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11 **UNITED STATES DISTRICT COURT**
 12 **NORTHERN DISTRICT OF CALIFORNIA**

14	IN RE NATIONAL SECURITY AGENCY)	No. M:06-CV-01791-VRW
15	TELECOMMUNICATIONS RECORDS	)	DEFENDANTS' NOTICE OF MOTION
16	LITIGATION	)	AND THIRD MOTION TO DISMISS
17	<u>This Document Solely Relates To:</u>	)	OR, IN THE ALTERNATIVE, FOR
18	<i>Al-Haramain Islamic Foundation et al.</i>	)	SUMMARY JUDGMENT IN
19	<i>v. Bush, et al.</i> (07-CV-109-VRW)	)	<i>Al-Haramain Islamic Foundation et al.</i>
20		)	<i>v. Bush et al.</i>
21		)	Date: December 2, 2008
22		)	Time: 10:00 a.m.
23		)	Courtroom: 6, 17 th Floor
24		)	Honorable Vaughn R. Walker

21 PLEASE TAKE NOTICE that on December 2, 2008 at 10:00 a.m., before Chief Judge
 22 Vaughn R. Walker, the Government Defendants will move, pursuant to Rules 12(b)(1) and 56 of
 23 the Federal Rules of Civil Procedure, for dismissal of plaintiffs' First Amended Complaint
 24 ("FAC"), *see* Dkt. 35 (07-cv-109-VRW), or, in the alternative, for summary judgment. The
 25 Government Defendants seek dismissal of the First Amended Complaint or summary judgment
 26 in their favor for all the reasons set forth in the instant motions and accompanying memorandum
 27 of law in support thereof, as well as the additional reasons on which they have previously sought

28 **Government Defendants' Third Motion to Dismiss or, in the alternative, for Summary Judgment**
Al-Haramain v. Bush (07-cv-109-VRW) (MDL 06-cv-1791-VRW)

1 dismissal and summary judgment in this case.

2 First, assuming, *arguendo*, Section 1806(f) of the FISA is applicable to consider
3 plaintiffs' claims set forth in the First Amended Complaint, the Government Defendants are now
4 entitled to summary judgment on the grounds that the evidence set forth in plaintiffs' First
5 Amended Complaint fails to establish that the plaintiffs are "aggrieved persons" as defined in the
6 FISA and, thus, that plaintiffs have standing to adjudicate any claim under Section 1806(f).

7 In addition, as set forth in the Government's first motion to dismiss or for summary
8 judgment, the Government's successful assertion of the state secrets privilege in this case
9 requires dismissal of all the claims in the FAC, or summary judgment for the Government
10 Defendants, on the ground that the plaintiffs cannot establish their standing, *see Al-Haramain*
11 *Islamic Found. v. Bush*, 507 F.3d 1190, 1201-05 (9th Cir. 2007), and because the facts otherwise
12 needed to adjudicate this case are excluded by the Government's privilege assertion. In addition,
13 as set forth on remand in the Government's second motion to dismiss or for summary judgment,
14 the Foreign Intelligence Surveillance Act does not preempt the Government's state secrets
15 privilege assertion upheld by the Ninth Circuit and, specifically, Section 1806(f) of the FISA, 50
16 U.S.C. § 1806(f), neither preempts the state secrets privilege nor applies in this case.

17 Accordingly, all claims in the FAC should be dismissed in accord with the Ninth Circuit's
18 decision that the state secrets privilege precludes plaintiffs from establishing their standing. In
19 addition, plaintiffs lack standing to obtain prospective declaratory or injunctive relief with
20 respect to alleged warrantless surveillance under the Terrorist Surveillance Program, which
21 lapsed in January 2007, and the Court lacks jurisdiction to review plaintiffs' claim for
22 retrospective damages against the United States, brought under 50 U.S.C. § 1810, because
23 Section 1810 does not expressly waive the sovereign immunity of the United States for this
24 claim. All of the foregoing grounds for dismissal of this case, or the entry of summary judgment
25 for the Government Defendants, previously raised in this case continue to apply with respect to
26 the First Amended Complaint.

27 This motion is supported by the accompanying Memorandum of Points and Authorities in

1 Support of the Government Defendants' Third Motion to Dismiss or for Summary Judgment as
2 well as by all prior submissions by the Government's in support of its first and second motions to
3 dismiss or for summary judgment, including: (i) Defendants' Motion to Dismiss or, in the
4 Alternative, for Summary Judgment in light of the United States' Assertion of the Military and
5 State Secrets Privilege (*see* Dkt. 59, Case No. 06-274-KI (D. Or. June 21, 2006)) and Reply in
6 support of that motion (*see* Dkt. 67, Case No. 06-274-KI (D. Or. July 25, 2006)); and
7 (ii) Defendants' Second Motion to Dismiss or, in the Alternative, for Summary Judgment (*see*
8 Dkt. 17, Case No. 07-109-VRW (N.D. Cal. Mar. 14, 2008)) and Reply in support of that motion
9 (*see* Dkt. 29, Case No. 07-109-VRW (N.D. Cal. Apr. 14, 2008)).

10 Dated: September 30, 2008

Respectfully Submitted,

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12 **UNITED STATES DISTRICT COURT**
13 **NORTHERN DISTRICT OF CALIFORNIA**

14 IN RE NATIONAL SECURITY AGENCY) No. M:06-CV-01791-VRW
15 TELECOMMUNICATIONS RECORDS)
LITIGATION) **DEFENDANTS' THIRD MOTION TO**
16 **DISMISS OR, IN THE ALTERNATIVE,**
This Document Solely Relates To:) **FOR SUMMARY JUDGMENT IN**
17 *Al-Haramain Islamic Foundation et al.*) *Al-Haramain Islamic Foundation et al.*
v. Bush, et al. (07-CV-109-VRW)) *v. Bush et al.*
18 Date: December 2, 2008
19 Time: 10:00 a.m.
20 Courtroom: 6, 17th Floor
Honorable Vaughn R. Walker

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INTRODUCTION

1 This is the Government Defendant's^{1/} third motion to dismiss or for summary judgment
2 since this case was filed in February 2006. Plaintiffs, the Al-Haramain Islamic Foundation of
3 Oregon and two lawyers associated with it, allege that they were subject to warrantless
4 surveillance authorized by the President after the 9/11 attacks under a program that was referred
5 to as the Terrorist Surveillance Program ("TSP"). Pursuant to the Court's July 2 Order in this
6 case,^{2/} this motion primarily addresses whether the evidence presented by plaintiffs in their First
7 Amended Complaint ("FAC") establishes that they are "aggrieved persons" under the Foreign
8 Intelligence Surveillance Act ("FISA")—*i.e.*, the "target of an electronic surveillance" or persons
9 "whose communications or activities were subject to electronic surveillance," *see* 50 U.S.C. §
10 1801(k)— and, thus, have standing to utilize the special procedures set forth in Section 1806(f)
11 of the FISA, *see id.* § 1806(f), to challenge the alleged warrantless surveillance.

12 As set forth below, nothing in the First Amended Complaint comes close to establishing
13 that plaintiffs are "aggrieved persons" under the FISA and thus have standing to proceed under
14 Section 1806(f) to litigate any claim. Plaintiffs offer nothing but speculation and unfounded
15 inferences drawn from facts on the public record that do not remotely demonstrate that any of the
16 plaintiffs has been subject to the alleged warrantless surveillance they challenge. The mere fact
17 that the President authorized the Terrorist Surveillance Program, or that the Government has
18 investigated terrorist financing by charitable organizations like the Al-Haramain Islamic
19 Foundation of Saudi Arabia and its worldwide branches, or that plaintiff Al-Haramain Islamic
20 Foundation of Oregon had been designated as Specially Designated Global Terrorist or, indeed,
21 that this designation had been supported by "classified" "intelligence" or "surveillance"
22 information, does not establish that the *plaintiffs* were targeted by or subject to the alleged
23

24 ¹ This motion is brought on behalf of the Government Defendants sued in their official
25 capacity (hereafter "Defendants" or "Government Defendants"). The response of the one
26 defendant sued in his personal capacity (FBI Director Mueller) to the First Amended Complaint
has been deferred by stipulation, *see* Dkt. 461 (07-cv-1791-VRW).

27 ² *See* Dkt. 35 (07-cv-109-VRW). The Court's decision is published at *Al-Haramain*
28 *Islamic Found. v. Bush*, 564 F. Supp. 2d 1109 (N.D. Cal. July 2, 2008).

