

1 **Jon B. Eisenberg, California Bar No. 88278** (jon@eandhlaw.com)
 2 **William N. Hancock, California Bar No. 104501** (bill@eandhlaw.com)
 3 **Eisenberg & Hancock LLP**
 4 1970 Broadway, Suite 1200 • Oakland, CA 94612
 510.452.2581 – Fax 510.452.3277

5 **Steven Goldberg, Oregon Bar No. 75134** (steven@stevengoldberglaw.com)
 6 River Park Center, Suite 300 • 205 SE Spokane St. • Portland, OR 97202
 503.445-4622 – Fax 503.238.7501

7 **Thomas H. Nelson, Oregon Bar No. 78315** (nelson@thnelson.com)
 8 P.O. Box 1211, 24525 E. Welches Road • Welches, OR 97067
 503.622.3123 - Fax: 503.622.1438

9 **Zaha S. Hassan, California Bar No. 184696** (zahahassan@comcast.net)
 10 8101 N.E. Parkway Drive, Suite F-2. • Vancouver, WA 98662
 11 360.213.9737 - Fax 866.399.5575

12 **J. Ashlee Albies, Oregon Bar No. 05184** (ashlee@sstcr.com)
 13 **Stenson, Schumann, Tewksbury, Creighton and Rose, PC**
 14 815 S.W. Second Ave., Suite 500 • Portland, OR 97204
 503.221.1792 – Fax 503.223.1516

15 **Lisa R. Jaskol, California Bar No. 138769** (ljaskol@earthlink.net)
 16 610 S. Ardmore Ave. • Los Angeles, CA 90005
 213.385.2977 – Fax 213.385.9089

17 **Attorneys for Plaintiffs Al-Haramain Islamic Foundation, Inc., Wendell Belew and Asim**
 18 **Ghafoor**

19 **IN THE UNITED STATES DISTRICT COURT**
 20 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

21 **IN RE NATIONAL SECURITY) MDL Docket No. 06-1791 VRW**
 22 **AGENCY TELECOMMUNICATIONS)**
 23 **RECORDS LITIGATION) PLAINTIFFS' CASE**
 24 **) MANAGEMENT STATEMENT**

25 This Document Relates Solely To:)
 26) Date: Friday, January 23, 2009
 27 *Al-Haramain Islamic Foundation, Inc., et al.*) Time: 10:30 a.m.
 28 *v. Bush, et al. (C07-CV-0109-VRW)*) Court: Courtroom 6, 17th Floor
 Honorable Vaughn R. Walker

AL-HARAMAIN ISLAMIC)
FOUNDATION, INC., et al.,)
 Plaintiffs,)

1 vs.)
2)
3 **GEORGE W. BUSH, President of the**)
4 **United States, et al.,**)
5)
6 Defendants.)
7)
8)

9 Pursuant to Local Rule 16-10(d), plaintiffs submit this separate case management statement
10 proposing a plan for proceeding with the adjudication of Article III standing in *Al-Haramain Islamic*
11 *Foundation, Inc. v. Bush* (07-109).

12 **REASON FOR SUBMITTING SEPARATE STATEMENT**

13 Plaintiffs submit their case management statement separately, instead of jointly with
14 defendants, for the following reason:

15 On Friday, January 9, 2009, plaintiffs' counsel Jon B. Eisenberg sent email to defendants'
16 counsel Anthony J. Coppolino attempting to begin conferring on a joint case management conference
17 statement. On January 12, Mr. Coppolino responded by email, asking Mr. Eisenberg to send a
18 proposal. On January 13, Mr. Eisenberg emailed Mr. Coppolino the proposed plan set forth below.
19 On January 15, Mr. Coppolino emailed that he hoped to respond the next day – Friday, January 16 –
20 with an indication of the government's position, and he suggested that counsel "touch base" that
21 Friday, although he also suggested that it might be more appropriate for the parties to file separate
22 statements. Mr. Eisenberg agreed that he and Mr. Coppolino would "touch base" on Friday.

