion to dismiss at the pleading stage, stating:
14 "Plaintiffs have alleged sufficient facts to withstand the government's motion to dismiss." *In re*
15 *National Security Agency Telecommunications Litigation*, 595 F.Supp.2d 1077, 1085 (N.D. Cal.
16 2009). But that is not all the Court held. In addition to ruling on defendants' third dismissal motion,
17 the Court *also* ruled on plaintiffs' motion for an adjudication of their "aggrieved person" status under
18 section 1806(f) – first determining that plaintiffs were required to establish a "prima facie case"
19 demonstrating their aggrieved person status, 595 F.Supp.2d at 1084, and then finding that the
20 "showing" plaintiffs made on their section 1806(f) motion was "legally sufficient" to constitute the
21 required prima facie case, 595 F.Supp.2d at 1086.

22 Thus, the Court did not merely hold that the *allegations* in plaintiffs' amended complaint are
23 sufficient to survive a dismissal motion; the Court *also* held that the *evidence* presented on plaintiffs'
24 1806(f) motion constitutes *prima facie evidence* that they were subjected to electronic surveillance.
25 The latter holding is critical to the pending motion for partial summary judgment, because plaintiffs'
26 burden on that motion is identical to their burden on the 1806(f) motion – to establish a prima facie
27 case. *See F.T.C. v. Gill*, 265 F.3d 944, 954 (9th Cir. 2001) (plaintiff's burden is to establish "a prima
28 facie case for summary judgment"). Because plaintiffs have presented prima facie proof of their
 electronic surveillance on the 1806(f) motion, they necessarily have sustained their burden of proving

1 electronic surveillance on their motion for partial summary judgment.

2 As for the prima facie sufficiency of the non-classified evidence, defendants largely re-hash
3 their previous arguments on plaintiffs' 1806(f) motion that a finding of Article III standing cannot
4 be based on circumstantial evidence and inferences. *See* Defs.' Memo. at 19-26, Dkt. #103 at 27-34.
5 Plaintiffs have previously, on their 1806(f) motion, apprised the Court of the legal authorities
6 establishing that the required showing *can* be made with circumstantial evidence and inferences. *See*
7 Motion Pursuant To 50 U.S.C. § 1806(f) To Discover Or Obtain Material Relating To Electronic
8 Surveillance at 14-15, Dkt. # 46 at 21-22. The point need not be revisited in this reply
9 memorandum. Suffice it to say that this Court has already rejected defendants' previous arguments
10 by finding the non-classified evidence sufficient to make the required prima facie case. *See In re*
11 *National Security Agency Telecommunications Litigation*, 595 F.Supp.2d at 1086.

12 **B. The Court may, on the competing cross-motions for summary judgment,**
13 **determine the inferences to be drawn from plaintiffs' undisputed**
14 **evidence.**

15 Defendants say that, on plaintiffs' motion for partial summary judgment, this Court must
16 draw all reasonable inferences in favor of defendants as the non-moving parties. *See* Defs.' Memo.
17 at 26, Dkt. #103 at 34. Defendants do not, however, identify any reasonable inferences that could
18 be drawn from plaintiffs' evidence *other* than the fact of their warrantless electronic surveillance.
19 Defendants insist that plaintiffs might have been surveilled "under authority of the FISA itself" or
20 by "foreign or human sources" or by "surveillance undertaken overseas," Defs.' Memo. at 21, Dkt.
21 #103 at 29, but defendants do not explain how such facts could possibly be inferred from plaintiffs'
22 evidence or how such inferences could be reasonable. That is because nothing about plaintiffs'
23 evidence even remotely suggests that defendants had a FISA warrant for plaintiffs' electronic
24 surveillance or that defendants surveilled plaintiffs through means outside FISA's scope. To the
25 contrary, plaintiffs' evidence points unerringly toward their warrantless electronic surveillance in
26 violation of FISA. Defendants have had ample opportunity to submit evidence of their own from
27 which reasonable inferences in their favor might be drawn, pursuant to their obligation under Federal
28 Rule of Civil Procedure 56(e)(2) to present facts showing a genuine issue for trial, but defendants
have chosen not to submit any evidence.