1 warrantless surveillance they challenge in their complaint. At most, plaintiffs' evidence would
2 support a finding that *some* classified intelligence information obtained through *some* form of
3 surveillance of *some* persons under *some* authority may have contributed to the designation of
4 Al-Haramain Oregon. But nothing in the complaint establishes the communications of these
5 plaintiffs were intercepted, or if they were, that they were intercepted through electronic
6 surveillance on a wire in the United States under the TSP without a warrant in violation of the
7 FISA. Plaintiffs simply stitch together their own inferences drawn from certain public facts to
8 support their pre-determined conclusion, but have not established (and, indeed cannot establish)
9 that what they allege has in fact occurred.

10 This fundamental problem does not relate to the mere sufficiency of plaintiffs'
11 allegations; rather, plaintiffs cannot meet their burden of proof at the summary judgment stage to
12 actually establish that they have been subject to the alleged warrantless surveillance. As the
13 Court has held, such proof must be established before Section 1806(f) proceedings might delve
14 into any classified evidence on the matter. *See Al-Haramain*, 564 F. Supp. 2d at 1134.

15 In assessing plaintiffs' purported evidentiary showing, it is important to stress that no
16 court has applied Section 1806(f) of the FISA to permit a party to attempt to prove their
17 "aggrieved" status under the FISA, with purportedly public evidence, in the face of a successful
18 state secrets privilege assertion on that very question. The Court of Appeals held that the
19 national security concerns that would result from adjudicating whether or not the plaintiffs were
20 subject to alleged warrantless surveillance were "exceptionally well-documented." *See*
21 *Al-Haramain Islamic Found. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007). Allowing a party to
22 attempt to establish the matter anyway, even with purportedly public evidence, is contrary to both
23 the purpose and operation of Section 1806(f), as well as the state secrets privilege. Whether or
24 not a party has been subject to surveillance, or when, how, and under what authority, is
25 information that is uniquely available to the Government, can only be confirmed or denied by the
26 Government, and is not susceptible to proof based on extraneous public information. The Court
27 can only exercise Article III jurisdiction based on the actual facts—facts that have been properly
28 protected in this case—not a party's conjecture based on public evidence. Any attempt to do

1 otherwise would result either in an exercise of jurisdiction based on an erroneous foundation, or
2 would necessarily risk or entail disclosure of the actual privileged facts.

3 For these reasons, set forth more fully below, the Government Defendants are entitled to
4 summary judgment and plaintiffs' First Amended Complaint must be dismissed.

5 ISSUES TO BE DECIDED

- 6 1. Whether summary judgment should be granted to the Government Defendants and the
7 complaint dismissed on the ground that plaintiffs have not established that they are
8 "aggrieved parties" under the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801(k)
9 and, thus, that they have standing to challenge alleged warrantless surveillance of them at
10 issue in this case?
11 2. Whether the First Amended Complaint should be dismissed, or summary judgment
12 should be granted for the Government Defendants, based on grounds set forth by the
13 Government Defendants in prior motions, including that: (i) the Government Defendants
14 have successfully asserted of the military and state secrets privilege, which precludes
15 plaintiffs from establishing standing; (ii) the plaintiffs cannot establish standing for
16 prospective relief; and (iii) the United States has not waived sovereign immunity with
17 respect to plaintiffs' claim for damages against the United States under 50 U.S.C. § 1810.

18 BACKGROUND

19 **A. Initial Proceedings**

20 Plaintiffs are the Al-Haramain Islamic Foundation of Oregon ("AHIF-Oregon"), an entity
21 designated by the United States as a "Specially Designated Global Terrorist," *see* Complaint ¶¶ 4,
22 21 (Dkt. 07-cv-109, No. 1, Part # 1), and two U.S. citizens (Wendell Belew and Asim Ghafoor)
23 who avered that they are attorneys that have "business and other relationships" with AHIF-
24 Oregon, *see id.* ¶¶ 4-6. Plaintiffs allege that, in March and April 2004, they were subject to
25 warrantless foreign intelligence surveillance by the NSA authorized by the President after the
26 September 11, 2001 attacks. *See id.* ¶¶ 5, 6, 19. Plaintiffs specifically allege that the designation
27 of AHIF-Oregon was based in part on evidence derived from the alleged surveillance, *see id.* ¶¶
28 1, 18, and they seek to rely upon the inadvertent release of a classified document (the "sealed
document") to support their allegations. Plaintiffs contend that the alleged surveillance violated
the FISA, the separation of powers doctrine, the Constitution and International law, *see id.* ¶¶
26-37, seek declaratory and injunctive relief, as well as money damages under 50 U.S.C. § 1810.
See id. at 7 (Prayer for Relief) ¶ 1.

In June 2006, the Director of National Intelligence ("DNI") asserted the state secrets

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1 privilege over information implicated by this case, including information that would reveal
2 whether or not the plaintiffs have been subject to alleged surveillance under the TSP or any other
3 program as well as information pertaining to the sealed document. *See* Public Declaration of
4 John D. Negroponte, Director of National Intelligence, ¶ 11(iii), (iv), ¶ 14 (Dkt. No. 59, Item #1)
5 (Civ. 06-274-KI) (D. Or.). The Government then moved to dismiss on the grounds that evidence
6 protected by the state secrets privilege is necessary to litigate the case. In September 2006, Judge
7 King of the District of Oregon upheld the Government’s state secrets privilege assertion with
8 respect to any information confirming or denying whether plaintiffs’ communications have been
9 or continue to be intercepted—except with respect to any prior communications allegedly
10 reflected in the sealed document. *See Al-Haramain v. Bush*, 451 F. Supp. 2d 1215, 1224 (D. Or.
11 2006), *rev’d*, 507 F. 3d 1190 (9th Cir. 2007). Judge King concluded that the content of the
12 sealed document would not be a secret to the plaintiffs in light of its inadvertent disclosure, and
13 held that the plaintiffs should be granted an opportunity to attempt to establish their standing as
14 to any alleged surveillance reflected in the sealed document through special *in camera*
15 procedures if necessary. *See id.* at 1226, 1229. Judge King therefore declined to dismiss the
16 case, but certified his decision for interlocutory review. The Government appealed to the Ninth
17 Circuit, which granted the petition for review. *See* December 21, 2006 Order, Dkt. No. 96 (Civ.
18 06-274-KI) (D. Or.).

19 In November 2007, the Ninth Circuit reversed the denial of the Government Defendants’
20 motion to dismiss and upheld the Government’s state secrets privilege assertion to protect from
21 disclosure information concerning whether or not the plaintiffs had been subject to the alleged
22 surveillance, as well information contained in the sealed document. *See Al-Haramain*, 507 F.3d
23 at 1202-04. The Ninth Circuit went on to hold that, without the privileged information, plaintiffs
24 could not establish their standing to litigate their claims. *See id.* at 1205. In upholding the
25 Government’s assertion of the state secrets privilege, the Ninth Circuit stated, after conducting “a
26 very careful” review of the classified record, that the basis for the privilege was “exceptionally
27 well documented” in “[d]etailed statements.” *Id.* at 1203. The Ninth Circuit’s decision did not
28 pertain solely to the use of the sealed document in this case. Rather, it covered information

1 concerning “whether Al-Haramain was subject to surveillance.” *See id.* at 1202 (identifying
2 these two separate state secret privilege issues and resolving both in the Government’s favor).
3 The Court of Appeals declined to decide a separate issue raised on appeal—whether the FISA
4 preempts the state secrets privilege, and remanded for the district court to consider that limited
5 issue and any proceedings collateral to that determination. *See id.* at 1205.

6 **B. Remand Proceedings**

7 Following the Ninth Circuit’s remand, the Government again moved to dismiss or for
8 summary judgment, and addressed not only the FISA preemption issue remanded by the Court of
9 Appeals but other threshold jurisdictional issues as well. Specifically, the Government argued
10 that plaintiffs’ complaint seeks prospective relief concerning alleged warrantless surveillance
11 authorized by the President under the TSP—a program that lapsed in January 2007. As a result
12 of the lapse, plaintiffs could not establish standing to obtain prospective declaratory and/or
13 injunctive relief with respect to the alleged surveillance at issue. *See* Defs. 2d MSJ Mem. (Dkt.
14 17 in 07-109-VRW) at 6-8. In addition, Government Defendants argued that the Court lacks
15 jurisdiction to consider plaintiffs’ retrospective claim for damages against the United States
16 under 50 U.S.C. § 1810 because that provision does not waive the sovereign immunity of the
17 United States. Defs. 2d MSJ Mem. at 8-12. Finally, the Government Defendants argued that
18 even if jurisdiction exists, the FISA does not preempt the state secrets privilege and, in particular,
19 argued that Section 1806(f) of the FISA applies solely to those cases where the use of evidence
20 based on electronic surveillance is at issue and the Government has acknowledged the existence
21 of such surveillance, and that the FISA cannot be read to compel the Government to disclose (or
22 risk the disclosure of) information concerning intelligence sources and methods that the
23 Government chooses to protect. Defs. 2d MSJ Mem. at 12-24.

