

No.

In the Supreme Court of the United States

FEDERAL BUREAU OF INVESTIGATION, ET AL.,
PETITIONERS

v.

YASSIR FAZAGA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 1806 of the Foreign Intelligence Surveillance Act of 1978 (FISA), 50 U.S.C. 1801 *et seq.*, governs the “[u]se of information” obtained or derived from electronic surveillance for foreign-intelligence purposes under FISA. 50 U.S.C. 1806. Section 1806(c) and (d) require the federal or a state government to provide notice to an aggrieved person whenever it intends to introduce such information as evidence in any proceedings against that person. Section 1806(e) affords the aggrieved person the opportunity to move to suppress any such information that was not obtained in compliance with FISA. And Section 1806(f) establishes special *in camera* and *ex parte* procedures to determine the admissibility of such evidence, if the Attorney General attests that a typical adversarial hearing would harm the national security of the United States. The question presented is as follows:

Whether Section 1806(f) displaces the state-secrets privilege and authorizes a district court to resolve, *in camera* and *ex parte*, the merits of a lawsuit challenging the lawfulness of government surveillance by considering the privileged evidence.

PARTIES TO THE PROCEEDING

Petitioners are the United States of America, the Federal Bureau of Investigation (FBI); Christopher A. Wray, in his official capacity as the Director of the FBI; and Kristi K. Johnson, in her official capacity as the Assistant Director of the FBI's Los Angeles Division, each of whom is a defendant in the district court.

Respondents are Yassir Fazaga, Ali Uddin Malik, and Yasser Abdelrahim, each of whom is a plaintiff in the district court; as well as Paul Allen, Kevin Armstrong, Pat Rose, J. Stephen Tidwell, and Barbara Walls, each of whom is a defendant in the district court sued in his or her individual capacity.

RELATED PROCEEDINGS

United States District Court (C.D. Cal.):

Fazaga v. FBI, No. 11-cv-301 (Aug. 14, 2012)

United States Court of Appeals (9th Cir.):

Fazaga v. FBI, No. 12-56867 (July 20, 2020)

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the federal parties, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.¹

OPINIONS BELOW

The amended panel opinion of the court of appeals (App., *infra*, 5a-98a), the order denying rehearing en banc (App., *infra*, 3a), and opinions regarding the denial of rehearing en banc (App., *infra*, 98a-135a) are reported at 965 F.3d 1015. The opinion of the district court (App., *infra*, 136a-180a) is reported at 884 F. Supp. 2d 1022. A related opinion of the district court (App., *infra*, 181a-195a) is reported at 885 F. Supp. 2d 978.

¹ This petition is filed on behalf of the official-capacity and agency defendants. The individual-capacity defendants are separately represented by private counsel at governmental expense.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 2019. A petition for rehearing was denied and an amended panel opinion was issued on July 20, 2020 (App., *infra*, 1a-135a). On March 19, 2020, this Court extended the time within which to file all petitions for a writ of certiorari due on or after that date to 150 days from the date of the lower court judgment, which, in this case, is December 17, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are set forth in the appendix to the petition. App., *infra*, 196a-212a.

STATEMENT

A. Legal Background

1. The Executive's power and responsibility to safeguard the national security and to protect state secrets from exposure in litigation have been recognized since the earliest years of the Republic. In the 1807 treason trial of Aaron Burr, Chief Justice Marshall recognized that a court must afford "all proper respect" to the President's judgment that, in response to a trial subpoena, the public interest required certain documents "be kept secret." *United States v. Burr*, 25 F. Cas. 187, 192 (C.C.D. Va. 1807) (No. 14,694). In *Totten v. United States*, 92 U.S. 105 (1876), this Court held that, "as a general principle," "public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential," including state and military secrets. *Id.* at 107. Most recently, in *General Dynamics Corp. v. United States*, 563 U.S. 478 (2011), the Court observed that it had long "recognized

the sometimes-compelling necessity of governmental secrecy by acknowledging a Government privilege against court-ordered disclosure of state and military secrets.” *Id.* at 484.

The state-secrets privilege is deeply rooted in both “the law of evidence,” *United States v. Reynolds*, 345 U.S. 1, 6-7 (1953), and the Executive’s “Art[icle] II duties” to protect “military or diplomatic secrets,” *United States v. Nixon*, 418 U.S. 683, 710 (1974). Even if a litigant makes a “strong showing of necessity” for discovery or use of information, the privilege applies whenever “there is a reasonable danger that compulsion of the evidence will expose military [or other] matters which, in the interest of national security, should not be divulged.” *Reynolds*, 345 U.S. at 10-11. And where it applies, the privilege is absolute: “[E]ven the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that [state] secrets are at stake.” *Id.* at 11.

To invoke the state-secrets privilege, “[t]here must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer.” *Reynolds*, 345 U.S. at 7-8 (citation omitted). Following a formal claim, “[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege * * * without forcing a disclosure of the very thing the privilege is designed to protect.” *Id.* at 8. As with any other evidentiary privilege, if the court upholds the government’s claim of state-secrets privilege, the privileged information is entirely removed from the case. See *id.* at 10-11; *General Dynamics*, 563 U.S. at 485 (“The privileged information is excluded.”).

Sometimes, when the privilege is invoked, the case may proceed without the state secrets. See *General Dynamics*, 563 U.S. at 485. “[T]he assertion of the privilege will require dismissal,” however, where “litigating the case to a judgment on the merits” even without introducing the privileged evidence “would present an unacceptable risk of disclosing state secrets.” *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1079 (9th Cir. 2010) (en banc), cert. denied, 563 U.S. 1002 (2011). In such a case, where the privilege precludes adjudication of the merits, this Court has recognized that “neither party can obtain judicial relief.” *General Dynamics*, 563 U.S. at 486.

2. The Foreign Intelligence Surveillance Act of 1978 (FISA or the Act), 50 U.S.C. 1801 *et seq.*, regulates the government’s collection of electronic surveillance for foreign-intelligence purposes.

a. FISA defines “[e]lectronic surveillance” as the acquisition of wire, radio, or other communications within the United States in various contexts. As relevant here, when electronic surveillance is conducted through the “installation or use of an electronic, mechanical, or other surveillance device in the United States” for the purpose of “acquir[ing] information, other than from a wire or radio communication,” where “a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes,” 50 U.S.C. 1801(f)(4), the Act typically requires that, before the government conducts the surveillance, it must obtain an order from the Foreign Intelligence Surveillance Court. 50 U.S.C. 1805, 1809(a)(1); see 50 U.S.C. 1803(a), 1804(a).

To obtain such an order, the government must establish, *inter alia*, probable cause to believe that the “target of the electronic surveillance” is a foreign power or

an agent thereof and that “each of the facilities or places” at which the surveillance is directed is being used, or is about to be used, by a foreign power or its agent. 50 U.S.C. 1805(a)(2). The government must also establish that the “minimization procedures” it will employ are reasonably designed to minimize the acquisition, retention, and dissemination of nonpublic information concerning “United States persons.” 50 U.S.C. 1801(h), 1805(a)(3), and (c)(2)(A).

FISA imposes criminal penalties on any person who intentionally engages in unauthorized electronic surveillance “under color of law” or intentionally “discloses or uses information obtained under color of law” by unauthorized electronic surveillance, “knowing or having reason to know that the information was obtained through” unauthorized electronic surveillance. 50 U.S.C. 1809(a). FISA also provides a private claim for damages to any “aggrieved person, other than a foreign power or [its] agent,” who has been subjected to electronic surveillance, or about whom information obtained by electronic surveillance has been disclosed or used, in violation of the criminal prohibition. 50 U.S.C. 1810.

b. Section 1806 of FISA regulates the government’s “[u]se of information” obtained or derived from electronic surveillance conducted under the Act. 50 U.S.C. 1806. As most relevant here, any person subject to surveillance pursuant to FISA must be afforded notice and an opportunity to be heard before information obtained or derived from that surveillance may be used in any court or agency proceeding against that person.

Section 1806(c) provides that, “[w]hensoever the Government intends to enter into evidence or otherwise use or disclose in any * * * proceeding * * * , against an aggrieved person, any information obtained or derived

from an electronic surveillance of that aggrieved person pursuant to [FISA],” the government must “notify the aggrieved person and the court * * * that the Government intends to so disclose or so use such information.” 50 U.S.C. 1806(c); see 50 U.S.C. 1806(d) (imposing the same notice requirement on States and their political subdivisions). Section 1806(e) authorizes an aggrieved person “against whom [such] evidence * * * is to be, or has been, introduced or otherwise used or disclosed” to “move to suppress the evidence” on the ground that (1) “the information was unlawfully acquired” or (2) “the surveillance was not made in conformity with an order of authorization or approval.” 50 U.S.C. 1806(e). Section 1806(f) provides, in turn, a mechanism for *in camera* and *ex parte* resolution of the admissibility of such evidence if “the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States.” 50 U.S.C. 1806(f).

Specifically, Section 1806(f) authorizes the Attorney General to invoke the *in camera* and *ex parte* procedures

[w]henever a court or other authority is notified pursuant to subsection (c) or (d), or whenever a motion is made pursuant to subsection (e), or whenever any motion or request is made by an aggrieved person pursuant to any other statute or rule of the United States or any State before any court or other authority of the United States or any State to discover or obtain applications or orders or other materials relating to electronic surveillance or to discover, obtain, or suppress evidence or information obtained or derived from electronic surveillance under [FISA].

50 U.S.C. 1806(f).

When the Attorney General invokes Section 1806(f), the district court in which the aggrieved person’s motion was filed—or, “where the motion is made before another authority,” the district court “in the same district as the authority”—“shall, notwithstanding any other law, * * * review in camera and ex parte the [FISA] application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted.” 50 U.S.C. 1806(f). Review under Section 1806(f) proceeds *ex parte* unless disclosure to the aggrieved person “is necessary to make an accurate determination of the legality of the surveillance,” in which case the court “may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other materials relating to the surveillance.” *Ibid.*

If the district court determines “pursuant to subsection (f)” that “the surveillance was not lawfully authorized or conducted,” it “shall, in accordance with the requirements of law, suppress the evidence which was unlawfully obtained or derived from electronic surveillance of the aggrieved person or otherwise grant the motion of the aggrieved person.” 50 U.S.C. 1806(g). Conversely, “[i]f the court determines that the surveillance was lawfully authorized and conducted, it shall deny the motion * * * except to the extent that due process requires discovery or disclosure.” *Ibid.*

B. The Present Controversy

1. Respondents are three members of Muslim communities in Southern California. App., *infra*, 140a. They brought this putative class action in 2011 against the United States, the Federal Bureau of Investigation (FBI), former FBI Director Robert Mueller and former

Assistant Director of the FBI Los Angeles Field Office Steven Martinez in their official capacities, and five FBI agents in their individual capacities. *Id.* at 141a, 146a. Respondents allege that, from 2006 to 2007, the FBI used a confidential informant, Craig Monteilh, to covertly gather information about Muslims in their communities based solely on their religion. *Id.* at 139a, 142a, 145a.