1 Moreover, defendants seem to forget that *they too* have moved for summary judgment on the
2 issue of Article III standing. Case law tells us that, on *their* motion, this Court must draw all
3 reasonable inferences in favor of *plaintiffs*. See, e.g., *Rawoof v. Texor Petroleum Co., Inc.*, 521 F.3d
4 750, 755 (7th Cir. 2008) (on defendants’ summary judgment motion for lack of standing, courts
5 “construe all facts and inferences drawn from them in the light most favorable to the nonmoving
6 party”); *Rome Ambulatory Surgical Center, LLC v. Rome Memorial Hospital, Inc.*, 349 F.Supp.2d
7 389, 405-06 (N.D.N.Y. 2004) (summary judgment motion based on lack of standing denied because
8 “[p]laintiff has set forth sufficient facts to allow a fact finder a reasonable inference” of the elements
9 of standing). Thus, even if reasonable inferences from plaintiffs’ evidence could be drawn not only
10 in plaintiffs’ favor but also in defendants’ favor (which plaintiffs do not concede), defendants would
11 not be entitled to summary judgment.

12 Outside the context of Article III standing, the possibility of conflicting inferences on cross-
13 motions for summary judgment requires both motions to be denied, in favor of a trial. But motions
14 for summary judgment of Article III standing are different: Instead of holding a trial on standing, the
15 district court may decide contested factual issues on the summary judgment motion, holding an
16 evidentiary hearing if necessary to resolve disputes between “warring affidavits” by assessing
17 witness credibility on live testimony. See *Bischoff v. Osceola County, Fla.*, 222 F.3d 874, 878-81
18 (11th Cir. 2000). Thus, in the present case, this Court may decide now, on the competing cross-
19 motions for summary judgment, the inferences to be drawn from plaintiffs’ evidence. See *United*
20 *States v. Jennings*, 726 F.2d 189, 190 (5th Cir. 1984) (“To the trial court as trier of fact is entrusted
21 the function of selecting from among conflicting inferences as to which reasonable minds could
22 differ.”). And because there are no “warring affidavits” here – defendants having elected to present
23 no evidence, so that plaintiffs’ evidence is undisputed – no credibility findings are necessary, and
24 thus no evidentiary hearing is necessary. Cf. *Bischoff*, 222 F.3d at 881 (evidentiary hearing necessary
25 because evidence required credibility findings). This Court may draw the inferences it deems
26 appropriate and decide *now* whether plaintiffs have Article III standing.

27 //

28 //

1 **C. For the Ninth Circuit's benefit, this Court should rule in the alternative**
2 **on whether the classified and non-classified evidence together**
3 **demonstrates plaintiffs' Article III standing.**

4 Plainly this case is not destined to end at the district court level. If this Court finds Article
5 III standing, defendants will certainly contend in the Ninth Circuit that plaintiffs' non-classified
6 evidence is insufficient to support that finding. The Ninth Circuit would benefit from an alternative
7 ruling by this Court as to whether the non-classified evidence *plus* the classified evidence (including
8 the Sealed Document) *together* demonstrates standing. That way, in the unlikely event the Ninth
9 Circuit finds the non-classified evidence insufficient, the appellate court can resolve all standing
10 issues in a single appeal, without any need for remand to this Court to decide the sufficiency of the
11 combined non-classified and classified evidence and then another trip to the Ninth Circuit.

12 This Court can make that alternative ruling without giving plaintiffs' counsel access to the
13 classified evidence, and thus without re-entering the legal thicket that defendants have created with
14 their strident resistance to further proceedings under section 1806(f). Plaintiffs have previously
15 advised the Court that they are agreeable to the Court adjudicating Article III standing based on the
16 classified evidence, without giving plaintiffs' counsel access to that evidence under section 1806(f).
17 *See Plaintiffs' Opposition To Defendants' Third Motion To Dismiss Or, In The Alternative, For*
18 *Summary Judgment at 21-22, Dkt. #50 at 30-31.* Plaintiffs now reiterate that position with regard
19 to their motion for partial summary judgment (but not otherwise). Defendants cannot reasonably
20 object to this approach, in light of the Court's advisement in the order of April 17, 2009, that the
21 Court has now reviewed the Sealed Document, *see Dkt. #84 at 1*, so that the Court is now well-
22 positioned to determine whether the non-classified evidence, the Sealed Document, and the other
23 classified filings demonstrate standing.