24 In its July 2 decision, the Court held that FISA preempts the state secrets privilege and
25 also rejected Defendants’ jurisdictional arguments. But the Court noted that its holding did “not
26 necessarily clear the way for plaintiffs to pursue their claim for relief against these defendants
27 under FISA’s section 1810,” because only a litigant who establishes that they are “aggrieved
28 person” may take advantage of procedures under section 1806(f) of the FISA. *See Al-Haramain,*

1 564 F. Supp. 2d at 1125. The Court rejected the Government’s contention that the special
2 procedures for judicial review established in Section 1806(f) applied solely when invoked by the
3 Attorney General in discovery matters concerning the use of evidence of acknowledged
4 surveillance. *See id.* at 1132-34. At the same time, the Court rejected the view that a litigant
5 could use Section 1806(f) to discover in the first instance whether it was “aggrieved”—*i.e.*, the
6 target of or subject to surveillance, *see id.* at 1134-35—and, instead, held that “a litigant must
7 first establish himself as an ‘aggrieved person’ *before* seeking to make a ‘motion or request’”
8 under 1806(f). *See id.* at 1134 (emphasis added). In light of the Ninth Circuit’s decision
9 upholding the Government’s state secrets privilege assertion, the Court also precluded the
10 plaintiffs from attempting to make this showing through the use of the classified sealed document
11 that had been inadvertently disclosed to them, *see id.*, and stated that “it is certain that plaintiffs’
12 showing thus far with the Sealed Document excluded falls short of the mark,” *see id.* at 1135.
13 The Court did not determine what standard would govern the standing inquiry as to whether a
14 party was an “aggrieved person” under the FISA, but noted that “independent evidence disclosing
15 that plaintiffs have been surveilled” was required. *Id.* Specifically, the Court stated that “[t]o
16 proceed with their FISA claim, plaintiffs must present to the court enough specifics based on
17 non-classified evidence to establish their ‘aggrieved person’ status under FISA.” *Id.* The Court
18 then dismissed plaintiffs’ complaint without prejudice and permitted plaintiffs to amend within
19 thirty days.

20 **C. Plaintiffs’ Amended Complaint**

21 On July 29, 2008, plaintiffs filed an amended complaint seeking to meet their burden
22 under the Court’s July 2 Order. *See* Dkt. 35 (07-109-VRW). In the FAC, plaintiffs refer to
23 various public statements and reports in an effort to establish that they have been subject to
24 alleged warrantless surveillance in violation of the Foreign Intelligence Surveillance Act.

25 First, plaintiffs refer to various public statements indicating that the President authorized
26 the Terrorist Surveillance Program after the 9/11 attacks. *See* FAC ¶¶ 16-19. Plaintiffs also cite
27 public statements indicating that the program ended in January 2007, *see id.* ¶ 21, but contend
28 based on public testimony by Government officials that “it is not clear that defendants’ unlawful

1 behavior could not reasonably be expected to recur,” *see id.* ¶¶ 22-23.

2 Next, plaintiffs refer to public testimony from officials of the Treasury Department’s
3 Office of Foreign Assets Control (“OFAC”) and the Federal Bureau of Investigation (“FBI”)
4 starting in 2002 concerning the Government’s effort to track the financing of terrorist activities
5 by charitable organizations, including of four branches of the Al-Haramain Islamic Foundation of
6 Saudi Arabia and, thus, the Al-Haramain Islamic Foundation of Oregon. *See* FAC ¶¶ 24-25.
7 Plaintiffs refer to statements by FBI and Treasury Department officials that the Government has
8 access to classified information from the intelligence community in their investigation of terrorist
9 financing. *See id.* ¶¶ 27, 28. Plaintiffs then juxtapose public information concerning the
10 designation of AHIF-Oregon with phone conversations that they aver occurred between plaintiffs
11 and individuals associated with AHIF. They note, for example, that the Treasury Department
12 blocked the assets of AHIF-Oregon in February 2004 but made no mention of any link between
13 AHIF-Oregon and Usama bin-Laden at that time. *See id.* ¶¶ 30-31. Plaintiffs then aver that they
14 had conversations from March through June of 2004 that, among other things, refer to the
15 coordination of payments for attorney fees for defendants in a lawsuit against Saudi entities and
16 citizens on behalf of victims of the 9/11 attacks, and that also reference individuals associated in
17 some way to Usama bin-Laden, including an individual who was married to one of bin Laden’s
18 daughters, and others clerics who bin-Laden had claimed had inspired him. *See id.* ¶¶ 32-35.

19 Plaintiffs then refer to subsequent correspondence to counsel for AHIF-Oregon indicating
20 that the Treasury Department was considering the designation of AHIF-Oregon as a Specially
21 Designated Global Terrorist Organization based in part on classified information, *see* FAC ¶¶ 36-
22 37, and, after AHIF-Oregon was so designated in September 2004, to a Treasury Department
23 press released indicating the AHIF-Oregon had “direct links” to Usama bin-Laden, *see id.* ¶¶ 38-
24 40. Plaintiffs also cite a public declaration filed in this litigation indicating that the classified
25 sealed document “was related to the terrorist designation” of AHIF-Oregon. *See id.* ¶ 41.

26 Next, plaintiffs refer to a speech by an FBI official in October 2007 purportedly
27 indicating that, although the FBI “used . . . surveillance” in connection with the Treasury
28 Department’s 2004 investigation of AHIF-Oregon, it was financial evidence that provided the

1 basis for the initial designation of AHIF-Oregon, *see id.* ¶¶ 42-43. But, citing a document filed in
2 a criminal proceeding, which distinguishes between the “preliminary-designation of AHIF-US”
3 in February 2004 and the “formal designation” of AHIF-US as an SDGT in September 2004,
4 plaintiffs allege that the Government relied on “surveillance evidence” for the subsequent formal
5 designation. *See id.* ¶¶ 44-45. Plaintiffs then contend that the FBI’s reference to the use of
6 surveillance evidence in the designation of AHIF-Oregon confirms that “plaintiffs were
7 surveilled.” *See id.* ¶ 46.

8 Plaintiffs then refer to a series of statements made in public testimony by U.S. officials
9 about how certain international communications pass on a wire through the United States and,
10 based on changes in technology, a warrant is required for their interception. *See* FAC ¶ 48.
11 Plaintiffs assert that these statements establish that the particular one-end foreign telephone
12 communications cited by plaintiffs in paragraphs 32-33 “were wire communications and were
13 intercepted by defendants within the United States.” *Id.* ¶ 47.

14 Plaintiffs also refer to a statement made by Government counsel during a court
15 proceeding to the effect that “attorneys who represent terrorist clients . . . come closer to being in
16 the ballpark of the terrorist surveillance program,” *see* FAC ¶ 49, as well as to a brief by the
17 Government in the appeal in this case which refers to AHIF-Oregon and plaintiffs Belew and
18 Ghafoor as “a terrorist organization and two lawyers affiliated with it.” *See id.* ¶ 50.

19 Plaintiffs also cite a memorandum by the Treasury Department dated February 6, 2008,
20 indicating that the Government had acknowledged surveillance of four telephone conversations
21 between an officer of AHIF-Oregon (al-Buthi) and a criminal defendant in a separate proceeding
22 (Ali al-Timimi). *See* FAC ¶ 51.

23 Based on the foregoing, plaintiffs allege that the conversations referred to in paragraph 35
24 of the FAC between plaintiff Ghafoor and al-Buthi and between plaintiff Belew and al-Buthi
25 were intercepted by means of a wire in the United States, without a warrant obtained pursuant to
26 the FISA, that the Treasury Department relied on this surveillance to declare that AHIF-Oregon
27 had direct links to bin-Laden and to formally declare AHIF-Oregon an SDGT, and thus that
28 plaintiffs AHIF-Oregon, Belew and Ghafoor are “aggrieved persons” under FISA, 50 U.S.C. §

1801(k). See FAC ¶ 52.