Respondents allege that the FBI directed Monteilh to engage in various forms of investigation, including non-electronic and electronic surveillance. For example, they allege that Monteilh was directed to “seiz[e] every opportunity to meet people” by “attend[ing] lectures by Muslim scholars,” “attend[ing] classes and dawn prayers at mosques,” and “work[ing] out with Muslims he met at [the] gym.” App., *infra*, 10a, 144a. They allege that Monteilh gathered personal information, like phone numbers and email addresses, through face-to-face encounters at such gatherings. *Id.* at 11a-12a, 144a-145a. They also allege that he collected video recordings capturing the interiors of mosques, homes, and businesses, and audio recordings of conversations, lectures, classes, and other events. *Ibid.* And, finally, respondents allege that FBI agents separately planted audio-listening devices in one respondent’s office and another’s home. *Id.* at 12a, 34a.

Based on these allegations, respondents assert claims under the Establishment Clause, the Free Exercise Clause, the Fourth Amendment, the equal protection component of the Due Process Clause, the Federal Tort Claims Act (FTCA), Section 1810 of FISA, the Religious Freedom Restoration Act of 1993, the Privacy Act, and California law. App., *infra*, 147a-148a. They seek dam-

ages from the FBI agents sued in their individual capacities under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and Section 1810 of FISA; damages from the government under the FTCA and California law; and an injunction ordering the government “to destroy or return any information gathered” through or derived from unlawful surveillance. App., *infra*, 58a (citation omitted); see *id.* at 148a & n.6.

2. Before the district court, the government formally invoked the state-secrets privilege, through a declaration of the Attorney General, over information concerning whether any particular individual, including each of the respondents, was the subject of an FBI counterterrorism investigation, the reasons for any such investigation, and the particular sources and methods used (including any undisclosed electronic surveillance). App., *infra*, 163a. The government submitted classified declarations explaining in detail why disclosure of that information could reasonably be expected to harm the national security. *Id.* at 163a-164a.

On August 14, 2012, the district court upheld the privilege and dismissed the claims against the government and the official-capacity federal defendants. App., *infra*, 136a-180a. The court determined that disclosure of the privileged evidence “would significantly compromise national security.” *Id.* at 165a. And it concluded that “litigation of this action would certainly require or, at the very least, greatly risk disclosure of secret information, such that dismissal at this stage of the proceeding is required.” *Id.* at 165a-166a.²

² The district court also dismissed the claims against the individual-capacity defendants on state-secrets grounds with the exception of

3. The court of appeals reversed. App., *infra*, 1a-98a. As relevant here, the court held that “the procedures established under FISA for adjudicating the legality of challenged electronic surveillance replace the common law state secrets privilege with respect to such surveillance to the extent that privilege allows the categorical dismissal of causes of action.” *Id.* at 37a-38a. Without addressing the district court’s determination that further litigation would require the disclosure of state secrets, the court of appeals held that the district court erred in dismissing respondents’ claims, instead of relying on Section 1806(f) of FISA as the means to adjudicate respondents’ claims on the merits based on the privileged evidence. See *id.* at 37a-67a.

The court of appeals determined that Section 1806(f) was triggered in two ways. First, it construed the Attorney General’s declaration invoking the state-secrets privilege to *exclude* certain information—including whether there was any undisclosed electronic surveillance—as constituting notice under Section 1806(c) of the government’s intent to *use or disclose* information obtained or derived from electronic surveillance against respondents’ claims. App., *infra*, 57a-58a; see 50 U.S.C. 1806(d), (f) (providing for *in camera* and *ex parte* review “[w]henver a court or other authority is notified pursuant to subsection (c) or (d)” of the government’s intent to “enter into evidence or otherwise use or disclose” the information in a legal proceeding). Second, the court concluded that a prayer for relief in respondents’ complaint—for an order requiring the destruction or return of information gathered in the alleged investigations—constituted a “motion or request * * * to

respondents’ claims for damages under FISA Section 1810. App., *infra*, 178a-180a, 195a.

discover, obtain, or suppress evidence or information obtained or derived from electronic surveillance” under FISA. App., *infra*, 57a (quoting 50 U.S.C. 1806(f)); see *id.* at 58a.

The court of appeals further held that, when the Section 1806(f) procedure applies, it “displace[s] the common law dismissal remedy created by the *Reynolds* state secrets privilege as applied to electronic surveillance within FISA’s purview.” App., *infra*, 47a; see *id.* at 46a-55a. The court reasoned that “[t]he state secrets privilege may have a constitutional core or constitutional overtones, but, at bottom, it is an evidentiary rule rooted in common law” that can be abrogated by any statute that “speak[s] directly to the question addressed by the common law.” *Id.* at 47a, 48a-49a (citations and internal quotation marks omitted). The court concluded that the text of FISA and its legislative history indicated that Congress intended to make Section 1806(f)’s *in camera* and *ex parte* procedure “the exclusive procedure for evaluating evidence that threatens national security in the context of electronic surveillance-related determinations.” *Id.* at 50a; see *id.* at 49a-55a.

The court of appeals accordingly reversed the district court’s dismissal based on the Attorney General’s assertion of the state-secrets privilege and remanded for further proceedings. App., *infra*, 92a-98a. The court instructed that, on remand, to the extent plaintiffs are “aggrieved persons” within the meaning of FISA, the district court “should, using § 1806(f)’s *ex parte* and *in camera* procedures, review any ‘materials relating to the surveillance as may be necessary,’ including the evidence over which the Attorney General asserted the state secrets privilege, to determine whether the elec-

tronic surveillance was lawfully authorized and conducted.” *Id.* at 92a-93a (citation omitted). “As permitted by Congress,” the court continued, “[i]n making this determination, the court may disclose to [respondents] * * * portions of the application, order or other materials relating to the surveillance” if “necessary to make an accurate determination.” *Id.* at 93a (quoting 50 U.S.C. 1806(f)) (first set of brackets in original).

The court of appeals further held that, once the district court used the Section 1806(f) procedures to determine the lawfulness of the electronic surveillance in resolving the merits of respondents’ claims, “it c[an] rely on its assessment of the same evidence * * * to determine the lawfulness of the surveillance falling outside FISA’s purview.” App., *infra*, 95a. The court reasoned that “[i]t would stretch the privilege beyond its purpose to require the district court to consider the state secrets evidence *in camera* and *ex parte* for one claim, but then, when considering another claim, ignore the evidence and dismiss the claim.” *Ibid.* The court of appeals stated that, if its “prediction of the overlap between the information to be reviewed * * * to determine the validity of FISA-covered electronic surveillance and the information pertinent to other aspects” of the claims turned out to be inaccurate, the government would be “free to interpose a specifically tailored, properly raised state secrets privilege defense.” *Ibid.*

4. The court of appeals denied rehearing en banc by a deeply divided vote. App., *infra*, 3a.

a. Judges Gould and Berzon, both members of the original panel, concurred in the denial of rehearing en banc, joined by three other judges. App., *infra*, 98a-108a. In their joint concurrence, Judges Gould and Berzon reiterated the reasoning of the panel opinion, and

stated that, in their view, the panel decision deprives the government “only” of the dismissal remedy “that sometimes follows the successful invocation of the state-secrets evidentiary privilege,” not the state-secrets privilege itself. *Id.* at 102a. In a footnote, they stated that if a district court, in following the Section 1806(f) procedures, were to order the disclosure of state secrets to opposing counsel under that provision to facilitate the court’s adjudication of the merits of respondents’ claims, “nothing in the panel opinion prevents the government from invoking the state secrets privilege’s dismissal remedy as a backstop at that juncture.” *Id.* at 100a n.1.

Senior District Judge Steeh, the third member of the panel, filed a brief statement respecting the denial of rehearing en banc, “agree[ing] with the views expressed by Judges Berzon and Gould in their concurrence.” App., *infra*, 108a.

b. Judge Bumatay, joined by nine other judges, dissented from the denial of rehearing en banc. App., *infra*, 109a-135a. Judge Bumatay observed that the Executive’s authority “to prevent the disclosure of information that would jeopardize national security” has been recognized “[f]rom the earliest days of our Nation’s history.” *Id.* at 108a. He explained that this authority “lies at the core of the executive power” vested in the President by Article II and in the “President’s authority as Commander in Chief.” *Ibid.* And he noted that, when this Court “confronts a legislative enactment implicating [such] constitutional concerns,” “it has commonly required a clear statement from Congress before plowing ahead * * * out of a due respect for those constitutional concerns.” *Id.* at 110a. In his view, Section 1806(f) “fall[s] pitifully short of th[at] standard.” *Id.* at 121a.

Judge Bumatay explained that, on its face, Section 1806(f) does not apply in these circumstances and does not displace the state-secrets privilege. Instead, Section 1806(f) provides procedures to determine the limited issue of the admissibility of electronic-surveillance evidence when the government seeks to use such evidence against an aggrieved person in litigation. App., *infra*, 108a, 127a-134a. He explained that, contrary to the panel’s opinion, the government’s invocation of the state-secrets privilege to *remove* evidence from the case did not trigger Section 1806(f)’s procedures because it did not provide notice of an intent to *use* that evidence against respondents. *Id.* at 128a-130a. He likewise concluded that respondents’ prayer for relief to destroy or return any information obtained or derived from government surveillance did not qualify as a motion or request “to discover, obtain, or suppress evidence or information” that would trigger Section 1806(f), reasoning that that language applies only to motions to suppress or other similar procedural requests, not “substantive requests for relief.” *Id.* at 132a (citation omitted); see *id.* at 131a-134a.

REASONS FOR GRANTING THE PETITION

This case raises exceptionally important questions concerning the Executive Branch’s responsibility under the Constitution to protect the national security of the United States. The court of appeals’ decision has the startling consequence of transforming a limited provision of FISA that was designed to *safeguard* national-security information into a mechanism for overriding the Executive’s invocation of the state-secrets privilege and for adjudicating the merits of private-party claims for substantive relief on the basis of state secrets. The court of appeals’ decision conflicts with this Court’s

clear admonition that courts should not endanger national security by allowing state secrets to be used in litigation, “even by the judge alone, in chambers.” *United States v. Reynolds*, 345 U.S. 1, 10 (1953). It is deeply misguided and warrants this Court’s review.