24 **IV. DEFENDANTS HAVE FAILED TO SUSTAIN THEIR BURDEN ON**
25 **PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT.**

26 **A. This Court's ruling on FISA preemption precludes defendants' assertion**
27 **of the state secrets privilege as a basis for evading their burden on**
28 **plaintiffs' motion.**

 Instead of attempting to meet their burden under Rule 56(e)(2) to present facts showing a
 genuine issue for trial, defendants have chosen to stake everything on their assertion – yet again –

1 of the state secrets privilege, arguing that the privilege relieves them of the obligation to sustain that
2 burden. *See* Defs.’ Memo. at 26-27, Dkt. #103 at 34-35. Of course, this Court has already ruled that
3 FISA *preempts* the state secrets privilege, which disposes of defendants’ assertion of the privilege.
4 Defendants nevertheless contend that because this Court has not continued to proceed under section
5 1806(f), the state secrets privilege applies after all, and requires dismissal, because “the case is not
6 proceeding under the FISA at this juncture.” Defs.’ Memo. at 13, Dkt. #103 at 21. That is nonsense.
7 The case is indeed “proceeding under the FISA” – specifically, under FISA’s civil liability provisions
8 as set forth in 50 U.S.C. section 1810.

9 Defendants theorize that because this Court has said specifically that section 1806(f) “applies
10 to preempt” the state secrets privilege, *see In re National Security Agency Telecommunications*
11 *Records Litigation*, 564 F.Supp.2d at 1119, there is no FISA preemption here unless the Court
12 continues to proceed under section 1806(f). *See* Defs.’ Memo. at 15-16, Dkt.#103 at 23-24. That
13 is just more nonsense. The Court held that FISA preemption is accomplished by the statutory
14 *exclusivity* provision making FISA “the exclusive means for foreign intelligence surveillance
15 activities,” which “limits the power of the executive branch to conduct such activities” and “*limits*
16 *the executive branch’s authority to assert the state secrets privilege* in response to challenges to the
17 legality of its foreign intelligence surveillance activities.” *In re National Security Agency*
18 *Telecommunications Records Litigation*, 564 F.Supp.2d at 1121 (emphasis added). FISA
19 preemption occurs by virtue of FISA’s exclusivity. It does not happen only when a litigant actually
20 invokes the particular provisions of section 1806(f) replacing the state secrets privilege. To say FISA
21 does not preempt the state secrets privilege until a party proceeds under section 1806(f) is like saying
22 there is no First Amendment right to free speech until one speaks.^{1/}

23 This Court has taken the state secrets privilege out of this case, not only by finding FISA
24 preemption, but also by proceeding solely on non-classified evidence. Defendants continue to
25

26
27
28 ^{1/} And if this Court were to conclude that FISA preemption depends on proceeding under
section 1806(f), then plaintiffs would ask the Court to resume doing so.

1 protest that an adjudication of plaintiffs' Article III standing "would reveal intelligence sources and
2 methods," Defs.' Memo. at 29, Dkt. #103 at 37, but the Court's decision to litigate plaintiffs' Article
3 III standing based on non-classified evidence eliminates the danger of revealing intelligence sources
4 and methods. The public information on which plaintiffs rely to establish their standing is just that
5 – *public information*. To whatever extent that information might reveal anything about intelligence
6 sources and methods, it has *already been disclosed*, by the government itself. And even if the Court
7 rules in the alternative that the classified and non-classified evidence together demonstrates standing,
8 *see supra* at 10, that ruling can occur without public disclosure of the classified evidence, with the
9 Court placing portions of its ruling under seal as contemplated by the order of January 5, 2009. *See*
10 *In re National Security Agency Telecommunications Records Litigation*, 595 F.Supp.2d at 1089. All
11 plaintiffs ask is for this Court to adjudicate the mere fact of their warrantless electronic surveillance,
12 which says nothing about intelligence sources and methods that the government has not already
13 disclosed.