ARGUMENT

I. PLAINTIFFS HAVE FAILED TO ESTABLISH THEIR STANDING AS AGGRIEVED PERSONS UNDER THE FISA.

As set forth below, the evidence plaintiffs proffer in their First Amended Complaint does not remotely establish they are “aggrieved persons” under the FISA and thus have standing to challenge alleged warrantless surveillance. Plaintiffs’ “evidence” is little more than conjecture and unfounded inferences based on a limited amount of public information that simply is not sufficient to carry plaintiffs’ burden of proof at this summary judgment stage.

A. Plaintiffs Bear the Burden of Proving an Actual Concrete Injury to Establish Standing Under Article III of the Constitution.

It is well established that the “judicial power of the United States defined by Article III of the Constitution is not an unconditioned authority to determine the constitutionality of legislative or executive acts” but, rather, is limited to the resolution of “cases” and “controversies.” *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992). To establish standing, plaintiffs must satisfy three requirements. “At an irreducible minimum, Art. III requires the party who invokes the court’s authority to show [1] that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, and that [2] the injury fairly can be traced to the challenged action, and [3] is likely to be redressed by a favorable decision.” *Valley Forge*, 454 U.S. at 472 (internal citations omitted); *see also Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 104 (1998); *Lujan*, 504 U.S. at 560. The elements of injury, traceability, and redressability present distinct considerations, *Steel Co.*, 523 U.S. at 103, 107 n.7, and a party must satisfy all three elements. In addition, the requisite injury must be “concrete and particularized,” and “actual or imminent,” not “conjectural” or “hypothetical.” *Lujan*, 504 U.S. at 560; *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990); *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983). Only a plaintiff who identifies this sort of concrete injury-in-fact has “such a personal stake in the outcome of the controversy” as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court’s remedial

1 powers on his behalf.” *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975) (quoting *Baker v. Carr*,
2 369 U.S. 186, 204 (1962)).

3 A party who seeks to invoke the jurisdiction of the court bears the burden of establishing
4 Article III standing. *Steel Co.*, 523 U.S. at 104; *Lujan*, 504 U.S. at 561; *FW/PBS, Inc. v. Dallas*,
5 493 U.S. 215, 231 (1990); *Warth*, 422 U.S. at 508. Since the elements of standing “are not mere
6 pleading requirements but rather an indispensable part of the plaintiff’s case, each element must
7 be supported in the same way as any other matter on which the plaintiff bears the burden of
8 proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the
9 litigation.” *Lujan*, 504 U.S. at 561. At the pleading stage, “general factual allegations of injury
10 resulting from the defendant’s conduct may suffice,” for on a motion to dismiss the Court may
11 “presume that general allegations embrace those specific facts that are necessary to support the
12 claim.” *See id.* In response to a summary judgment motion, however, “the plaintiff can no
13 longer rest on such ‘mere allegations,’ but must ‘set forth’ by affidavit or other evidence ‘specific
14 facts’” establishing their standing, which for purposes of the summary judgment motion will be
15 taken to be true unless controverted. *See id.* (citing Fed. R. Civ. Proc. 56(e)). Standing cannot
16 be “‘inferred argumentatively from averments in the pleadings,’ . . . but rather ‘must
17 affirmatively appear in the record.’” *FW/PBS, Inc.*, 493 U.S. at 231. And if “the plaintiff’s
18 standing does not adequately appear from all materials of record, the complaint must be
19 dismissed.” *Warth*, 422 U.S. at 502. Purported evidence that “contains only conclusory
20 allegations, not backed up by statements of fact . . . cannot defeat a motion for summary
21 judgment.” *Shane v. Greyhound Lines, Inc.*, 868 F.2d 1057, 1061 (9th Cir. 1989).^{3/}

22 ³ The foregoing Article III requirements for establishing standing directly apply to
23 determine whether a party is “aggrieved” for purposes of the FISA. The phrase “aggrieved
24 person” was imported into FISA from section 2510 of Title III, Omnibus Crime Control and Safe
25 Streets Act of 1968. *See* S. Rep. No. 95-604, 95th Cong. 2d Sess., pt. 1, at 56 (1978) (an
26 “aggrieved person” in FISA is “defined to coincide with the definition . . . in section 2510 of title
27 III.”); S. Rep. 95-701, 1978 U.S.C.C.A.N. 3973, 4031 (1978). And the Supreme Court has
28 recognized that the term “aggrieved person” in Title III “should be construed in accordance with
existent standing rules.” *See Alderman v. United States*, 394 U.S. 165, 176 n.9 (1969).
Likewise, when Congress enacted FISA’s “aggrieved person” provision it clearly contemplated
that only those with constitutional standing could possibly be aggrieved. *See* H.R. Rep. No. 95-
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1 Thus, to establish their “aggrieved” status under the FISA, plaintiffs must establish that
2 they have suffered an actual personal, concrete, particularized injury—that is, that they were the
3 “target” of warrantless electronic surveillance or that their communications were intercepted and
4 they were thus “subject to” warrantless electronic surveillance. Inferences and conjecture are not
5 sufficient. Plaintiffs cannot rest on a showing that they might be aggrieved, or that there is a
6 even a likelihood they are aggrieved—they must establish that fact through “independent
7 evidence disclosing that plaintiffs have been surveilled.” *See Al-Haramain*, 564 F. Supp. 2d at
8 1125.

9 **B. The Evidence Cited by Plaintiffs Fails to Establish That They Have Been
10 Subject to the Alleged Warrantless Surveillance Challenged in This Case.**

11 There can be little doubt that the evidence cited by plaintiffs in their First Amended
12 Complaint fails to establish that they have been subject to the alleged warrantless surveillance at
13 issue. Even assuming that plaintiffs have accurately described the public information they cite in
14 the FAC, they are relying on speculation, conjecture, and unfounded inferences drawn from that
15 information which does not establish that plaintiffs have been the target of or subject to the
16 alleged surveillance. In addition, however, plaintiffs’ characterization of the public information
17 they cite (but do not attach to the FAC) is not accurate, and examination of this evidence
18 demonstrates further that the plaintiffs have not established their standing.^{4/}

19 The public “evidence” on which plaintiffs rely to establish that they were subject to
20 alleged warrantless surveillance in violation of the FISA can be summarized as follows:

- 21 • The Government admitted the existence of the Terrorist Surveillance Program, under
22 which the National Security Agency was authorized by the President to intercept certain
23 one-end international communications where one party was reasonably believed to be a
24 member of agent of al Qaeda or affiliated terrorist organization. *See* FAC ¶¶ 16-18.
- 25 • The assets of plaintiff AHIF-Oregon were blocked by the Treasury Department in

26 1283, 95th Cong. 2d Sess., pt.1, at 66 (1978) (“As defined, the term [aggrieved person] is
27 intended to be *coextensive*, but no broader than, those persons who have standing to raise claims
28 under the Fourth Amendment with respect to electronic surveillance.”).

⁴ The Government Defendants submit herewith some of the public statements and
information cited by plaintiffs in the FAC, specifically those statements that are referred to below
as Defendants discuss the inadequacy of plaintiffs’ evidence. *See* Exhibits 1 to 19.

February 2004 pending an investigation of AHIF-Oregon's financial support of international terrorism. *See* FAC ¶¶ 24-25.

- After phone conversations between plaintiffs and a director of AHIF-Oregon located in Saudi Arabia (Mr. al-Buthi) between March and June of 2004 included references to people associated with Usama bin-Laden, the Government later "formally designated" AHIF-Oregon in September 2004 as a Specially Designated Global Terrorist Organization and specifically cited "direct links" it had with bin-Laden. *See* FAC ¶¶ 30-35, 39-40.
- The FBI and the Treasury Department have stated publicly that they relied on classified information, including "surveillance" information, to designate AHIF-Oregon as a terrorist organization associated with al Qaeda and bin-Laden. *See* FAC ¶¶ 36-43.
- In testimony before Congress, the Government stated that a warrant is required before certain communications that transit a wire in the United States can be intercepted. *See* FAC ¶ 48.
- In a separate criminal proceeding, the Government acknowledged that it had intercepted communications between the defendant (Ali al-Timimi) and an AHIF official, Mr. Al-Buthi. *See* FAC ¶ 51.
- Government counsel indicated at oral argument in *ACLU v. National Security Agency* that lawyers for terrorists are "closer to the ballpark" of being subject to the TSP. *See* FAC ¶ 49.