23 Mr. Eisenberg then waited all day Friday, January 16, to hear from Mr. Coppolino. Meanwhile,
24 at 8:21 p.m. Eastern time that evening, Mr. Coppolino filed a notice of appeal from this Court's order
25 of January 5, 2009. Ten minutes later, Mr. Coppolino emailed plaintiffs' counsel saying the parties
26 should file separate case management statements.

27 On the morning of Saturday, January 17, 2009, Mr. Eisenberg left email and voicemail for Mr.
28 Coppolino asking him to call to discuss the notice of appeal that had been filed the night before. Mr.
Coppolino telephoned Mr. Eisenberg on the afternoon of Monday, January 19, 2009 and advised that
defendants would be filing, late that evening, a motion in the district court for a stay of further
proceedings. Mr. Eisenberg advised Mr. Coppolino of plaintiffs' view that defendants' notice of

1 appeal does not effect a stay of further proceedings in this Court if the order of January 5, 2009 is not
2 directly appealable, and asked Mr. Coppolino to state the grounds on which the government believes
3 the order is directly appealable, so that plaintiffs could effectively address, in their case management
4 statement, appealability and its effect on further district court proceedings. Mr. Coppolino responded
5 that “the Solicitor General has determined that the order is appealable under the collateral order
6 doctrine and 1292 and other authority,” but Mr. Coppolino declined to specify that “other authority.”
7 Mr. Coppolino suggested that plaintiffs could file a separate case management statement or that,
8 alternatively, the parties could attempt to prepare and file a joint statement on January 21, 2009. Mr.
9 Coppolino added, however, that in his view it would be “more reasonable” for plaintiffs to address the
10 appealability issue in opposition to the stay motion. Mr. Coppolino also suggested that the parties
11 stipulate to a continuance of the case management conference to January 30, 2009. Mr. Eisenberg
12 responded that plaintiffs would so stipulate if defendants would agree not to file their stay motion in
13 this Court until after 12:00 noon Eastern time on January 20, 2009. Mr. Coppolino refused to so agree.

14 At 10:56 p.m. Eastern time on January 19, 2009 – 64 minutes before midnight on the last day
15 of the Bush presidency – defendants filed a motion for a stay pending appeal and for certification of
16 an interlocutory appeal under 28 U.S.C. section 1292(b). The motion also summarily asserts that this
17 Court’s order of January 5, 2009 is *directly* appealable, stating that defendants “believe that several
18 possible grounds exist for appealing the Court’s Order under 28 U.S.C. § 1292, including the collateral
19 order and mandamus doctrines.” Doc. #60, at 15, n. 11.

20 Plaintiffs have chosen to submit this separate statement today, rather than making any further
21 attempts to get defendants’ agreement to a joint statement, because in plaintiffs’ view too much delay
22 has already occurred in the filing of statements that were due a week ago. Plaintiffs also have chosen
23 to address the appealability issue in this statement, rather than later in opposition to the stay motion,
24 because that issue is critical to this Court’s decision on how to proceed in light of defendants’ notice
25 of appeal. Plaintiffs do not at this time respond to defendants’ motion for a stay and certification of
26 an interlocutory appeal, but will do so in due course according to the applicable deadline for filing
27 opposition.

28 //

1 *Carlisle & Jacquelin*, 417 U.S. 156, 171 (1974) (issue must be “settled conclusively”). That is
2 because this Court has *not yet ordered disclosure* of anything. A key provision of the January 5
3 order is its requirement that defendants

4 shall review the Sealed Document and their classified submissions to date in this
5 litigation and determine whether the Sealed Document and/or any of defendants’
6 classified submissions may be declassified, take all necessary steps to declassify
7 those that they have determined may be declassified and, no later than forty-five
8 (45) days from the date of this order, serve and file a report of the outcome of that
9 review.

10 Doc. #50, at 24-25. If defendants decide to *declassify* the Sealed Document or an appropriately
11 redacted portion of it, and/or their classified submissions, it may not be necessary for this Court to
12 order any disclosure at all, because such disclosure will have occurred by defendants’ voluntary
13 declassification. And, as defendants make clear in their stay motion, they have “commenced the
14 declassification review process,” Doc. #60, at 6, n. 3 – which evidently means they have not yet
15 made any decisions with regard to declassification, so that it is still quite possible there will be
16 declassification and thus no issue of compelled disclosure. Thus, the issue whether defendants
17 must disclose anything is not yet conclusively determined.