14 Defendants insist that they are not asserting the state secrets privilege "to cover-up alleged
15 unlawful conduct." Defs. Memo. at 29, Dkt. #103 at 37. Their counsel's own colleagues at the
16 Department of Justice think otherwise. On September 16, 2008, seven law professors presented a
17 joint statement to Congress saying: "In recent years, the Executive Branch has increasingly used [the
18 state secrets] privilege as a categorical bar to litigation and *as a shield to avoid scrutiny of legally*
19 *questionable executive programs*, such as the Terrorist Surveillance Program" – citing the Ninth
20 Circuit's opinion in this very case. *Restoring the "Rule of Law": Hearing Before the S. Comm. On*
21 *the Judiciary, Subcomm. On the Constitution*, 110th Cong. 6-7 (Sept. 16, 2008) (joint statement of
22 David J. Barron et al.) (emphasis added); *see* Suppl. Decl. of Jon B. Eisenberg, exh. DD at 52-53.
23 Among the signatories to this statement are: David J. Barron, who is now Principal Deputy at the
24 DOJ's Office of Legal Counsel; Martin S. Lederman, who is now Deputy Assistant Attorney General
25 at the Office of Legal Counsel; and Dawn E. Johnsen, who is President Obama's nominee to head
26 the Office of Legal Counsel. *See id.*, exh. DD at 46. Given the belief of top officials at President
27 Obama's DOJ that the assertion of the state secrets privilege in this very case has been designed to
28

1 cover up unlawful conduct, this Court should look askance at defendants' protest to the contrary.^{2/}

2 **B. Defendants have the burden of producing evidence of a FISA warrant**
3 **and have failed to sustain that burden.**

4 Defendants challenge the proposition that they have the burden of proving the existence of
5 a FISA warrant as a matter within their exclusive knowledge. *See* Defs.' Memo. at 26-29, Dkt. #103
6 at 34-37. Defendants wrongly assume, however, that plaintiffs cannot establish the absence of a
7 FISA warrant without such burden-shifting. As explained in plaintiffs' motion for partial summary
8 judgment, plaintiffs do not rely solely on exclusive-knowledge burden-shifting to prevail on the issue
9 whether their electronic surveillance was warrantless. The charge that plaintiffs have links to al-
10 Qaeda puts them squarely within the scope of the *warrantless* TSP, raising the reasonable inference
11 that their electronic surveillance was warrantless – so that, under the normal rules for summary
12 judgment motions, the burden shifts to defendants to produce evidence of a FISA warrant. *See*
13 Plaintiffs Motion For Partial Summary Judgment at 10, 15, Dkt. #99 at 18, 23. Plaintiffs do not need
14 exclusive-knowledge burden-shifting unless this Court decides not to draw from plaintiffs' evidence
15 the inference that defendants had no FISA warrant.

16 Moreover, defendants are wrong about application of the burden of producing evidence
17 within their exclusive knowledge. Defendants contend exclusive-knowledge burden-shifting as
18 discussed in *Schaffer v. Weast*, 546 U.S. 49 (2005), is restricted to the burden of persuasion and does
19 not encompass the burden of producing evidence where Article III standing is concerned. *See* Defs.'
20

21
22 ^{2/} In addition to the gradual public disclosure of non-classified evidence of plaintiffs' electronic
23 surveillance, something else of note has happened since the Ninth Circuit proceedings: On February
24 27, 2009, defendants filed classified declarations with this Court purporting to "address an
25 inaccuracy contained in a prior submission by the Government, the details of which involve
26 classified information that cannot be set forth on the public record." Government Defendants'
27 Report On Declassification Review at 2, Doc. #78 at 2. This "inaccuracy" remains a mystery to
28 plaintiffs, who have not yet had access to those classified filings. But if the inaccuracy amounts to
a *misrepresentation*, the Court should find that defendants have forfeited judicial deference to their
assertion of the state secrets privilege. *See Horn v. Huddle*, ___ F.Supp.2d ___, ___ (2009 WL
2144131 at *4) (D.D.C. July 16, 2009) (court refuses to give "a high degree of deference" to
assertion of state secrets privilege because of government's "prior misrepresentations regarding the
state secrets privilege in this case").

1 Memo. at 27 n. 18, Dkt.#103 at 35 n. 18. But in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561
2 (1992), which *Schaffer* cited as applying “the ordinary default rule” to which there is an exception
3 for matters within a party’s exclusive knowledge, *see Schaffer*, 546 U.S. at 57-58, the issue was
4 Article III standing and the Supreme Court was speaking of the burden of producing evidence, not
5 the burden of persuasion. For both burdens, the rule of burden-shifting applies for matters within
6 a party’s exclusive knowledge, even where Article III standing is concerned.

7 There are two separate and independent reasons why defendants have the burden of
8 producing evidence of a FISA warrant: Rule 56(e)(2) burden-shifting, and exclusive-knowledge
9 burden-shifting. Defendants have made no effort to sustain that burden – undoubtedly because they
10 cannot. Their opposition to partial summary judgment is bereft of supporting evidence, classified
11 or non-classified. Having failed to sustain their burden, they effectively concede summary judgment
12 of Article III standing.