As the ten judges who dissented from the denial of rehearing en banc correctly recognized, Section 1806(f) of FISA creates a limited, government-protective procedure for resolving questions of admissibility or suppression when the government affirmatively seeks in litigation to use electronic-surveillance evidence against a person who was subject to the surveillance. It does not create a freestanding *in camera* and *ex parte* mechanism for resolving the merits of a case brought against the government or its officers on the basis of evidence that the government seeks, on state-secrets grounds, to exclude—much less for resolution of the lawfulness of *non*-electronic surveillance. Nor, even more fundamentally, does Section 1806(f) silently displace the long-standing and constitutionally rooted state-secrets privilege, which enables the Executive to fulfill its constitutional duty to protect national-security information.

The Ninth Circuit’s decision to the contrary poses a substantial risk that state secrets will be disclosed on remand in this case. And it has already formed the basis for requests by inventive litigants in other pending cases brought against the government to “dodge the state secrets privilege” by invoking Section 1806(f). App., *infra*, 111a (Bumatay, J., dissenting from denial of rehearing en banc). If left undisturbed, the panel’s opinion threatens to leave the government “powerless to prevent the disclosure of state secrets” in defending itself against such claims. *Ibid.* And “[m]ost alarming[ly],” it could “lead to the disclosure of state secrets

to the very subjects of the foreign-intelligence surveillance.” *Id.* at 110a. Before such results are permitted, this Court’s review is warranted.

A. The Court Of Appeals’ Decision Is Incorrect

The court of appeals held that the *in camera, ex parte* procedures under Section 1806(f) may be triggered whenever the government invokes the state-secrets privilege to *exclude* evidence that was allegedly obtained by or derived from electronic surveillance or whenever a plaintiff files suit challenging the legality of alleged electronic surveillance and requests an order to destroy or return information gathered through such surveillance. App., *infra*, 57a-58a. The court further held that, where Section 1806(f) applies, it permits the district court to adjudicate the merits of substantive claims for relief by considering the very evidence over which the government asserted the privilege. *Id.* at 47a. Both holdings are incorrect and warrant this Court’s review.

1. a. Section 1806, titled “Use of information,” regulates how the government may use or disclose evidence obtained or derived from electronic surveillance conducted under FISA. 50 U.S.C. 1806. Subsection (a) requires that such information “may be used” only in compliance with privacy-protective minimization procedures; subsection (b) provides that such information “may only be used” with the advance authorization of the Attorney General; subsections (c) and (d) require that, if a government entity seeks to “use or disclose” such information “against an aggrieved person” in a legal proceeding, the government must “notify the aggrieved person”; and subsection (e) provides that an aggrieved person against whom the electronic-surveillance information is to be “used or disclosed” may “move to

suppress” the information “on the ground[] that” it was “unlawfully acquired.” 50 U.S.C. 1806(a)-(e). The provision at issue here is subsection (f).

In keeping with the rest of Section 1806, subsection (f) creates a procedure for determining whether the government can introduce evidence obtained or derived from electronic surveillance against an aggrieved person, or whether such evidence must be suppressed, in circumstances when a typical adversarial hearing on the question of such use by the government would “harm the national security.” 50 U.S.C. 1806(f). When the Attorney General attests to such harm, a district court reviews the underlying FISA application, order, and related materials *in camera* and *ex parte* to determine “the legality of the surveillance,” and may disclose the relevant materials to the aggrieved person only where “necessary to make an accurate determination.” *Ibid.* If the court “determines that the surveillance was not lawfully authorized or conducted, it shall * * * suppress the evidence [that] was unlawfully obtained or derived from electronic surveillance of the aggrieved person or otherwise grant the motion.” 50 U.S.C. 1806(g). Conversely, “[i]f the court determines that the surveillance was lawfully authorized and conducted, it shall deny the motion * * * except to the extent that due process requires discovery or disclosure.” *Ibid.*

By its terms, Section 1806(f)’s procedures are available only in three circumstances: first, when the government provides notice under subsections (c) and (d) of its intent to “use or disclose” electronic-surveillance evidence against an aggrieved person in a legal proceeding; second, when an aggrieved person against whom electronic-surveillance evidence has been, or is to be, used or disclosed files a motion to suppress under

subsection (e); or, third, “whenever any motion or request is made by an aggrieved person pursuant to any other statute or rule of the United States” to “discover or obtain applications or orders or other materials relating to electronic surveillance or to discover, obtain, or suppress evidence or information obtained or derived from electronic surveillance under [FISA].” 50 U.S.C. 1806(f). Because the government has no intention of using or disclosing any FISA-obtained or FISA-derived evidence in this case and respondents have not filed any motion to suppress or similar procedural motion in an effort to preclude such (non-existent) use or disclosure of any FISA-obtained or FISA-derived evidence, Section 1806(f) does not apply.

b. The court of appeals concluded that Section 1806(f) provides the exclusive procedure for resolving respondents’ claims on the merits and permits the court to rely on such evidence, notwithstanding the Attorney General’s invocation of the state-secrets privilege. The court reasoned that the first and third grounds for invoking those procedures are satisfied here. Both conclusions are incorrect.

i. As to the first ground, the court of appeals concluded that the government’s assertion of the state-secrets privilege with respect to certain categories of information in this case constituted notice under Section 1806(c) of the government’s intent “to enter into evidence or otherwise use or disclose” FISA-obtained or FISA-derived information against respondents in this lawsuit, 50 U.S.C. 1806(c). See App., *infra*, 57a-58a. The court reasoned that it was “because the Government would like to use this information to defend itself that it * * * asserted the state secrets privilege.” *Id.* at 57a. That reasoning is misguided.

The government invoked the state-secrets privilege for the same reason that any party asserts any evidentiary privilege: to *prevent* the introduction or disclosure of the privileged information. As the declaration of the Attorney General explained, disclosure of the privileged information—including whether or not there was any electronic surveillance—“could reasonably be expected to cause significant harm to the national security.” Holder Declaration, D. Ct. Doc. 32-3, at 2 (Aug. 1, 2011). The government sought to avoid that result by precluding its use. By the panel’s reasoning, a litigant who asserts the attorney-client privilege signals his intent to use or disclose private communications with counsel, or a husband who asserts the marital-communications privilege signals his intent to use or disclose private conversations with his spouse. But, of course, they do nothing of the sort. “Such upside-down logic should not stand.” App., *infra*, 128a (Bumatay, J., dissenting from denial of rehearing en banc).

To be sure, invoking the state-secrets privilege to *remove* evidence from a case may in some circumstances result in dismissal of the plaintiff’s claims, see *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1083 (9th Cir. 2010) (en banc), cert. denied, 563 U.S. 1002 (2011), but that potential outcome does not convert the invocation of the privilege into an attempt to *introduce* the privileged evidence that would trigger FISA’s *in camera* procedures.

ii. As to the third ground for invoking Section 1806(f), the court of appeals concluded that respondents’ substantive prayer for relief in their complaint for an injunction requiring the government to “destroy or return any information gathered through the [allegedly] unlawful surveillance program” constituted a “motion

or request * * * made by an aggrieved person * * * to discover, obtain, or suppress evidence or information obtained or derived from electronic surveillance” under FISA. App., *infra*, 58a; 50 U.S.C. 1806(f). But in the context of Section 1806 and the Act as a whole, that conclusion too is implausible.

The rest of Section 1806 and its title make clear that Section 1806 concerns the government’s use or disclosure of FISA-obtained and FISA-derived evidence. The immediately preceding subsections demonstrate that subsection (f), in particular, concerns the government’s attempt to use or disclose such evidence against an aggrieved person in a legal proceeding. And the three grounds for invoking Section 1806(f) each fit comfortably within that framework. The first ground applies whenever the government provides notice under Section 1806(c) or (d) of its intent to “use or disclose” FISA-obtained or FISA-derived material against the aggrieved person. 50 U.S.C. 1806(c) and (d); see 50 U.S.C. 1806(f). The second ground applies when the aggrieved person invokes Section 1806(e) to “suppress” such material. 50 U.S.C. 1806(e); see 50 U.S.C. 1806(f). And the third ground serves as a backstop to the first two, ensuring that an aggrieved person cannot prevent the Attorney General from invoking Section 1806(f)’s *in camera*, *ex parte* procedures by seeking to suppress evidence or obtain discovery of FISA materials by invoking “any *other* statute or rule of the United States or any State.” 50 U.S.C. 1806(f) (emphasis added). As the Senate Report explains, the third ground prevents the “carefully drawn” procedures of Section 1806(f) “from being bypassed by the inventive litigant using a new statute, rule or judicial construction.” S. Rep. No. 701, 95th Cong., 2d Sess. 63 (1978) (1978 Senate Report); see

H.R. Rep. No. 1283, 95th Cong., 2d. Sess. Pt. 1, at 91 (1978); S. Rep. No. 604, 95th Cong., 1st Sess. 40 (1977).

Against that backdrop, respondents' prayer for relief on the merits cannot be understood as a "request" to "discover, obtain, or suppress" FISA-obtained or FISA-derived information that would trigger the Section 1806(f) process. 50 U.S.C. 1806(f); see App., *infra*, 58a. A word or phrase in a statute "is known by the company it keeps." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995). Even if a civil complaint's prayer for final judgment and substantive relief might be colloquially described as a "request," it is nothing like the sort of procedural motion to which Section 1806(f) is directed. Nor would awarding such relief on final judgment plausibly be described as granting the "[s]uppression of evidence" or other "motion of the aggrieved person"—the only relief that a district-court proceeding under Section 1806(f) can afford. 50 U.S.C. 1806(g).

Contrary to the court of appeals' assertion, the existence in Section 1810 of a private cause of action for specified violations of FISA does not suggest a broader reading. The court reasoned that "[i]t would make no sense" to provide procedures for reviewing national-security evidence "but not intend for those very procedures to be used" under Section 1810. App., *infra*, 61a. Section 1806(f) may well apply to a covered procedural motion in such a case. But for the reasons described above, Section 1806(f) can no more be read to authorize *in camera* and *ex parte* resolution of the *merits* of a Section 1810 claim, than it can be read to authorize resolving any other substantive claim. The court provided no basis for its contrary conclusion, other than its bare assertion.

In short, by holding that Section 1806(f) provides a vehicle for *in camera*, *ex parte* resolution not simply of the admissibility of FISA-obtained or FISA-derived evidence, but of the *merits* of respondents' civil claims challenging electronic and non-electronic surveillance, the decision below "jam[s] a square peg into a round hole." App., *infra*, 134a (Bumatay, J., dissenting from denial of rehearing en banc).