These points, in sum, constitute the key public evidence on which plaintiffs rely in the FAC to establish that their communications were intercepted off of a wire in the United States under authority of the TSP and in violation of the FISA, thus rendering them "aggrieved persons" as defined in the FISA, *see* 50 U.S.C. § 1801(k). *See* FAC ¶ 52. But it should be apparent, upon even a cursory review, that the evidence cited by the plaintiffs establishes no such thing.

1. Assuming Plaintiffs Have Accurately Described the Public Information Cited in the First Amended Complaint, They Have Failed to Establish That They Are Aggrieved Persons Under the FISA.

Assuming, *arguendo*, that plaintiffs have accurately described the public statements cited in the First Amended Complaint, the pieces of evidence plaintiffs advance do not establish, individually or collectively, that they were subject to surveillance at all, let alone warrantless surveillance whereby their communications were intercepted on a wire in the United States in violation of the FISA. Plaintiffs are attempting to draw a string of inferences from limited public facts to support a pre-determined conclusion. The very exercise is inherently speculative and conjectural and, thus, fails to meet their burden of proof. *See Lujan*, 504 U.S. at 560. Plaintiffs speculate that because AHIF-Oregon was found to be associated with al Qaeda, individuals

1 associated with it must have been subject to surveillance under the TSP, which was directed at
2 agents or affiliates of al Qaeda. Plaintiffs speculate that, because they had phone conversations
3 with an officer of AHIF-Oregon located overseas (Mr. Al-Buthi) that made references to
4 individuals associated with Usama bin-Laden, the Treasury Department's subsequent formal
5 designation of AHIF-Oregon, which referred to "direct links" between AHIF-Oregon and bin-
6 Laden, must have resulted from surveillance of those conversations. Plaintiffs add that OFAC
7 and the FBI have stated that they relied on "classified" information in designating AHIF-Oregon,
8 including "surveillance" information, and speculate that this must include surveillance evidence
9 *of them*. Finally, citing Government statements that, under the TSP, the NSA was authorized to
10 intercept certain one-end communications involving members of agents of al Qaeda, and public
11 statements that the interception of certain international communications required a warrant under
12 the FISA, plaintiffs infer further that any interception of them must have occurred off a wire in
13 the United States under the TSP.

14 The flaws with plaintiffs' presentation should be apparent. The existence of the TSP and
15 its focus on al Qaeda-related communications does not establish that *plaintiffs'* communications
16 were subject to surveillance, nor, indeed, that any particular person or entity associated with al
17 Qaeda was necessarily subject to surveillance, or that any surveillance of individuals who were
18 associated with al Qaeda, or who spoke with people associated with al Qaeda, necessarily
19 occurred under just one method or authority. Also, the fact that OFAC stated it relied on
20 classified evidence to designate al-Haramain does not, in isolation or viewed with other
21 information, establish that plaintiffs were subject to surveillance, let alone under the TSP.
22 Likewise, the fact that the FBI referred to the use of surveillance evidence in its investigation of
23 AHIF-Oregon does not establish that these plaintiffs had been subject to any such surveillance,
24 let alone electronic surveillance, or electronic surveillance under the TSP. And the fact that
25 OFAC's "formal" designation of AHIF-Oregon referred to direct links to Usama bin-Laden does
26 not demonstrate that the source of this information must have been an interception of plaintiffs'
27 conversations. What plaintiffs' string of conjecture amounts to is an argument that they *could*
28 have been subject to surveillance under the TSP based on the focus of that program, their own

1 association with AHIF-Oregon and communications with AHIF-Oregon officials overseas, and
2 their own inferences drawn from public statements that the designation of AHIF-Oregon was
3 based in part on classified information and surveillance, and referred to direct-links to Usama
4 bin-Laden. This simply does not constitute “independent evidence disclosing that plaintiffs have
5 been surveilled.” *See Al-Haramain*, 564 F. Supp. 2d at 1125. Standing cannot be “inferred
6 argumentatively from averments in the pleadings,” *FW/PBS, Inc.*, 493 U.S. at 231 (citing *Grace*
7 *v. American Central Ins. Co.*, 109 U.S. 278, 284, (1883)), but rather “must affirmatively appear
8 in the record.” *Id.* (citations omitted). The facts cited by plaintiffs do not meet their burden of
9 proof on summary judgment.

10 In addition, it bears separate emphasis that nothing plaintiffs cite would establish that any
11 alleged surveillance of plaintiffs (if any) would necessarily have occurred on a wire in the United
12 States in violation of the FISA. *See* FAC ¶ 52(a)-(c). The Government has many means of
13 surveillance of al Qaeda-affiliated organizations and individuals at its disposal, including
14 surveillance under authority of the FISA itself, surveillance information obtained from foreign or
15 human sources, or surveillance undertaken overseas—that is, collected outside the United States
16 and not on a wire in this country. Thus, even if the plaintiffs had been subject to surveillance
17 (which itself is not established by the evidence cited), nothing separately establishes how such
18 surveillance may have occurred. The mere fact that the TSP focused on certain one-end
19 international communications involving al Qaeda, or that the Government officials have stated
20 that certain communications intercepted in this country would require a warrant under the FISA,
21 does not establish that, even if plaintiffs had been subject to surveillance, it necessarily occurred
22 under the TSP.

23 In short, assuming the accuracy of plaintiffs’ description of public information cited in the
24 FAC, whether or not plaintiffs have been subject to the alleged surveillance is simply not
25 established, and the actual facts would still have to be confirmed or denied by the Government
26 but have been protected by its successful assertion of the state secrets privilege.

1 **2. The Evidence Cited by Plaintiffs in the First Amended**
2 **Complaint Does Not Establish Their Standing as Aggrieved**
3 **Persons Under the FISA.**

4 A closely related, but distinct, response must be made to the specific evidence cited by
5 plaintiffs in the FAC: that information does not support the inferences that plaintiffs seek to
6 draw from it to establish their standing.

7 First, plaintiffs’ attempt to juxtapose conversations that allegedly occurred at a time
8 between OFAC’s initial blocking action against AHIF-Oregon pending investigation, and
9 subsequent designation of AHIF-Oregon as a Specially Designated Global Terrorist, *see* FAC
10 ¶¶ 30-46, is not only wholly speculative, but is undercut by the record on which plaintiffs seek to
11 rely. In particular, the notion that the Government’s reference to “direct links” between AHIF-
12 Oregon and bin-Laden must have been based on the interception of plaintiffs’ alleged
13 conversations is not supported by the very information plaintiffs cite. The Treasury Department
14 press release of February 19, 2004, which announced that a search warrant had been executed
15 against AHIF-Oregon and that its assets had been blocked pending further investigation,
16 illustrates longstanding ties between AHIF as a whole, al Qaeda, and Usama bin-Laden. The
17 press release makes specific reference to the fact that in March 2002—long before plaintiffs’
18 alleged conversations—several branches of AHIF worldwide (in Bosnia, Somalia, Indonesia,
19 Tanzania, Kenya, and Pakistan) had long been designated as associated with terrorism, including
20 pursuant to UN Security Council Resolution 1267. *See* Exhibit 9. That UN Resolution, in
21 particular, linked these AHIF entities to al Qaeda, Usama bin-Laden, and the Taliban, and
22 subjected these organizations to international sanctions. *See id.* Indeed, the September 2004
23 Treasury Department press release, which plaintiffs cite to support their claim that they were
24 surveilled, itself refers to extensive documentation linking AHIF and al Qaeda going back as far
25 as 1997, and including AHIF-Oregon’s link to funds provided to Chechen leaders associated with
26 al Qaeda, as well as links between other AHIF branches and al Qaeda terrorists responsible for
27 the 1998 embassy bombings in Kenya and Tanzania. *See* Exhibit 12. Other public evidence
28 plaintiffs cite states that AHIF-Oregon “was an active arm in this worldwide organization, and its
 operations, including its direct funding to AHIF in Saudi Arabia, enabled the global AHIF to

1 continue supporting terrorist activities.” *See* Exhibit 14 (Feb. 6, 2008 Letter from OFAC to
2 Plaintiffs’ Counsel cited in ¶ 47 of the FAC). The full record of OFAC’s designation of AHIF-
3 Oregon includes a classified component, as OFAC’s correspondence to plaintiffs indicates. *See*,
4 *e.g.*, Exhibits 14, 19. But based on the publicly available information cited in the FAC on which
5 plaintiffs rely to establish their standing, the notion that links between AHIF-Oregon and al
6 Qaeda or bin-Laden must be based on an interception of plaintiffs’ communications is simply
7 unfounded.