13 **C. Defendants have chosen to forego the opportunity to present evidence**
14 **under the secure procedures authorized by section 1806(f).**

15 Defendants insist they should not be required to produce classified evidence in their defense
16 *at the risk of its public disclosure*. *See* Defs.’ Memo. at 26-27, Dkt. #103 at 34-35. But as this Court
17 concluded in its decision of January 5, 2009, the provisions of section 1806(f) enable defendants to
18 produce classified evidence under secure conditions that guard against any public disclosure or harm
19 to national security. *In re National Security Agency Telecommunications Records Litigation*, 595
20 F.Supp.2d at 1089 (prescribing procedures under section 1806(f) for the purpose of “protecting
21 classified evidence from disclosure and enabling plaintiffs to prosecute their action”); *see also Horn*
22 *v. Huddle*, ___ F.Supp.2d at ___ & n. 12 (2009 WL 2144131 at *6, *7) (citing this Court’s decision
23 of January 5, 2009, as support for adopting protective measures “to prevent unauthorized disclosures
24 of classified information”). This Court provided assurance against public disclosure of classified
25 evidence or harm to national security when ordering, on June 5, 2009, that “[i]f defendants rely upon
26 the Sealed Document or other classified evidence in response” to plaintiffs’ motion for partial
27 summary judgment, “the court will enter a protective order and produce such classified evidence to
28 those of plaintiffs’ counsel who have obtained top secret/sensitive compartmented information

1 clearances.” Dkt. # 96 at 2. Defendants, however, have expressly chosen *not* to produce classified
2 evidence pursuant to section 1806(f), despite this Court’s assurances against public disclosure or
3 harm to national security. *See* Defs.’ Memo. at 16, Dkt. #103 at 24.

4 Again, defendants’ choice – here, to forego the protections of section 1806(f) – has
5 consequences: Having elected not to present any evidence under section 1806(f) that might rebut
6 plaintiffs’ prima facie showing of Article III standing, defendants have effectively conceded the
7 evidentiary issues pertaining to standing.

8 **V. THE COURT HAS ALREADY REJECTED DEFENDANTS’ REMAINING**
9 **ARGUMENTS ON ARTICLE III STANDING.**

10 Defendants’ remaining arguments on Article III standing consist of yet more re-hashing of
11 points that have already been litigated in plaintiffs’ favor. Plaintiffs see no need to contribute further
12 to the re-hashing, but simply provide a roadmap of the parties’ previous competing arguments and
13 this Court’s prior rulings:

14 • Defendants repeat their claim that the TSP’s purported termination precludes
15 prospective relief here. *See* Defs.’ Memo. at 10-11, Dkt. #103 at 18-19. The Court rejected that
16 claim in the order of July 2, 2008. *See In re National Security Agency Telecommunications Records*
17 *Litigation*, 564 F.Supp.2d at 1124.

18 • Defendants repeat their assertion of sovereign immunity from claims for damages
19 under section 1810. *See* Defs.’ Memo. at 12, Dkt. #103 at 20. The Court rejected that assertion, too,
20 in the order of July 2, 2008. *See In re National Security Agency Telecommunications Records*
21 *Litigation*, 564 F.Supp.2d at 1124-25.

22 • Defendants repeat various claims why plaintiffs’ non-classified evidence does not
23 raise the inference of warrantless electronic surveillance, including arguments about interception of
24 telephonic communications on a wire in the United States, prior terrorist designations of overseas
25 branches of Saudi Arabia-based Al-Haramain Islamic Foundation, FBI Deputy Director John S.
26 Pistole’s public confirmation that the FBI used surveillance in the 2004 investigation of plaintiff Al-
27 Haramain, and Mr. Coppolino’s 2006 comment about TSP surveillance of “attorneys who represent
28 terrorist clients.” *See* Defs.’ Memo. at 21-25, Dkt. #103 at 29-33. Plaintiffs addressed these claims

1 in Plaintiffs' Opposition To Defendants' Third Motion To Dismiss Or, In The Alternative, For
2 Summary Judgment at 9-14, Dkt. #50 at 18-23, after which this Court found, in the order of January
3 5, 2009, that plaintiffs' "showing" is "legally sufficient" to make their prima facie case. *In re*
4 *National Security Agency Telecommunications Litigation*, 595 F.Supp.2d at 1086.