2. The court of appeals significantly compounded its error by further holding that Section 1806(f)'s procedures preclude the government from invoking the state-secrets privilege to remove any sensitive national-security information from a case in which Section 1806(f) applies. The court reasoned that, in enacting Section 1806(f), Congress "'sp[oke] directly" to the question addressed by the [privilege]" and that, because the privilege "is an evidentiary rule rooted in common law, *not* constitutional law," that was sufficient to displace "the common law dismissal remedy created by the *Reynolds* state secrets privilege as applied to electronic surveillance within FISA's purview." App., *infra*, 47a, 48a-49a (citation omitted). Once again, the court was wrong on both counts.

a. Nothing in Section 1806(f) speaks—directly or indirectly—to displacing the state-secrets privilege or the government's ability to protect the national security by removing state secrets from a case. The privilege is not mentioned in the text of that provision or anywhere in Section 1806. Nor have the court of appeals or plaintiffs identified anything in FISA's legislative history suggesting that Congress intended to displace the privilege. And nothing in the operation of Section 1806(f) is incompatible with the continued vitality of the privilege.

The court of appeals observed that Section 1806(f) and the state-secrets privilege are both “animated by * * * threats to national security,” and it described Section 1806(f) as, “in effect, a “codification of the state secrets privilege for purposes of relevant cases under the FISA.”” App., *infra*, 51a (citation omitted). But the two measures have different scopes; they apply in different circumstances; they are invoked by different officials; and they address national-security concerns in diametrically opposite ways.

Section 1806(f) applies when the government seeks to “use or disclose” electronic-surveillance information against an aggrieved person in legal proceedings, typically a criminal case. It provides a mechanism for adjudicating whether that information may be introduced into evidence or must be suppressed. In keeping with the focus on the government’s position in litigation, the Attorney General (or his delegee)—the official primarily responsible for government litigation—triggers those statutory procedures. 50 U.S.C. 1801(g), 1806(f). If the government prevails under Section 1806(f)’s procedures, the government may introduce the evidence into the proceeding.

By invoking the state-secrets privilege, by contrast, the government seeks to *remove* information from a case to protect the national security from harms that could result from its use or disclosure. The privilege is invoked most often where the government is a defendant, but also may apply in a case in which the government is not even a party. See, e.g., *Fitzgerald v. Penthouse Int’l, Ltd.*, 776 F.2d 1236 (4th Cir. 1985). In keeping with that broader focus, the state-secrets privilege is invoked by the “head of the department” responsible for the national-security information (*not* necessarily

the Attorney General), who must “personal[ly]” (*not* through a delegee) make a privilege claim. See *Reynolds*, 345 U.S. at 7-8. It generally forecloses even *in camera* consideration. See *id.* at 10 (“[T]he court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.”). And if the privilege is upheld, the privileged information may *not* be introduced or relied upon in the case by anyone.

In light of those differences, there is no reasonable basis to conclude that, by providing a means for the government to *introduce* FISA-obtained or FISA-derived evidence in a legal proceeding, Congress implicitly intended to prevent the government from *excluding* privileged evidence for national-security purposes. Indeed, even before FISA was enacted, courts used *in camera* procedures to determine the legality of foreign-intelligence surveillance in appropriate circumstances for purposes of determining whether evidence resulting from such surveillance could be used by the government. See *United States v. Belfield*, 692 F.2d 141, 149 (D.C. Cir. 1982) (“In this circuit and in others, it has constantly been held [pre-FISA] that the legality of electronic, foreign intelligence surveillance may, even should, be determined on an *in camera*, *ex parte* basis.”). If Congress effectively codified anything in Section 1806(f), it was that pre-FISA practice. “Given that *ex parte*, *in camera* review procedures coexisted with the state secrets privilege before FISA, there’s no reason to construe Congress’s codification of such procedures as an intent to eliminate the privilege.” App., *infra*, 124a (Bumatay, J., dissenting from denial of rehearing en banc).

The court of appeals emphasized that Section 1806(f) provides that, “whenever” one of the triggering conditions is met, the *in camera, ex parte* procedures “shall” be used “notwithstanding any other law.” App., *infra*, 50a (quoting 50 U.S.C. 1806(f)) (emphasis omitted). But that mandatory language is expressly conditioned on the Attorney General’s invocation of the Section 1806(f) procedures by sworn affidavit. See 50 U.S.C. 1806(f) (requiring a district court to conduct *in camera* review, “notwithstanding any other law, if the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security”) (emphasis added). It speaks only to the *type* of review the court must undertake in those circumstances—“in camera and ex parte,” rather than adversarial adjudication in open court. *Ibid.* Thus, Congress’s use of such language is designed to protect the *government’s* ability to channel certain motions through Section 1806(f), regardless of what procedure the aggrieved person attempts to invoke. See pp. 20-21, *supra*. It was not intended to preclude the government from protecting national security by invoking the state-secrets privilege to prevent the use of the evidence in the case altogether.

The 1978 Senate Report makes that point clear. As that report explains, Congress’s use of broad, mandatory language, like “notwithstanding any other law,” was intended to “make very clear that the procedures set out in [Section 1806(f)] apply whatever the underlying rule or statute referred to in the [aggrieved person’s] motion” to suppress, discover, or obtain FISA-obtained or FISA-derived evidence. 1978 Senate Report 63. At the same time, however, the report explains that, even when Section 1806(f) would otherwise apply,

the government may always “prevent[]” a court’s “adjudication of legality” by simply “choos[ing]” to “forgo the use of the surveillance-based evidence” and thereby avoid the risk that even Section 1806(f)’s protective procedures “would damage the national security.” *Id.* at 65.

The court of appeals found support for its contrary reading in unrelated and general statements in FISA’s legislative history about the need to enact “fundamental reform,” in order to provide the “exclusive legal authority for domestic security activities” and a civil remedy to “afford effective redress to people who are injured by improper federal intelligence activity.” App., *infra*, 53a-54a (quoting *Intelligence Activities and the Rights of Americans: Book II*, S. Rep. No. 755, 94th Cong., 2d Sess. 289, 297, 336 (1976)). But those statements describe nascent proposals for reform several years before FISA was enacted, not actual statutory provisions—much less the provision at issue here. To the extent they are relevant to interpreting the final legislation, they are reflected in FISA’s provisions (1) making the FISA warrant procedures the “exclusive” authority for domestic electronic surveillance for foreign-intelligence purposes, 50 U.S.C. 1812(a); see 1978 Senate Report 71 (“This statement puts to rest the notion that Congress recognizes an inherent Presidential power to conduct such surveillances.”); and (2) providing a private cause of action for damages based on criminal violations of FISA’s procedures, see 50 U.S.C. 1810. They have no bearing on the question presented here.

In the end, not even the panel itself appears to have had confidence in any purported congressional intent to displace the state-secrets privilege. In response to the concern that the panel’s opinion might require a district court to disclose sensitive national-security information

to the subjects of the government's surveillance, see App., *infra*, 125a (Bumatay, J., dissenting from denial of rehearing en banc), two members of the panel announced in their concurrence in denial of rehearing en banc that, if the district court ordered such disclosure pursuant to Section 1806(f), "nothing in the panel opinion prevents the government from invoking the state secrets privilege's dismissal remedy as a backstop at that juncture," *id.* at 100a n.1 (Gould & Berzon, JJ., concurring in denial of rehearing en banc). The third member of the panel "agree[d]." *Id.* at 108a (Steeh, J., statement regarding denial of rehearing en banc). But neither opinion explains how Section 1806(f) could be read to displace the state-secrets privilege, but only so far as disclosure to the aggrieved party is not ordered during the Section 1806(f) proceedings. Nothing in the text, structure, nor history of FISA supports such a line, and subjecting the national security to such procedures is incompatible with the privilege's vesting of the responsibility and authority to protect state secrets in the Executive.

b. Finally, if there were any doubt that Congress did not displace the state-secrets privilege, any ambiguity in Section 1806(f) should be construed in favor of retaining the privilege.

The state-secrets privilege is a longstanding feature of our legal system, deeply rooted in early Anglo-American law. As Judge Bumatay explained, "[f]rom the earliest days of our Nation's history, all three branches of government have recognized that the Executive has authority to prevent the disclosure of information that would jeopardize national security." App., *infra*, 108a (dissenting from denial of rehearing en banc); see *id.* at 113a-119a (canvassing historical sources).

This Court’s 1953 opinion in *Reynolds* traced the history of the privilege in the United States to, among other notable roots, the treason trial of Aaron Burr. 345 U.S. at 6-9 & n.18. By 1978, when FISA was enacted, “it [wa]s quite clear that the privilege to protect state secrets must head the list” of “the various privileges recognized in our courts.” *Halkin v. Helms*, 598 F.2d 1, 7 (D.C. Cir. 1978). Insofar as the privilege has been recognized as an element—indeed, an essential element—of the common law, this Court has long employed a “presumption favoring retention” of such federal common law. *United States v. Texas*, 507 U.S. 529, 534 (1993).

The privilege, moreover, is firmly rooted in the Constitution and is critical to the Executive Branch’s ability to fulfill its constitutional duties. “The authority to protect [national-security] information falls on the President as head of the Executive Branch and as Commander in Chief.” *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988) (citing *Totten v. United States*, 92 U.S. 105, 106 (1876)). “The President, both as Commander-in-Chief and as the Nation’s organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world.” *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). Executive privileges, including the state-secrets privilege, that “relate[] to the effective discharge of a President’s powers” are thus “constitutionally based.” *United States v. Nixon*, 418 U.S. 683, 710-711 (1974); cf. *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1498-1499 (2019) (noting that the “executive privilege” is one of the “constitutional doctrines” “implicit in [the Constitution’s] structure and supported by historical practice”).

At the very least, the Court should require a much clearer statement from Congress than Section 1806(f) expresses before it construes a statute to displace the longstanding and constitutionally based state-secrets privilege. See *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 466 (1989). As this Court has explained, “unless Congress *specifically* has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.” *Egan*, 484 U.S. at 530 (emphasis added). Similarly, as Judge Bumatay observed, “[w]hen [this] Court confronts a legislative enactment implicating constitutional concerns—federalism or separation of powers—it has commonly required a clear statement from Congress before plowing ahead * * * out of a due respect for those constitutional concerns.” App., *infra*, 110a (dissenting from denial of rehearing en banc). The state-secrets privilege “deserves the same respect.” *Ibid.*

For the reasons described above, the best reading of Section 1806(f) is that it has no application to this case and does not displace the government’s ability to invoke the state-secrets privilege to protect the national security. At a minimum, there exists no clear statement in Section 1806(f), or anywhere else in FISA, that Congress intended to bring about such a startling change in the Executive’s authority to protect national-security information from compelled disclosure in litigation. The court of appeals thus erred in “discovering abrogation of the state secrets privilege more than 40 years after FISA’s enactment” and “disrupt[ing] the balance of powers among Congress, the Executive, and the Judiciary.” App., *infra*, 110a (Bumatay, J., dissenting from denial of rehearing en banc).