18 With the advent of the Obama presidency, defendants might very well choose to declassify
19 some portions of the Sealed Document and/or the classified submissions. In a speech to the
20 American Constitution Society last summer, Attorney General designate Eric Holder condemned
21 the warrantless wiretapping program, saying:

22 We owe the American people a reckoning I never thought that I would see that
23 a president would act in direct defiance of federal law by authorizing warrantless
24 NSA surveillance of American citizens. This disrespect for the rule of law is not
25 only wrong, it is destructive in our struggle against terrorism. . .

26 See <http://www.acslaw.org/node/6720> (last visited Jan. 18, 2009).

27 In a law review article last spring, President Obama’s pick to head the Department of
28 Justice’s Office of Legal Counsel, Dawn E. Johnsen, wrote of defendants’ asserted justifications
for the warrantless wiretapping program – the so-called “unitary executive” theory and defendants’
“Commander-in-Chief” theory – that:

The Bush administration’s ‘unitary executive’ and ‘Commander-in-Chief’ theories,
in my view, are clearly wrong and threaten both the constitutionally prescribed

1 balance of powers and individual rights.

2 Dawn E. Johnsen, *What's a President to do? Interpreting the Constitution in the Wake of Bush*
3 *Administration Abuses*, 88 B.U.L. Rev. 395, 417 (2008).

4 It would be a remarkable turnabout for the new Department of Justice, under the guidance
5 of Mr. Holder and Ms. Johnsen, to refuse any declassification here and continue the effort to resist
6 a decision on plaintiffs' standing and this Court's adjudication of the Bush administration's
7 "unitary executive" and Commander-in-Chief" theories.

8 This Court's 1806(f) ruling fails the second prong of the collateral order doctrine because
9 the key question that is implicated and may be resolved on plaintiffs' 1806(f) motion – whether
10 plaintiffs' surveillance "was lawfully authorized and conducted," 50 U.S.C. § 1806(g) – is not
11 "completely separate from the merits of the action," *Coopers & Lybrand*, 437 U.S. at 468, but,
12 quite to the contrary, is "enmeshed in the factual and legal issues comprising the plaintiff's cause
13 of action," *id.* The 1806(f) issue – whether plaintiffs were subjected to unlawful surveillance – is
14 hardly collateral to the merits issue, but *is* the merits issue.

15 In short, this Court's order of January 5, 2009 cannot be directly appealable under the
16 collateral order doctrine. As for defendants' other theory of "appealability" – mandamus – that is
17 not a theory of appealability at all, for mandamus is a writ, not an appeal. Defendants have not
18 even filed a petition for writ of mandamus. They cannot claim the benefit of mandamus when they
19 have not requested it.

20 We also note that, according to 50 U.S.C. section 1806(h), an order to disclose materials
21 relating to electronic surveillance is "final." That provision, however, does not make this court's
22 1806(f) order appealable, for one of the same reasons it is not appealable under the collateral order
23 doctrine: It does not yet order disclosure of anything – that is, it does not conclusively determine
24 the matter of disclosure – and thus is not final.

25 Finally, there is reason to doubt that defendants truly believe the January 5 order is directly
26 appealable, when they have filed a 16-page motion for certification of an interlocutory appeal and a
27 discretionary stay yet devote only half a sentence in a footnote to a contradictory and unsupported
28

1 claim that the order is directly appealable.

2 Because no direct appeal lies from the January 5, 2009 order, defendants' purported appeal
3 from that order has no effect on this Court's jurisdiction to proceed with the adjudication of
4 plaintiffs' Article III standing. Purported appeals from unappealable orders "do not transfer
5 jurisdiction to the appellate court and thus do not strip the district court of jurisdiction to conduct
6 further proceedings in the case." *Nascimento v. Dummer*, 508 F.3d 905, 910 (9th Cir. 2007);
7 accord, *Estate of Conners*, 6 F.3d 656, 658 (9th Cir. 1993).