5 • Defendants repeat their quotation of comments by plaintiffs' counsel during oral
6 argument in 2006 before the Oregon district court, which defendants claim amounted to a concession
7 of inability to demonstrate Article III standing. *See* Defs.' Memo. at 28-29 n. 20, Dkt. #103 at 36-37
8 n. 20. Plaintiffs addressed this claim – and the fact that those 2006 comments have since been
9 eclipsed by the disclosure of non-classified evidence demonstrating plaintiffs' Article III standing
10 – in Plaintiffs' Reply To Defendants' Opposition To Motion Pursuant To 50 U.S.C. § 1806(f) To
11 Discover Or Obtain Material Relating To Electronic Surveillance at 10, Dkt. 515 at 15. The Court
12 did not even deem this point worthy of mention in the Court's rulings.

13 **VI. THE COURT SHOULD NOT GRANT DEFENDANTS' FOURTH MOTION**
14 **TO DISMISS AND FOR SUMMARY JUDGMENT WITHOUT GIVING**
15 **PLAINTIFFS' COUNSEL ACCESS TO THE CLASSIFIED FILINGS UNDER**
16 **SECTION 1806(f).**

17 Finally, plaintiffs address the Government Defendants' Fourth Motion To Dismiss And For
18 Summary Judgment. There is nothing new here, either. With the exception of defendants' meritless
19 rule of mandate argument, the motion is the same re-hash of defendants' previously unsuccessful
20 arguments, which no more require dismissal or summary judgment for defendants than they preclude
21 partial summary judgment for plaintiffs. Having failed to present any evidence to support their
22 motion, defendants are not entitled to dismissal or summary judgment.

23 One additional point, however, requires comment. Defendants posit that if this Court finds
24 the non-classified evidence insufficient to establish Article III standing, the Court must dismiss the
25 action forthwith. That is not correct. For the time being, pending the Court's assessment of the non-
26 classified evidence on the parties' competing summary judgment motions, the Court has held in
27 abeyance further proceedings under section 1806(f) as prescribed in the Court's order of January 5,
28 2009, which indicated that plaintiffs' counsel might subsequently be given access to the classified
filings in this case under secure conditions as authorized by section 1806(f). *See In re National*

1 *Security Agency Telecommunications Records Litigation*, 595 F.Supp.2d at 1089-90. If the Court
2 were to find the non-classified evidence insufficient to establish Article III standing (and did not rule
3 in the alternative on whether the classified and non-classified evidence together demonstrates Article
4 III standing, *see supra* at 10), the next appropriate step would be for the Court to resume proceedings
5 on plaintiffs' successful motion under section 1806(f) and afford plaintiffs the opportunity to use the
6 classified filings to demonstrate their Article III standing.^{3/}

7 **CONCLUSION**

8 For the foregoing reasons and for those set forth in Plaintiffs' Motion For Partial Summary
9 Judgment, this Court should grant a partial summary judgment of plaintiffs' Article III standing and
10 defendants' liability under 50 U.S.C. section 1810 and should deny the Government Defendants'
11 Fourth Motion To Dismiss And For Summary Judgment.

12 DATED this 8th day of September, 2009

13 /s/ Jon B. Eisenberg

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22 Foundation, Inc., Wendell Belew, and Asim
23 Ghafoor**

24 _____
25
26 ^{3/} One of the issues regarding further proceedings under section 1806(f) is whether this Court
27 may decide whether plaintiffs' counsel have a "need to know" information in the classified filings
28 in this case. Plaintiffs supplied the Court with pertinent legal authorities on that issue in Plaintiffs'
Supplemental Case Management Statement at 2-6, Dkt. #72 at 3-7. Since that filing, Chief Judge
Royce L. Lamberth of the United States District Court for the District of Columbia (a former
Presiding Judge of the Foreign Intelligence Surveillance Court) has determined that a district judge
may decide whether counsel who have been favorably adjudicated for access to classified
information have a "need to know" the information within the context of pending litigation. *Horn*
v. Huddle, ___ F.Supp.2d ___, ___ (2009 WL 2610100 at *7-*8 & n. 18) (D.C.Cir. Aug. 26, 2009)
("The deference generally granted the Executive Branch in matters of classification and national
security must yield when the Executive attempts to exert control over the courtroom.").