8 Similarly, plaintiffs’ assertion that reference by OFAC to reliance on classified
9 information in the designation record, *see* FAC ¶¶ 28, 36, 37, 47, also must indicate that the
10 plaintiffs were subject to surveillance—and surveillance under the TSP—is also wholly
11 unsupported. OFAC’s designation of AHIF-Oregon, before and after plaintiffs’ alleged
12 conversations, was based on a range of classified information concerning the various branches of
13 AHIF-Saudi Arabia and numerous individuals associated with AHIF. *See* Exhibit 19 (Feb. 6,
14 2008 Memorandum for the Director of OFAC, referred to in ¶ 51 of the FAC). Thus, the notion
15 that OFAC’s reference to the classified record supporting its designation somehow establishes
16 that the plaintiffs were subject to surveillance, or surveillance under the TSP, is again simply
17 without any foundation.

18 Likewise, plaintiffs’ reference to public statements by FBI officials about terrorist-
19 financing investigations not only fails to establish that plaintiffs were subject to alleged
20 warrantless surveillance, but undermines that contention. Plaintiffs cite a speech by FBI Deputy
21 Director John S. Pistole on October 22, 2007, *see* Exhibit 13, for the proposition that “the FBI
22 ‘used . . . surveillance’ in connection with defendant OFAC’s 2004 investigation of plaintiff al-
23 Haramain Oregon.” FAC ¶ 42. Here is what Deputy Director Pistole said about Al-Haramain in
24 the speech cited (beyond the four words quoted by plaintiffs with ellipses in between):

25 Some of you may have heard of the Al Haramain Islamic Foundation. It was a charity
26 based in Saudi Arabia, with branches all over the world. Its U.S. branch was established
in Oregon in 1997 and in 1999, it registered as a 501(c)(3) charity.

27 In 2000, the FBI discovered possible connections between Al Haramain and al Qaeda and
28 began an investigation. We started where we often start—by following the money. And
we uncovered criminal tax and money laundering violations.

1 Al Haramain claimed that money was intended to purchase a house of prayer in
2 Missouri—but in reality, the money was sent to Chechnya to support al Qaeda fighters.
3 In 2004, the Treasury Department announced the designation of the U.S. branch of Al
4 Haramain, as well as two of its leaders, and several other branch offices. In 2005, a
5 federal grand jury indicted Al Haramain and two of its officers on charges of conspiring
6 to defraud the U.S. government.

7 We relied on BSA information and cooperation with financial institutions for both the
8 predication and fulfillment of the investigation. Because of reporting requirements
9 carried out by banks, we were able to pursue leads and find rock-solid evidence.

10 Yes, we used other investigative tools—like records checks, surveillance, and interviews
11 of various subjects. But it was the financial evidence that provided justification for the
12 initial designation and then the criminal charges.

13 Nothing in this passage remotely establishes that *plaintiffs* were subject to surveillance,
14 let alone *electronic* surveillance, or electronic surveillance under the TSP. Notably, in its full
15 context, the passage indicates that the link between AHIF-Oregon and al Qaeda was first
16 discovered in 2000—before the TSP even began and well before plaintiffs’ alleged conversations
17 in March 2004. In addition, nothing indicates that the investigative tool of “surveillance”
18 referred to by Deputy Director Pistole concerned either surveillance of AHIF-Oregon or even
19 electronic surveillance or surveillance under the TSP. This reference obviously could refer to
20 broader intelligence gathering activities directed at AHIF worldwide. Moreover, if there had
21 been surveillance of AHIF-Oregon, this passage in no way indicates what kind of surveillance
22 may have occurred—such as whether it occurred under the TSP, or was undertaken under the
23 FISA, or outside the United States, or involved the collection of information from foreign
24 sources or human sources. The mere statement that “surveillance . . . was used” in investigating
25 the connections between al Qaeda and AHIF’s world-wide activities establishes nothing as to
26 who, where, when, and how any such surveillance was directed. That is why plaintiffs must add
27 the wholly conjectural conclusion that any such surveillance must have been of them, and must
28 have occurred under the TSP. But that is nowhere established by the evidence cited and would
29 have to be confirmed or denied by the Government with information that has been protected in
30 the Government’s successful state secrets privilege assertion.^{5/}

31 ⁵ Likewise, plaintiffs’ citation to a public memo indicating that the Government
32 acknowledged surveillance of another individual—Ali al-Timimi—and that conversations were
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1 In addition, plaintiffs attempt to draw a purported link between the classified evidence
2 used in the AHIF designation and surveillance under the TSP, based on public testimony by the
3 Government about legislative efforts to amend the Foreign Intelligence Surveillance Act, also
4 fails. *See* FAC ¶¶ 48(a)-(d). The testimony plaintiffs cite (but again, do not provide) addresses
5 broad issues concerning the modernization of the Foreign Intelligence Surveillance Act to enable
6 the Government to intercept communications in the United States of targets located overseas. In
7 the course of that debate, the Government indicated that the interception of certain
8 communications emanating overseas would require a warrant under the FISA. *See* generally
9 Exhibits 4, 15-17 (Testimony by the Director National Intelligence and Department of Justice
10 cited by plaintiffs at ¶ 48(b)-(d) of the FAC). But, obviously, nothing in this testimony
11 establishes that the communications of the plaintiffs were intercepted, or were intercepted on a
12 wire in the United States without a warrant in violation of the FISA.^{6/} Again, plaintiffs are simply
13 drawing their own speculative inference from general testimony about how the FISA operates in
14 certain circumstances to support their predetermined conclusion.

15 Finally, plaintiffs' reference to a statement made by Government counsel during a court
16 proceeding in *American Civil Liberties Union v. National Security Agency*, 493 F. 3d 644 (6th
17 Cir. 2007) to the effect that "attorneys who represent terrorist clients . . . come closer to being in
18 the ballpark of the terrorist surveillance program," *see* FAC ¶ 49, is taken out of context and
19 ultimately negates their claim to standing. The full context of that quoted excerpt is attached at
20 Exhibit 18. Government counsel made the point that, in the *ACLU* case, there were two broad

21 _____
22 intercepted between Mr. Al-Timimi and Mr. al-Buthi, *see* FAC ¶ 51, does not establish plaintiffs'
23 standing in this case. That Mr. Al-Timimi was the target of interception and was overheard
24 speaking with Mr. Al-Buthi, a Saudi national, does not indicate that any of the named plaintiffs
25 in this case were the target of or subject to surveillance, or where or how any such surveillance
26 had occurred, including whether or not it was warrantless surveillance off of a wire in the United
27 States or authorized under the FISA. In fact, plaintiffs' citation to this example illustrates that
28 surveillance evidence related to AHIF may *not* have come from surveillance of the plaintiffs.

26 ⁶ Likewise, nothing in the public testimony concerning a dispute in Executive Branch
27 deliberations in March 2004, *see* FAC ¶¶ 19, 20, in any way indicates that the plaintiffs were
28 subject to warrantless surveillance or, indeed, what that matter was specifically about. *See also*
Exhibits 1-2 (excerpts of the testimony cited in ¶¶ 19, 20 of the FAC).

1 categories of plaintiffs: (i) individuals who claimed to be subject to the TSP merely because they
2 spoke with people overseas; and (ii) other plaintiffs in that case who were lawyers representing al
3 Qaeda suspects. The first group obviously could not even credibly allege they might be subject
4 to the TSP, which was directed at al Qaeda communications. *See id.* at pp. 37-39. The “closer to
5 the ballpark” comment referred specifically to the second group of plaintiffs in the *ACLU* case
6 who alleged that they *did* speak to al Qaeda suspects. *See id.* at pp. 46-47. But as to this
7 category of plaintiffs, as the actual transcript indicates, the Government argued that standing was
8 lacking because even individuals who might be more likely subject to surveillance do not thereby
9 establish their standing. *See id.* at pp. 47-48 (citing, *inter alia*, *United Presbyterian Church v*
10 *Reagan*, 738 F.2d 1375 (D.C. Cir. 1984)).