B. The Court Of Appeals' Decision Warrants Further Review

1. The court of appeals' holding that Section 1806(f) displaces the state-secrets privilege, and its transformation of Section 1806(f)'s protections for the government's use of electronic surveillance into an avenue for facilitating claims *against* the government, raise exceptionally important questions for this Court's review. As the ten judges dissenting from denial of rehearing en banc recognized, the panel's holding "seriously degrades the Executive's ability to protect our Nation's secrets" in this and future cases. App., *infra*, 134a (Bumatay, J., dissenting from denial of rehearing en banc). It creates the dangerous prospect that, "[m]oving forward, litigants can dodge the state secrets privilege simply by invoking 'electronic surveillance' somewhere within the Ninth Circuit." *Id.* at 111a. It accordingly presents a serious risk of depriving the government of a vital tool "to prevent the disclosure of state secrets." *Ibid.*; see *Tenet v. Doe*, 544 U.S. 1, 11 (2005) ("Forcing the Government to litigate these claims would also make it vulnerable to 'graymail,' *i.e.*, individual lawsuits brought to induce the CIA to settle a case * * * out of fear that any effort to litigate the action would reveal classified information that may undermine ongoing covert operations."). And, in so doing, it "not only upset[s] the balance of power among co-equal branches of government, but * * * do[es] damage to a right inherent in the constitutional design and acknowledged since our Nation's founding." App., *infra*, 134a (Bumatay, J., dissenting from denial of rehearing en banc).

Litigants have already seized on the panel's opinion in an attempt to prevent the government from invoking the state-secrets privilege over sensitive national-

security information. See, *e.g.*, Appellants’ Opening Br., *Jewel v. National Sec. Agency*, No. 19-16066 (9th Cir.) (filed Oct. 7, 2019). Under the panel’s opinion, such litigants need not establish that the government failed to satisfy the procedural requirements for assertion of the state-secrets privilege, nor challenge the government’s assertion that further litigation would present a serious risk of harm to the national security. Rather, it is, perversely, the government’s assertion of the state-secrets privilege to *exclude* such evidence from further litigation against an aggrieved person that simultaneously serves to displace the privilege. That situation is untenable.

In their concurrence in denial of rehearing en banc, two members of the panel attempted to downplay the significance of their decision, describing it as overriding “only the *dismissal remedy* that sometimes follows the successful invocation of the state secrets evidentiary privilege.” See App., *infra*, 101a (Gould & Berzon, JJ., concurring in denial of rehearing en banc). But the court of appeals’ alternative to dismissal was for a district court to resolve the merits of a case like this one *on the basis of the privileged evidence*. See *id.* 92a-93a (panel opinion) (instructing that, to the extent plaintiffs are “aggrieved persons,” the district court must “review any ‘materials relating to the surveillance as may be necessary,’ including the evidence over which the Attorney General asserted the state secrets privilege”) (citation omitted). That is not how the state-secrets privilege, or any other privilege, works. See *General Dynamics Corp. v. United States*, 563 U.S. 478, 485 (2011) (“The privileged evidence is excluded.”). The panel was therefore right in its decision to describe

its holding as displacing both “the state secrets privilege *and* its dismissal remedy.” App., *infra*, 64a (emphasis added). Such a momentous holding deserves this Court’s review.

2. The interlocutory posture of this case provides no basis for deferring this Court’s review. The Court frequently grants review of interlocutory decisions where the petition presents an “important and clear-cut issue of law” that “would otherwise qualify as a basis for certiorari” and “is fundamental to the further conduct of the case.” Stephen M. Shapiro et al., *Supreme Court Practice* § 4.18, at 283 (10th ed. 2013); see, e.g., *Facebook, Inc. v. Duguid*, No. 19-511 (cert. granted, July 9, 2020); *FNU Tanzin v. Tanvir*, 140 S. Ct. 550 (2019); *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *Nielsen v. Preap*, 138 S. Ct. 1279 (2018); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 412 n.4 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). So it is here.

Indeed, interlocutory review is particularly warranted given the potential for harm to the national security posed by further proceedings in this case and others pending in lower courts. Any disclosure of state secrets is “play[ing] with fire.” *Sterling v. Tenet*, 416 F.3d 338, 344 (4th Cir. 2005), cert. denied, 546 U.S. 1093 (2006). And any disclosure “chance[s] further disclosure—inadvertent, mistaken, or even intentional—that would defeat the very purpose for which the privilege exists.” *Ibid.* The court’s inquiry itself, including any requests for additional information, could be revealing of the nature of the information the government provided. Even if any such questioning or requests for additional materials were conducted *in camera* and *ex parte*, the outcome of the proceedings—e.g., whether or

not relief is granted to any particular plaintiff and for what reason—would tend to disclose some information about the state secrets the government seeks to protect. Cf. *Clapper*, 568 U.S. at 412 n.4 (noting that disposition of matters *in camera* could reveal sensitive national-security information). Such disclosure of state secrets and any concomitant damage to the national security would be irreparable.

Moreover, even if the *in camera* review proceeds without further disclosure, adjudication of the merits on the basis of state secrets still presents serious potential consequences for the government and the national security. In some cases, for example, proceeding on the basis of state-secrets evidence would risk breaking the federal government’s promises to foreign governments that have shared information on the condition that it not be used in any court proceeding. See Exec. Order No. 13,526, § 1.1(d), 3 C.F.R. 298 (2009 Comp.) (“The unauthorized disclosure of foreign government information is presumed to cause damage to the national security.”); *id.* § 6.1(s), 3 C.F.R. 323 (defining “[f]oreign government information” to include information provided by a foreign government “with the expectation that the information, the source of the information, or both, are to be held in confidence”).

Particularly in light of “the importance of the issue and the novel view” adopted by the Ninth Circuit, *Clapper*, 568 U.S. at 408, this Court’s review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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DECEMBER 2020

APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 12-56867

D.C. No. 8:11-cv-00301-CJC-VBK

YASSIR FAZAGA; ALI UDDIN MALIK;
YASSER ABDELRAHIM, PLAINTIFFS-APPELLEES

v.

FEDERAL BUREAU OF INVESTIGATION; CHRISTOPHER
A. WRAY, DIRECTOR OF THE FEDERAL BUREAU OF
INVESTIGATION, IN HIS OFFICIAL CAPACITY; PAUL
DELACOURT, ASSISTANT DIRECTOR IN CHARGE,
FEDERAL BUREAU OF INVESTIGATION'S LOS ANGELES
DIVISION, IN HIS OFFICIAL CAPACITY; PAT ROSE;
KEVIN ARMSTRONG; PAUL ALLEN, DEFENDANTS

AND

BARBARA WALLS; J. STEPHEN TIDWELL,
DEFENDANTS-APPELLANTS

No. 12-56867

D.C. No. 8:11-cv-00301-CJC-VBK

YASSIR FAZAGA; ALI UDDIN MALIK;
YASSER ABDELRAHIM, PLAINTIFFS-APPELLEES

v.

FEDERAL BUREAU OF INVESTIGATION; CHRISTOPHER
A. WRAY, DIRECTOR OF THE FEDERAL BUREAU OF
INVESTIGATION, IN HIS OFFICIAL CAPACITY; PAUL
DELACOURT, ASSISTANT DIRECTOR IN CHARGE,
FEDERAL BUREAU OF INVESTIGATION'S LOS ANGELES
DIVISION, IN HIS OFFICIAL CAPACITY; J. STEPHEN
TIDWELL; BARBARA WALLS, DEFENDANTS

2a

AND

PAT ROSE; KEVIN ARMSTRONG; PAUL ALLEN,
DEFENDANTS-APPELLANTS

No. 13-55017

D.C. No. 8:11-cv-00301-CJC-VBK

YASSIR FAZAGA; ALI UDDIN MALIK;
YASSER ABDELRAHIM, PLAINTIFFS-APPELLANTS

v.

FEDERAL BUREAU OF INVESTIGATION; CHRISTOPHER
A. WRAY, DIRECTOR OF THE FEDERAL BUREAU OF
INVESTIGATION, IN HIS OFFICIAL CAPACITY; PAUL
DELACOURT, ASSISTANT DIRECTOR IN CHARGE,
FEDERAL BUREAU OF INVESTIGATION'S LOS ANGELES
DIVISION, IN HIS OFFICIAL CAPACITY; J. STEPHEN
TIDWELL; BARBARA WALLS; PAT ROSE; KEVIN
ARMSTRONG; PAUL ALLEN; UNITED STATES OF AMERICA,
DEFENDANTS-APPELLEES

Argued and Submitted: Dec. 7, 2015
Pasadena, California
Filed: Feb. 28, 2019
Amended: July 20, 2020

Appeal from the United States District Court
for the Central District of California
Cormac J. Carney, District Judge, Presiding

ORDER AND AMENDED OPINION

Before: RONALD M. GOULD and MARSHA S. BERZON,
Circuit Judges and GEORGE CARAM STEEH III*, District
Judge.

ORDER

The opinion filed on February 28, 2019, reported at 916 F.3d 1202, is hereby amended. An amended opinion is filed concurrently with this order. With these amendments, the panel has unanimously voted to deny appellees' petition for rehearing. Judges Berzon and Gould have voted to deny the petition for rehearing en banc and Judge Steeh so recommends.

The full court has been advised of the petition for rehearing en banc. A judge of the court requested a vote on en banc rehearing. The matter failed to receive a majority of votes of non-recused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are **DENIED**. No further petitions for panel rehearing or rehearing en banc will be entertained. Judge Berzon's concurrence with and Judge Bumatay's dissent from denial of en banc rehearing are filed concurrently herewith.

* The Honorable George Caram Steeh III, United States District Judge for the Eastern District of Michigan, sitting by designation.

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BERZON, Circuit Judge:

INTRODUCTION

Three Muslim residents of Southern California allege that, for more than a year, the Federal Bureau of Investigation (“FBI”) paid a confidential informant to conduct a covert surveillance program that gathered information about Muslims based solely on their religious identity. The three plaintiffs filed a putative class action against the United States, the FBI, and two FBI officers in their official capacities (“Government” or “Government Defendants”), and against five FBI agents in their individual capacities (“Agent Defendants”). Alleging that the investigation involved unlawful searches and anti-

Muslim discrimination, they pleaded eleven constitutional and statutory causes of action.¹

The Attorney General of the United States asserted the state secrets privilege with respect to three categories of evidence assertedly at issue in the case, and the Government moved to dismiss the discrimination claims pursuant to that privilege. The Government expressly did not move to dismiss the Fourth Amendment and Foreign Intelligence Surveillance Act (“FISA”) unlawful search claims based on the privilege. Both the Government and the Agent Defendants additionally moved to dismiss Plaintiffs’ discrimination and unlawful search claims based on arguments other than the privilege.