8 **PLAINTIFFS' PROPOSED PLAN**

9 In plaintiffs' view, as explained at pages 20-21 of Plaintiffs' Opposition To Defendants'
10 Third Motion To Dismiss Or, In The Alternative, For Summary Judgment, Doc. #50, at 29-30, this
11 Court can and should adjudicate plaintiffs' Article III standing upon plaintiffs' 1806(f) motion in
12 the course of determining "whether the surveillance of the aggrieved person[s] was lawfully
13 authorized and conducted." 50 U.S.C. § 1806(f).

14 Before this Court decides the standing issue, plaintiffs propose a round of briefing in which
15 plaintiffs have the opportunity to address how the Sealed Document contributes to plaintiffs'
16 showing of Article III standing. That briefing should occur after defendants have decided whether
17 the Sealed Document or an appropriately redacted portion of it and/or any of defendants' classified
18 submissions will be declassified and have completed any such declassification, and after plaintiffs'
19 counsel receive their TS/SCI clearances and have reviewed any remaining classified material under
20 secure conditions. Briefing by plaintiffs' counsel addressing still-classified information should be
21 prepared under secure conditions similar to those under which plaintiffs' counsel prepared sealed
22 filings during litigation in the Ninth Circuit Court of Appeals.

23 This Court's order of January 5, 2009 prescribes the following schedule for upcoming
24 proceedings:

- 25 • January 20: Deadline for the Court's review of the Sealed Document (14 days
26 from filing of order).
- 27 • February 13: Deadline for processing of applications by plaintiffs' counsel for
28 TS/SCI security clearances (date specified in order).

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DATED this 20th day of January, 2009.

/s/ Jon B. Eisenberg

Jon B. Eisenberg, Calif. Bar No. 88278
William N. Hancock, Calif. Bar No. 104501
Steven Goldberg, Ore. Bar No. 75134
Thomas H. Nelson, Oregon Bar No. 78315
Zaha S. Hassan, Calif. Bar No. 184696
J. Ashlee Albies, Ore. Bar No. 05184
Lisa Jaskol, Calif. Bar No. 138769

**Attorneys for Plaintiffs Al-Haramain Islamic
Foundation, Inc., Wendell Belew, and Asim
Ghafoor**

1 CERTIFICATE OF SERVICE

2
3 **RE: In Re National Security Agency Telecommunications Records Litigation**
4 **MDL Docket No. 06-1791 VRW**

5 I am a citizen of the United States and employed in the County of San Francisco, State of
6 California. I am over eighteen (18) years of age and not a party to the above-entitled action. My
7 business address is Eisenberg and Hancock, LLP, 180 Montgomery Street, Suite 2200, San
8 Francisco, CA, 94104. On the date set forth below, I served the following documents in the manner
9 indicated on the below named parties and/or counsel of record:

10 • **PLAINTIFFS' CASE MANAGEMENT STATEMENT**

11 _____ **Facsimile** transmission from (415) 544-0201 during normal business hours, complete and
12 without error on the date indicated below, as evidenced by the report issued by the
13 transmitting facsimile machine.

14 _____ **U.S. Mail**, with First Class postage prepaid and deposited in a sealed envelope at San
15 Francisco, California.

16 XX **By ECF:** I caused the aforementioned documents to be filed via the Electronic Case Filing
17 (ECF) system in the United States District Court for the Northern District of California, on
18 all parties registered for e-filing in In Re National Security Agency Telecommunications
19 Records Litigation, Docket Number M:06-cv-01791 VRW, and *Al-Haramain Islamic*
20 *Foundation, Inc., et al. v. Bush, et al.*, Docket Number C07-CV-0109-VRW.

21 I am readily familiar with the firm's practice for the collection and processing of
22 correspondence for mailing with the United States Postal Service, and said correspondence would
23 be deposited with the United States Postal Service at San Francisco, California that same day in the
24 ordinary course of business.

25 I declare under penalty of perjury that the foregoing is true and correct. Executed on
26 January 20, 2009 at San Francisco, California.

27 _____ /s/ Jessica Dean

28 JESSICA DEAN