11 More importantly, the Court of Appeals for the Sixth Circuit *agreed* with the
12 Government’s position in that case and held that plaintiffs who merely allege their conversations
13 with individuals associated with al Qaeda may have been subject to surveillance under the TSP
14 did *not* establish their standing to sue. *See ACLU*, 493 F.3d at 691 (Gibbons, J. concurring)
15 (“There is no relevant factual difference between the *United Presbyterian Church* plaintiffs,
16 whose activities the D.C. Circuit conceded made them more likely to be subject to surveillance,
17 *id.*, and the attorney-plaintiffs in this case, whose representations of ‘exactly the types of clients’
18 targeted by the TSP make them more likely to be targeted by the TSP.”); and *id.* (“As this case
19 was decided on the government’s motion for summary judgment, the plaintiffs must set forth by
20 affidavit or other evidence specific facts,” but “plaintiffs have failed to meet this burden because
21 there is no evidence in the record that any of the plaintiffs are personally subject to the TSP.”)
22 (citations and internal quotation marks omitted). And, like the Ninth Circuit in this case, the
23 Sixth Circuit held that the actual facts concerning such surveillance are properly protected by the
24 state secrets privilege. *See id.* at 660 (Batchelder, J.) (information covered by the state secrets
25 privilege was needed for the *ACLU* plaintiffs to establish standing).

26 At bottom, plaintiffs rely on their own speculative inferences drawn from public
27 information that does not establish their standing: speculation about whether they were surveilled
28 at all and, if so, speculation concerning whether it occurred through electronic surveillance under

1 the TSP, and speculation about whether their conversations formed the basis of public statements
2 by OFAC and the FBI in the designation of AHIF-Oregon. But such speculation and conjecture
3 establishes nothing. The Government is not required to confirm or deny whether any such
4 surveillance has in fact occurred even either Section 1806(f) of the FISA, *see ACLU Found. v.*
5 *Barr*, 952 F.2d 457, 469 (D.C. Cir. 1991), or the state secrets privilege, *see Al-Haramain*, 507
6 F.3d at 1202-04, and the information cited by plaintiffs is simply not “independent evidence
7 disclosing that plaintiffs have been surveilled.” *See Al-Haramain*, 564 F. Supp. 2d at 1125.⁷

8 **II. THE LAW DOES NOT SUPPORT THIS ATTEMPT TO ADJUDICATE**
9 **MATTERS SUBJECT TO THE STATE SECRETS PRIVILEGE WITH**
10 **“PUBLIC” EVIDENCE.**

11 Beyond the insufficiency of the evidence plaintiffs present, an even more fundamental
12 point must be emphasized: the law does not support an attempt to adjudicate whether the
13 plaintiffs are “aggrieved persons” under the FISA in the face of the Government’s successful
14 state secrets privilege assertion. That privilege assertion reflects a judgment by Executive
15 Branch officials with responsibility under the law to protect intelligence sources and methods
16 that national security would be harmed if a particular matter is litigated—in this case, whether
17 the plaintiffs have been subject to the alleged surveillance—and further proceedings on that issue
18 will continue to risk such harm, even if based on public information and even if every effort is
19 made to protect the actual underlying facts subject to the Government’s successful privilege
20 assertion.

21 ⁷ The Government has previously provided the Court, for *in camera*, *ex parte* review,
22 classified information in support of the state secrets privilege which sets forth the actual facts
23 regarding whether or not plaintiffs have been subject to surveillance. *See* Defendants’ Notice of
24 Lodging of *In Camera*, *Ex Parte* Submission in *Al-Haramain et al. v. Bush et al.* (Dkt. 18) (07-
25 cv-109-VRW) (submitting for the Court’s *in camera*, *ex parte* review a Classified Supplemental
26 Memorandum in Support of Defendants’ Second Motion To Dismiss Or For Summary Judgment
27 and the classified Declarations of the Director of National Intelligence and the Director of the
28 National Security Agency in support of the state secrets and statutory privilege assertions
previously submitted in this case with Defendants’ [First] Motion to Dismiss or for Summary
Judgment). But as both this Court and the Ninth Circuit have held, the Court’s conclusions on
standing cannot be based on the classified sealed document, *see Al-Haramain*, 507 F.3d at 1204;
Al-Haramain, 564 F. Supp. 2d at 1134. Accordingly, the Government does not presently rely on
classified information to address the evidentiary basis of plaintiffs’ standing, and the public
evidence on which plaintiffs rely plainly does not support their standing.

1 The Court cannot exercise jurisdiction based on anything less than the actual facts, and if
2 the actual facts at issue in the Government’s privilege assertion are that *none* of the plaintiffs
3 were aggrieved, plaintiffs’ claims could not proceed under Section 1806(f) regardless of
4 whatever conclusions may be drawn from “public” evidence. And, if the actual facts were that
5 *one* of the plaintiffs was “aggrieved” but not the others, the case still could not proceed as to any
6 plaintiff that may have standing, since attempting to make any such distinction would reveal
7 precisely the kind of information concerning intelligence sources and methods at issue in the
8 Government’s state secrets privilege assertion (*i.e.*, who may or may not have been subject to
9 surveillance, when, and how). Also, if the Court found that *all* the plaintiffs were aggrieved
10 based purportedly on public evidence, that too would tend to reveal the very privilege
11 information at stake because, again, the Court could not proceed unless jurisdiction was in fact
12 established. Thus, the mere fact that standing might be found, and the case might proceed, could
13 tend to reveal privileged information.

14 The Court has already held that statutory law that, in some circumstances, requires the
15 Government to confirm or deny alleged surveillance does *not* apply to FISA Section 1806(f).
16 Specifically, under 18 U.S.C. § 3504, a party against whom evidence is being used in certain
17 proceedings may attempt to adduce enough evidence to require the Government to confirm or
18 deny alleged surveillance.^{8/} Although inapplicable here, Section 3504 demonstrates that the
19 Government holds the dispositive evidence on this question, and among the matters that would
20 have to be confirmed or denied to establish whether plaintiffs are “aggrieved” under the FISA in

21
22 ⁸ The Ninth Circuit has made clear that this provision only applies where the
23 Government seeks to use evidence against a witness that is alleged to derive from unlawful
24 surveillance. *See, e.g., In re Grand Jury Investigation (Doe)*, 437 F.3d 855, 858 (9th Cir. 2006)
25 (“A grand jury witness may refuse to answer questions based on illegal interception of his
26 communication.”); *see also In re Grand Jury Witness (Whitnack)*, 544 F.2d 1245, 1247 (9th Cir.
27 1976) (Kennedy, C.J., concurring) (Government has no duty to affirm or deny surveillance under
28 Section 3504(a) where grand inquiry is based on independent evidence). Even in this limited
context, “because responding to ill-founded claims of electronic surveillance would place an
awesome burden on the government,” such claims must be “sufficiently concrete and specific
before the government’s affirmance or denial” is required. *United States v. Tobias*, 836 F.2d
449, 452-53 (9th Cir. 1988) (citing *United States v. Alter*, 482 F.2d 1016, 1027 (9th Cir. 1973)).

1 this case includes not only whether or not some or all of the plaintiffs were the target of or
2 subject to surveillance, but whether or not they were subject to a particular kind of surveillance
3 (electronic surveillance as defined by FISA or some other type of surveillance, where any such
4 surveillance occurred (overseas or on a wire in the United States), and under what legal authority
5 (the TSP, the FISA, or some other authority). This is precisely the kind of information protected
6 by the Government's successful privilege assertion, and Section 1806(f) of the FISA does not
7 contain any provision comparable to Section 3504 that could, in some circumstances, require its
8 disclosure.^{9/}

9 Indeed, the only circuit court decisions that appear to have dealt with the interplay
10 between Section 3504 of Title 18 and Section 1806(f) of the FISA indicate that confirmation of
11 surveillance by the Government is *not* required by the FISA. In *United States v. Hamide*, 914
12 F.2d 1147, 1148-50 (9th Cir. 1990), Section 1806(f) proceedings were invoked by the United
13 States where surveillance was acknowledged in a civil deportation proceeding. But in a related
14 case involving individuals from the same deportation proceeding as to whom the Government
15 had not acknowledged surveillance, the D.C. Circuit held that the Government was not required
16 by the FISA to make such a disclosure. See *ACLU Found. v. Barr*, 952 F.2d at 469 (“if the
17 government is forced to admit or deny such allegations, in an answer to the complaint or
18 otherwise, it will have disclosed sensitive information that may compromise critical foreign
19 intelligence activities.”).^{10/}

20
21 ⁹ On the contrary, Congress gave the Government a choice under Section 1806(f) to
22 either disclose *or* forgo the use of the surveillance-based evidence and protect sensitive
23 intelligence sources and methods. See Defs. 2d MSJ Mem. at 20-21 (citing S. Rep. No. 95-701
24 at 65, 1978 U.S.C.C.A.N. 4027 (1978) (Report of the Select Committee on Intelligence)); see
25 also *In re Sealed Case*, 310 F.3d 717, 741 (For. Intel. Surv. Rev. 2002) (where the Government
26 does not intend to use surveillance evidence, “the need to preserve secrecy for sensitive
27 counterintelligence sources and methods justifies elimination of the notice requirement.”).