The district court dismissed all but one of Plaintiffs’ claims on the basis of the state secrets privilege—including the Fourth Amendment claim, although the Government Defendants had not sought its dismissal on privilege grounds. The district court allowed only the FISA claim against the Agent Defendants to proceed. Plaintiffs appeal the dismissal of the majority of their claims, and the Agent Defendants appeal the denial of qualified immunity on the FISA claim.

We conclude that some of the claims dismissed on state secrets grounds should not have been dismissed outright. Instead, the district court should have re-

¹ Specifically, the Plaintiffs alleged violations of the First Amendment’s Establishment Clause and Free Exercise Clauses; the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*; the equal protection component of the Fifth Amendment’s Due Process Clause; the Privacy Act, 5 U.S.C. § 552a; the Fourth Amendment; the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1810; and the Federal Tort Claims Act, 28 U.S.C. § 1346.

viewed any state secrets evidence necessary for a determination of whether the alleged surveillance was unlawful following the secrecy-protective procedure set forth in FISA. *See* 50 U.S.C. § 1806(f). After addressing Defendants’ other arguments for dismissing Plaintiffs’ claims, we conclude that some of Plaintiffs’ allegations state a claim while others do not. Accordingly, we remand to the district court for further proceedings on the substantively stated claims.

BACKGROUND

At this stage in the litigation, we “construe the complaint in the light most favorable to the plaintiff[s], taking all [their] allegations as true and drawing all reasonable inferences from the complaint in [their] favor.” *Doe v. United States*, 419 F.3d 1058, 1062 (9th Cir. 2005). “Conclusory allegations and unreasonable inferences, however, are insufficient to defeat a motion to dismiss.” *Sanders v. Brown*, 504 F.3d 903, 910 (9th Cir. 2007).

Plaintiffs are three Muslims who were residents of Southern California: Sheikh Yassir Fazaga, Ali Uddin Malik, and Yasser AbdelRahim. Fazaga was, at the times relevant to this litigation, an imam at the Orange County Islamic Foundation (“OCIF”), a mosque in Mission Viejo, California. Malik and AbdelRahim are practicing Muslims who regularly attended religious services at the Islamic Center of Irvine (“ICOI”).

The complaint sought relief against the United States, the FBI, and two federal officials named in their official capacities, as well as five individual Agent Defendants—Kevin Armstrong, Paul Allen, J. Stephen Tidwell, Barbara Walls, and Pat Rose—named in their individual capacities. Armstrong and Allen were FBI Special

Agents assigned to the Orange County areas; Tidwell was the Assistant Director in Charge of the FBI's Los Angeles Field Office from August 2005 to December 2007; Walls was the Special Agent in Charge of the FBI's Santa Ana branch office, a satellite office of the FBI's Los Angeles field office; and Rose was a Special Agent assigned to the FBI's Santa Ana branch office.

Because of the sensitivity of the issues in this case, we particularly stress the usual admonition that accompanies judicial determination on motions to dismiss a complaint: the facts recited below come primarily from Plaintiffs' allegations in their complaint.² The substance of those allegations has not been directly addressed by the defendants. At this point in the litigation, the truth or falsity of the allegations therefore is entirely unproven.

I. Factual Background

For at least fourteen months in 2006 and 2007, the FBI paid a confidential informant named Craig Montelh to gather information as part of a counterterrorism investigation known as Operation Flex. Plaintiffs allege that Operation Flex was a "dragnet surveillance" program, the "central feature" of which was to "gather information on Muslims."³

² In addition to the facts alleged in the complaint, this opinion at some points refers to facts contained in two public declarations submitted by the Government in support of its invocation of the state secrets privilege.

³ In a public declaration, the FBI frames Operation Flex differently, contending that it "focused on fewer than 25 individuals and was directed at detecting and preventing possible terrorist attacks."

At some point before July 2006, Stephen Tidwell, then the Assistant Director in Charge of the FBI's Los Angeles Field Office, authorized first the search for an informant and later the selection of Monteilh as that informant. Once selected, Monteilh was supervised by two FBI handlers, Special Agents Kevin Armstrong and Paul Allen.

In July 2006, Monteilh began attending ICOI. As instructed by Allen and Armstrong, Monteilh requested a meeting with ICOI's imam, represented that he wanted to convert to Islam, and later publicly declared his embrace of Islam at a prayer service. Monteilh subsequently adopted the name Farouk al-Aziz and began visiting ICOI daily, attending prayers, classes, and special events. He also visited "with some regularity" several other large mosques in Orange County.

Armstrong and Allen closely supervised Monteilh during the course of Operation Flex, explaining to him the parameters and goals of the investigation. Monteilh was "to gather information on Muslims in general," using information-gathering and surveillance tactics. The agents provided him with the tools to do so, including audio and video recording devices. They also gave Monteilh general goals, such as obtaining contact information from a certain number of Muslims per day, as well as specific tasks, such as entering a certain house or having lunch with a particular person. Sometimes, Allen and Armstrong prepared photo arrays with hun-

The FBI maintains that the goal of Operation Flex "was to determine whether particular individuals were involved in the recruitment and training of individuals in the United States or overseas for possible terrorist activity."

dreds of Muslim community members and asked Monteilh to arrange the photos from most to least dangerous.

Armstrong and Allen did not, however, limit Monteilh to specific targets. Rather, “they repeatedly made clear that they were interested simply in Muslims.” Allen told Monteilh, “We want to get as many files on this community as possible.” To the extent Allen and Armstrong expressed an interest in certain targets, it was in particularly religious Muslims and persons who might influence young Muslims. When Monteilh’s surveillance activities generated information on non-Muslims, the agents set that information aside.

In accordance with his broad directive, Monteilh engaged with a wide variety of individuals. As instructed by his handlers, he attended classes at the mosque, amassed information on Muslims’ charitable giving, attended Muslim fundraising events, collected information on community members’ travel plans, attended lectures by Muslim scholars, went to daily prayers, memorized certain verses from the Quran and recited them to others, encouraged people to visit “jihadist” websites, worked out with targeted people at a gym to get close to them, and sought to obtain compromising information that could be used to pressure others to become informants. He also collected the names of board members, imams, teachers, and other leadership figures at the mosques, as well as the license plate numbers of cars in the mosque parking lots during certain events.

Virtually all of Monteilh’s interactions with Muslims were recorded. Monteilh used audio and video recording devices provided to him by the agents, including a

cellphone, two key fobs with audio recording capabilities, and a camera hidden in a button on his shirt. He recorded, for example, his interactions with Muslims in the mosques, which were transcribed and reviewed by FBI officials. He also recorded meetings and conversations in the mosque prayer hall to which he was not a party. He did so by leaving his possessions behind, including his recording key fob, as though he had forgotten them or was setting them down while doing other things. Monteilh told Allen and Armstrong in written reports that he was recording conversations in this manner. The agents never told him to stop this practice, and they repeatedly discussed with Monteilh the contents of the recordings.

Armstrong and Allen occasionally instructed Monteilh to use his secret video camera for specific purposes, such as capturing the internal layout of mosques and homes. They also told Monteilh to obtain the contact information of people he met, and monitored his email and cellphone to obtain the email addresses and phone numbers of the people with whom he interacted.

Although Monteilh spent the majority of his time at ICOI, he conducted surveillance and made audio recordings in at least seven other mosques during the investigation. During Monteilh's fourteen months as an informant for Operation Flex, the FBI obtained from him hundreds of phone numbers; thousands of email addresses; background information on hundreds of individuals; hundreds of hours of video recordings of the interiors of mosques, homes, businesses, and associations; and thousands of hours of audio recordings of conversations, public discussion groups, classes, and lectures.

In addition to the surveillance undertaken directly by Monteilh, Allen and Armstrong told Monteilh that electronic surveillance equipment had been installed in at least eight mosques in the area, including ICOI. The electronic surveillance equipment installed at the Mission Viejo mosque was used to monitor Plaintiff Yassir Fazaga's conversations, including conversations held in his office and other parts of the mosque not open to the public.

At the instruction of Allen and Armstrong, Monteilh took extensive handwritten notes each day about his activities and the surveillance he was undertaking. Allen and Armstrong met with Monteilh roughly twice each week to discuss his assignments, give him instructions, receive his daily notes, upload his recordings, and give him fresh devices. Monteilh was also required to call either Allen or Armstrong each day to apprise them of his activities. They told Monteilh that his daily notes were read by their supervisors.

The operation began to unravel when, in early 2007, Allen and Armstrong instructed Monteilh to begin more pointedly asking questions about jihad and armed conflict and to indicate his willingness to engage in violence. Implementing those instructions, Monteilh told several people that he believed it was his duty as a Muslim to take violent action and that he had access to weapons. Several ICOI members reported Monteilh to community leaders. One of the community leaders then called the FBI to report what Monteilh was saying, and instructed concerned ICOI members to call the Irvine Police Department, which they did. ICOI sought a restraining order against Monteilh, which was granted in June 2007.

Around the same time, Allen and Armstrong told Monteilh that Barbara Walls, then Assistant Special Agent in Charge of the FBI's Santa Ana office, no longer trusted him and wanted him to stop working for the FBI. In October 2007, Monteilh was told that his role in Operation Flex was over. At one of the final meetings between Monteilh and Agents Allen and Armstrong, Walls was present. She warned Monteilh not to tell anyone about the operation.

Monteilh's identity as an informant was revealed in February 2009 in connection with a criminal prosecution for naturalization fraud of Ahmadullah (or Ahmed) Niazi, one of the ICOI members who had reported Monteilh's statements to the Irvine Police Department. FBI Special Agent Thomas Ropel testified at a bail hearing in Niazi's case that he had heard several recordings between Niazi and a confidential informant, and that the informant was the same person Niazi had reported to the police. Ropel's statements thus indicated that Monteilh was a confidential informant and that he had recorded numerous conversations for the FBI.

Several sources subsequently confirmed that Monteilh worked for the FBI, including the FBI and Monteilh himself. Although the FBI has disclosed some information about Monteilh's actions as an informant, including that he created audio and video recordings and provided handwritten notes to the FBI, the FBI maintains that "certain specific information" concerning Operation Flex and Monteilh's activities must be protected in the interest of national security.