28 ¹⁰ Other courts have held that the Government is not required under the FISA to confirm
alleged surveillance. See *In re Grand Jury Investigation*, 431 F. Supp. 2d 584 (E.D. Va. 2006)
(notice not required under FISA Section 1806(c) of whether grand jury witnesses had been
subject to the Terrorist Surveillance Program); *In re Grand Jury Proceedings*, 856 F.2d 685, 688
(4th Cir. 1988) (grand jury witness not entitled to notice of alleged FISA surveillance).

1 The foregoing demonstrates that Section 1806(f) is not intended to permit a party to
2 adjudicate whether they are “aggrieved persons” under the FISA where the very existence of
3 surveillance has not been confirmed or denied, nor to require the Government to proceed in a
4 manner that risks the disclosure of such information. The Executive’s judgment as to the serious
5 harm to national security at stake in this case have been recognized and upheld by the Ninth
6 Circuit. *See Al-Haramain*, 507 F.3d at 1205 (disclosure of sources and methods of intelligence
7 gather in the context of this case “would undermine the government’s intelligence capabilities
8 and compromise national security.”). Courts are “not required to play with fire and chance
9 further disclosure—inadvertent, mistaken, or even intentional—that would defeat the very
10 purpose for which the privilege exists.” *Sterling v. Tenet*, 416 F.3d 338, 344 (4th Cir. 2005),
11 *cert. denied*, 546 U.S. 1093 (2006); *see also Doe v. Tenet*, 544 U.S. 1, 11 (2005) (rejecting “in
12 camera proceedings” proposed by the Ninth Circuit to adjudicate claims because of the risk of
13 jeopardizing state secrets).

14 These concerns can and should be avoided in this case since public evidence advanced by
15 the plaintiffs plainly does not—and could not—establish their standing. And if the Court were
16 inclined to consider finding that public evidence somehow supports plaintiffs’ alleged aggrieved
17 status under the FISA, it should not do so given the underlying national security considerations
18 that already have been upheld in this case, which would be put inherently at risk with any such
19 finding.

20 **III. THE PRIOR GROUNDS FOR DISMISSAL SET FORTH BY THE**
21 **GOVERNMENT UNDERSCORE THAT THERE IS NO JURISDICTION OR**
22 **BASIS IN LAW TO FIND THAT PLAINTIFFS ARE AGGRIEVED**
23 **UNDER THE FISA.**

24 Finally, the Government Defendants have previously sought dismissal and summary
25 judgment in this action based on several grounds set forth in prior motions, all of which would
26 apply to plaintiffs’ First Amended Complaint. Because the amended complaint “supersedes the
27 original, the latter being treated thereafter as non-existent,” *Loux v. Rhay*, 375 F.2d 55 (9th Cir.
28 1967), the Government Defendants expressly preserve and incorporate all grounds for dismissal
and summary judgment set forth in their prior motions, and briefly summarize those grounds.

1 (1) *State Secrets Privilege and FISA Preemption*: First, the Government’s state secrets
2 privilege assertion,^{11/} upheld by the Ninth Circuit, requires dismissal of all claims in this case
3 unless the FISA preempts that privilege. *See Al-Haramain*, 507 F.3d at 1201-06. Defendants
4 reserve their position that the FISA does not preempt that privilege.^{12/} Further proceedings under
5 Section 1806(f) in the face of the Government’s state secrets privilege assertion—which would
6 otherwise now require complete dismissal of this case—are contrary to law and would be
7 especially erroneous to the extent they may risk or result in the inadvertent disclosure or
8 confirmation of information properly protected by the privilege assertion, as Defendants submit
9 they inherently would. *See* Defs. 2d MSJ Reply at 24.

10 (2) *Prospective Relief and Sovereign Immunity*: The Court also lacks jurisdiction to even
11 reach the application of Section 1806(f) of the FISA, including whether the plaintiffs are
12 “aggrieved” under the FISA. Plaintiffs’ claim for prospective relief challenges alleged
13 surveillance under a program that has lapsed, and under *City of Los Angeles v. Lyons*, 461 U.S.
14 95, 108 (1983), there is no basis for standing to obtain prospective relief, and thus no jurisdiction
15 for the Court to enter any such relief.^{13/} The Court’s July 2 decision concluded that if plaintiffs
16 can show they are “aggrieved as [FISA] section 1810” contemplates, then plaintiffs have
17 adequately demonstrated injury for purposes of establishing Article III standing.” *See Al-*
18 *Haramain*, 564 F. Supp. 2d at 1124. But the Court did not address the *Lyons* doctrine at all and
19 what remedy would be available to the plaintiffs, regardless of whether they are “aggrieved
20 persons” under the FISA. Section 1810 of the FISA concerns retrospective damages, which

21 ¹¹ *See* Memorandum of Points and Authorities in Support of Defendants’ [First] Motion
22 to Dismiss or for Summary Judgment (*see* Dkt. 59, Case No. 06-274-KI (D. Or. June 21, 2006)
23 and Declaration of John D. Negroponte, Director of National Intelligence, ¶ 11(iii), (iv) (Dkt. No.
59, Item #1) (Civ. 06-274-KI) (D. Or).

24 ¹² *See* Memorandum of Points and Authorities in Support of Defendants’ Second Motion
25 to Dismiss or for Summary Judgment (*see* Dkt. 17, Case No. 07-109-VRW (N.D. Cal. Mar. 14,
26 2008)) (“Defs. 2d MSJ Mem.”) at 12-24; *see also* Defendants’ Reply in Support of Defendants’
27 Second Motion to Dismiss or for Summary Judgment (*see* Dkt. 29, Case No. 07-109-VRW (N.D.
Cal. Apr. 14, 2008)) (“Defs. 2d MSJ Reply”) at 8-24.

28 ¹³ Defs. 2d MSJ Mem. at 6-8; Defs. 2d MSJ Reply at 3-4.

1 would not address or satisfy standing requirements set forth in *Lyons* for obtaining prospective
2 relief as to alleged conduct that is no longer occurring. *See* Defs. 2d MSJ Reply at 3-4.

3 As for retrospective damages, Defendants reserve our position that Section 1810 of the
4 FISA does not waive the sovereign immunity of the United States. Congress expressly waived
5 sovereign immunity of the United States in several provisions of the FISA that authorize
6 damages against the Government, but not in Section 1810.^{14/} While the Court ruled that such a
7 waiver is “implicit” in Section 1810, *see Al-Haramain*, 564 F. Supp. 2d at 1125, the law requires
8 that such waivers be explicit. *See* Defs. 2d MSJ Reply at 4 (citing *Multi Denominational*
9 *Ministry of Cannabis v. Gonzales*, 474 F. Supp. 2d 1133, 1140 (N.D. Cal. 2007)). At most, the
10 text of Section 1810 is ambiguous on the matter (as finding an “implicit” waiver would indicate),
11 and hence no waiver of sovereign immunity can be found under the law. *See* Defs. 2d MSJ
12 Reply at 4 (citing *United States v. Nordic Village*, 530 U.S. 30, 34-37 (1992)).

13 The foregoing grounds for dismissal or summary judgment for the Government provide
14 important context for considering the arguments set forth above that the plaintiffs have not
15 established that they are “aggrieved persons” under the FISA and likewise underscore the lack of
16 any jurisdictional basis on which this case may proceed.^{15/}

17 CONCLUSION

18 For the foregoing reasons, the Court should dismiss the plaintiffs’ First Amended
19 Complaint or, in the alternative, grant summary judgment for the Government Defendants.

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23 ¹⁴ Defs. 2d MSJ Mem. at 8-12; Defs. 2d MSJ Reply at 4-8.

24 ¹⁵ If the Court were inclined to proceed under FISA Section 1806(f), the parties should
25 address first whether it would be appropriate for the Court to certify the case for appellate review
26 that would address several jurisdictional questions, including whether the FISA preempts the
27 Government’s successful state secrets privilege assertion; whether FISA Section 1806(f) permits
28 a party to prove their aggrieved status with public evidence in the face of a state secrets privilege
assertion; whether there is even a continued jurisdictional basis for plaintiffs’ demand for
prospective relief as to a lapsed program; and whether sovereign immunity has been waived for
plaintiffs’ damages claim.

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