II. Procedural History

Plaintiffs filed the operative complaint in September 2011, asserting eleven causes of action, which fall into two categories: claims alleging unconstitutional searches (“search claims”) and claims alleging unlawful discrimination on the basis of, or burdens on, or abridgement of the rights to, religion (“religion claims”). The religion claims allege violations of the First Amendment Religion Clauses, the equal protection guarantee of the Due Process Clause of the Fifth Amendment,⁴ the Privacy Act, the Religious Freedom Restoration Act (“RFRA”), the Foreign Intelligence Surveillance Act (“FISA”), and the Federal Tort Claims Act (“FTCA”).

Plaintiffs filed the complaint as a putative class action, with the class defined as “[a]ll individuals targeted by Defendants for surveillance or information-gathering through Monteilh and Operation Flex, on account of their religion, and about whom the FBI thereby gathered personally identifiable information.” The complaint sought injunctive relief for the individual Plaintiffs and the class, and damages for themselves as individuals.⁵ The Agent Defendants moved to dismiss the

⁴ “The liberty protected by the Fifth Amendment’s Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws.” *United States v. Windsor*, 570 U.S. 744, 774 (2013) (citing *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954)).

⁵ The proposed class has not been certified. In addition to its relevance to the merits of Plaintiffs’ claims, the information over which the Government asserted the state secrets privilege may also be relevant to the decision whether to certify the class. In addition, the scope of privileged evidence needed to litigate the case likely will differ should class certification be granted.

claims against them on various grounds, including qualified immunity. The Government moved to dismiss the amended complaint and for summary judgment, arguing that Plaintiffs' statutory and constitutional claims fail on various grounds unrelated to the state secrets privilege.

The Government also asserted that the religion claims, but not the search claims, should be dismissed under the *Reynolds* state secrets privilege, see *United States v. Reynolds*, 345 U.S. 1 (1953), on the ground that litigation of the religion claims could not proceed without risking the disclosure of certain evidence protected by the privilege. The assertion of the state secrets privilege was supported with a previously filed public declaration from then-U.S. Attorney General Eric Holder; a public declaration from Mark Giuliano, then Assistant Director of the FBI's Counterterrorism Division; and two classified declarations and a classified supplemental memorandum from Giuliano. The Attorney General asserted the state secrets privilege over three categories of evidence: (1) "[i]nformation that could tend to confirm or deny whether a particular individual was or was not the subject of an FBI counterterrorism investigation"; (2) "[i]nformation that could tend to reveal the initial reasons (*i.e.*, predicate) for an FBI counterterrorism investigation of a particular person (including in Operation Flex), any information obtained during the course of such an investigation, and the status and results of the investigation"; and (3) "[i]nformation that could tend to reveal whether particular sources and methods were used in a counterterrorism investigation."

In one order, the district court dismissed the FISA claim against the Government, brought under 50 U.S.C.

§ 1810, concluding that Congress did not waive sovereign immunity for damages actions under that statute. *See Al-Haramain Islamic Found., Inc. v. Obama (Al-Haramain II)*, 705 F.3d 845, 850-55 (9th Cir. 2012). Plaintiffs do not challenge this dismissal. In the same order, the district court permitted Plaintiffs' FISA claim against the Agent Defendants to proceed, rejecting the argument that the Agent Defendants were entitled to qualified immunity.

In a second order, the district court dismissed all the other claims in the case on the basis of the *Reynolds* state secrets privilege—including the Fourth Amendment claim, for which the Government Defendants expressly did not seek dismissal on that ground. Relying “heavily” on the classified declarations and supplemental memorandum, the district court concluded “that the subject matter of this action, Operation Flex, involves intelligence that, if disclosed, would significantly compromise national security.” It held that the Government Defendants would need to rely on the privileged material to defend against Plaintiffs' claims, and that the privileged evidence was so inextricably tied up with nonprivileged material that “the risk of disclosure that further litigation would engender [could not] be averted through protective orders or restrictions on testimony.” The district court declined to use, as a substitute for dismissal, the *in camera*, *ex parte* procedures set out in § 1806(f) of FISA, on the ground that FISA's procedures do not apply to non-FISA claims.

The Agent Defendants timely filed notices of appeal from the denial of qualified immunity on Plaintiffs' FISA claim. The district court then approved the parties' stipulation to stay all further proceedings related

to the remaining FISA claim pending resolution of the Agent Defendants' appeal and, at Plaintiffs' request, entered partial final judgment under Federal Rule of Civil Procedure 54(b), allowing immediate appeal of the majority of Plaintiffs' claims. The Plaintiffs' appeal and the Agent Defendants' appeal from the denial of qualified immunity on the FISA claim were consolidated and are both addressed in this opinion.

DISCUSSION

We begin with the only claim to survive Defendants' motions to dismiss in the district court: the FISA claim against the Agent Defendants. After addressing the FISA claim, we turn to Plaintiffs' argument that in cases concerning the lawfulness of electronic surveillance, the *ex parte* and *in camera* procedures set out in § 1806(f) of FISA supplant the dismissal remedy otherwise mandated by the state secrets evidentiary privilege. *See infra* Part II. We then proceed to evaluate Defendants' other arguments for dismissal of the search and religion claims. *See infra* Parts III-IV. Finally, we explain the procedures to be followed on remand. *See infra* Part V.

I. The FISA Claim Against the Agent Defendants

Section 110 of FISA, codified at 50 U.S.C. § 1810, creates a private right of action for an individual subjected to electronic surveillance in violation of FISA's procedures. It provides, in pertinent part:

An aggrieved person . . . who has been subjected to an electronic surveillance or about whom information obtained by electronic surveillance of such person has been disclosed or used in violation of section

1809 of this title shall have a cause of action against any person who committed such violation. . . .

50 U.S.C. § 1810.

This statutory text refers to another section, § 1809. That section, in turn, proscribes as criminal offenses two types of conduct: (1) “intentionally . . . engag[ing] in electronic surveillance under color of law except as authorized by [FISA, the Wiretap Act, the Stored Communications Act, or the pen register statute,] or any express statutory authorization,” and (2) “intentionally . . . disclos[ing] or us[ing] information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through electronic surveillance” without authorization. 50 U.S.C. § 1809(a).

To determine whether Plaintiffs plausibly allege a cause of action under § 1810, we must decide (1) whether Plaintiffs are “aggrieved persons” within the meaning of the statute, (2) whether the surveillance to which they were subjected qualifies as “electronic surveillance,” and (3) whether the complaint plausibly alleges a violation of 50 U.S.C. § 1809.

An “aggrieved person” is defined as “a person who is the target of an electronic surveillance or any other person whose communications or activities were subject to electronic surveillance.” 50 U.S.C. § 1801(k).⁶ Plaintiffs allege in extensive detail in the complaint that they were subjected to many and varied instances of audio and video surveillance. The complaint’s allegations are

⁶ “Person’ means any individual, including any officer or employee of the Federal Government, or any group, entity, association, corporation, or foreign power.” 50 U.S.C. § 1801(m).

sufficient if proven to establish that Plaintiffs are “aggrieved persons.”

The complaint also adequately alleges that much of the surveillance as described constitutes “electronic surveillance” as defined by FISA. FISA offers four definitions of electronic surveillance. 50 U.S.C. § 1801(f). Only the fourth is potentially at stake in this case:

the installation or use of an electronic, mechanical, or other surveillance device in the United States for monitoring to acquire information, other than from a wire or radio communication, under circumstances in which *a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes.*

Id. § 1801(f)(4) (emphases added). The key question as to the presence of “electronic surveillance” under this definition is whether the surveillance detailed in the complaint was undertaken in circumstances in which (1) Plaintiffs had a reasonable expectation of privacy and (2) a warrant would be required for law enforcement purposes. If, as the complaint alleges, no warrant was in fact obtained, such electronic surveillance would constitute a violation of § 1809. *Id.* § 1809(a).

The parties, citing *ACLU v. NSA*, 493 F.3d 644, 657 n.16, 683 (6th Cir. 2007), agree that these legal standards from FISA—reasonable expectation of privacy and the warrant requirement—are evaluated just as they would be under a Fourth Amendment analysis. The Agent Defendants argue, however, that they are entitled to qualified immunity on Plaintiffs’ FISA claim.

Plaintiffs accept that qualified immunity can apply under FISA but maintain that the Agent Defendants are not entitled to immunity.⁷

The Agent Defendants are entitled to qualified immunity from damages unless Plaintiffs “plead[] facts showing (1) that the official[s] violated a statutory or constitutional right, and (2) that the right was ‘clearly established’ at the time of the challenged conduct.” *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). We are permitted to “exercise [our] sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.” *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). Because, as we conclude in *infra* Part II.E, the applicability of FISA’s alternative procedures for reviewing state secrets evidence turns on whether the surveillance at issue constitutes “electronic surveillance” within the meaning of FISA,⁸ we will begin with the first prong, even though

⁷ We have found only one decision, unpublished, addressing whether qualified immunity is an available defense to a FISA claim. See *Elnashar v. U.S. Dep’t of Justice*, No. CIV.03-5110(JNE/JSM), 2004 WL 2237059, at *5 (D. Minn. Sept. 30, 2004) (dismissing a FISA claim on grounds of qualified immunity because there was no evidence the defendant “would have known that the search of [plaintiff’s] apartment would have required a warrant”), *aff’d on other grounds*, 446 F.3d 792 (8th Cir. 2006). As the issue is not contested, we do not decide it.

⁸ Again, as we noted above, “electronic surveillance” as defined by FISA must fall under one of four types of government action. 50 U.S.C. § 1801(f). The relevant one for our purposes involves “the installation or use of an electronic, mechanical, or other surveillance

we conclude that the Agent Defendants are ultimately entitled to qualified immunity on the second prong.

For purposes of qualified immunity, a right is clearly established if, “at the time of the challenged conduct, ‘[t]he contours of [a] right [are] sufficiently clear’ that every ‘reasonable official would have understood that what he is doing violates that right.’” *al-Kidd*, 563 U.S. at 741 (alterations in original) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). “This inquiry . . . must be undertaken in light of the specific context of the case, not as a broad general proposition.” *Saucier v. Katz*, 533 U.S. 194, 201 (2001). “We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.” *al-Kidd*, 563 U.S. at 741.

“The operation of [the qualified immunity] standard, however, depends substantially upon the level of generality at which the relevant ‘legal rule’ is to be identified.” *Anderson*, 483 U.S. at 639. Often, whether a right is “clearly established” for purposes of qualified immunity will turn on the legal test for determining whether that right has been violated. For claims of excessive force, for example, “[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts.” *Saucier*, 533 U.S. at 205. “The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rap-

device . . . under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes.” *Id.* § 1801(f)(4).

idly evolving—about the amount of force that is necessary in a particular situation.” *Graham v. Connor*, 490 U.S. 386, 396-97 (1989). By contrast, “[w]ith few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no,” *Kyllo v. United States*, 533 U.S. 27, 31 (2001), as “the Fourth Amendment has drawn a firm line at the entrance to the house,” *Payton v. New York*, 445 U.S. 573, 590 (1980). Thus, where the test for determining whether the right in question has been violated is framed as a standard, rather than a rule, officials are given more breathing room to make “reasonable mistakes.” *Saucier*, 533 U.S. at 205. In those instances, we require a higher degree of factual specificity before concluding that the right is “clearly established.” But where the right at issue is clear and specific, officials may not claim qualified immunity based on slight changes in the surrounding circumstances.⁹

To properly approach this inquiry, we consider separately three categories of audio and video surveillance alleged in the complaint: (1) recordings made by Monteilh of conversations to which he was a party; (2) recordings made by Monteilh of conversations to which he was not a party (i.e., the recordings of conversations in

⁹ The Supreme Court made a similar observation in an analogous context—determining whether a state court has unreasonably applied clearly established federal law for purposes of habeas review under the Antiterrorism and Effective Death Penalty Act: “[T]he range of reasonable judgment can depend in part on the nature of the relevant rule. If a legal rule is specific, the range may be narrow. . . . Other rules are more general, and their meaning must emerge in application over the course of time.” *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004).

the mosque prayer hall); and (3) recordings made by devices planted by FBI agents in Fazaga's office and AbdelRahim's house, car, and phone.¹⁰

We conclude that the Agent Defendants are entitled to dismissal on qualified immunity grounds of Plaintiffs' § 1810 claim as to the first two categories of surveillance. As to the third category of surveillance, conducted via devices planted in AbdelRahim's house and Fazaga's office, Allen and Armstrong are not entitled to qualified immunity. But Tidwell, Walls, and Rose are entitled to dismissal as to this category, because Plaintiffs do not plausibly allege their involvement in this category of surveillance, and so have not "pleaded facts showing . . . that [those] officials violated a statutory or constitutional right." *al-Kidd*, 563 U.S. at 735.

¹⁰ We note that, in their "Claims for Relief," under the FISA cause of action, Plaintiffs recite that "Defendants, under color of law, *acting through Monteilh*" violated FISA (emphasis added). But the complaint specifically recites facts relating to devices allegedly planted directly by the Agent Defendants. Under the Federal Rules of Civil Procedure, it is the facts alleged that circumscribe the reach of the complaint for purposes of a motion to dismiss. *See Skinner v. Switzer*, 562 U.S. 521, 530 (2011).

We also note that there may be a fourth category of surveillance here at issue: video recordings of the interiors of individuals' homes. These recordings are not given meaningful attention in the parties' briefs, and we cannot determine from the complaint if Plaintiffs mean to allege that Monteilh video recorded the layouts of houses into which he was invited, or that he entered the houses without permission. Although at this stage we do not construe the complaint as asserting claims based on this fourth category of surveillance, our opinion does not foreclose Plaintiffs from clarifying these and other allegations on remand.

A. Recordings of Conversations to Which Monteilh Was a Party

A reasonable expectation of privacy exists where “a person ha[s] exhibited an actual (subjective) expectation of privacy,” and “the expectation [is] one that society is prepared to recognize as ‘reasonable.’” *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); see, e.g., *California v. Ciraolo*, 476 U.S. 207, 211 (1986) (describing Justice Harlan’s test as the “touchstone of Fourth Amendment analysis”). Generally, an individual “has no privacy interest in that which he voluntarily reveals to a government agent,” a principle known as the invited informer doctrine. *United States v. Wahchumwah*, 710 F.3d 862, 867 (9th Cir. 2013) (citing *Hoffa v. United States*, 385 U.S. 293, 300-02 (1966)); see also *United States v. Aguilar*, 883 F.2d 662, 697-98 (9th Cir. 1989), *superseded on other grounds by statute*, Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, *as recognized in United States v. Gonzalez-Torres*, 309 F.3d 594 (9th Cir. 2002). Plaintiffs contend, however, that the invited informer doctrine does not apply to the recordings made by Monteilh of conversations to which he was a party because the surveillance was conducted with discriminatory purpose and therefore in bad faith.

Bad faith of this sort does not, however, implicate the reasonable privacy expectation protected by the Fourth Amendment or violate the Fourth Amendment’s warrant requirement. There is, to be sure, an important “limitation[] on the government’s use of undercover informers to infiltrate an organization engaging in protected first amendment activities”: the government’s investigation must not be conducted “for the purpose of

abridging first amendment freedoms.” *Aguilar*, 883 F.2d at 705. But that limitation on voluntary conversations with undercover informants—sometimes referred to as a “good faith” requirement,¹¹ *e.g.*, *United States v. Mayer*, 503 F.3d 740, 751 (9th Cir. 2007); *Aguilar*, 883 F.2d at 705—is imposed by the First Amendment, not the Fourth Amendment. As that constitutional limitation is not grounded in privacy expectations, it does not affect the warrant requirement under the Fourth Amendment.

Under the appropriate Fourth Amendment precepts, “[u]ndercover operations, in which the agent is a so-called ‘invited informer,’ are not ‘searches’ under the Fourth Amendment.” *Mayer*, 503 F.3d at 750 (emphasis added) (quoting *Aguilar*, 883 F.2d at 701). “[A] defendant generally has *no* privacy interest”—not merely an *unreasonable* privacy interest—“in that which he voluntarily reveals to a government agent.” *Wahchumwah*, 710 F.3d at 867 (emphasis added). In other words, use of a government informant under the invited informer doctrine—even if not in good faith in the First Amendment sense—does not implicate the privacy interests protected by the Fourth Amendment. Because our inquiry under FISA is confined to whether a reasonable expectation of privacy was violated and whether a warrant was therefore required, *see ACLU*, 493 F.3d at 657 n.16, 683, the First Amendment-grounded good-faith limitation does not apply to our current inquiry.

Under the invited informer doctrine, Plaintiffs lacked a reasonable expectation of privacy in the conversations

¹¹ We use this term in the remainder of this discussion to refer to the constitutional limitation on the use of informants discussed in the text.

recorded by Monteilh to which he was a party. The Agent Defendants are therefore not liable under FISA for this category of surveillance.

B. Recordings of Conversations in the Mosque Prayer Hall to Which Monteilh Was Not a Party

Plaintiffs did have a privacy-grounded reasonable expectation that their conversations in the mosque prayer hall would not be covertly recorded by an individual who was not present where Plaintiffs were physically located and was not known to be listening in.¹² The Agent Defendants are, however, entitled to qualified immunity with respect to this category of surveillance under the second prong of the qualified immunity standard—whether “the right was ‘clearly established’ at the time of the challenged conduct.” *al-Kidd*, 563 U.S. at 735 (quoting *Harlow*, 457 U.S. at 818).

Again, the relevant questions here on the merits of the FISA and Fourth Amendment issues are whether “a person ha[s] exhibited an actual (subjective) expectation of privacy,” and whether “the expectation [is] one that society is prepared to recognize as ‘reasonable.’” *Katz*, 389 U.S. at 361 (Harlan, J., concurring). To first determine whether an individual has “exhibited an actual expectation of privacy,” we assess whether “he [sought] to preserve [something] as private.” *Bond v. United States*, 529 U.S. 334, 338 (2000) (alterations in original) (quoting *Smith v. Maryland*, 442 U.S. 735, 740 (1979)). Based on the rules and customs of the mosque, and the

¹² We are not suggesting that the recording would have been impermissible under FISA and the Fourth Amendment if the Agent Defendants had obtained a warrant based on probable cause. Here, however, no warrant was obtained.

allegations in the complaint, we have no trouble determining that Plaintiffs manifested an actual, subjective expectation of privacy in their conversations there.

The mosque prayer hall is not an ordinary public place. It is a site of religious worship, a place for Muslims to come together for prayer, learning, and fellowship. Plaintiffs allege that the prayer hall “is [a] sacred space where particular rules and expectations apply. Shoes are prohibited, one must be in a state of ablution, discussing worldly matters is discouraged, and the moral standards and codes of conduct are at their strongest.” Notably, “[g]ossiping, eavesdropping, or talebearing (*namima*—revealing anything where disclosure is resented) is forbidden.” And ICOI, which Malik and AbdelRahim attended, specifically prohibited audio and video recording in the mosque without permission. When, on a rare occasion, an outside entity did record an event or a speaker, ICOI put up signs to notify congregants. Furthermore, Plaintiffs explain in their complaint that *halaqas*, which are small group meetings during which participants “discuss theology or matters related to the practice of Islam,” are understood by mosque attendees to be environments that “ensure some measure of confidentiality among participants.”¹³

These privacy-oriented rules and customs confirm for us that Plaintiffs held a subjective expectation of privacy in their conversations among themselves while in the prayer hall.

¹³ We understand that description to imply that Monteilh recorded conversations that occurred during *halaqas* in the mosque prayer hall.

That Plaintiffs were not alone in the mosque prayer hall does not defeat their claim that they manifested an expectation of privacy.¹⁴ “Privacy does not require solitude.” *United States v. Taketa*, 923 F.2d 665, 673 (9th Cir. 1991). For example, “a person can have a subjective expectation that his or her home will not be searched by the authorities, even if he or she has invited friends into his or her home.” *Trujillo v. City of Ontario*, 428 F. Supp. 2d 1094, 1102 (C.D. Cal. 2006), *aff’d sub nom. Bernhard v. City of Ontario*, 270 F. App’x 518 (9th Cir. 2008). The same principle applies to certain other enclosed locations in which individuals have particular reason to expect confidentiality and repose.¹⁵

¹⁴ The Agent Defendants cite *Smith v. Maryland*, 442 U.S. at 740-41, to support the proposition that the unattended recordings in the mosque prayer hall did not invade Plaintiffs’ reasonable expectation of privacy. *Smith* and its progeny do not apply here. *Smith* concerned a pen register installed and used by a telephone company, and held that an individual enjoys no Fourth Amendment protection “in information he voluntarily turns over to third parties.” *Id.* at 743-44. But, as the Fourth Circuit has stressed, *Smith* and the cases relying on it are concerned with “whether the government invades an individual’s reasonable expectation of privacy when it obtains, *from a third party*, the third party’s records.” *United States v. Graham*, 824 F.3d 421, 426 (4th Cir. 2016) (en banc) (emphasis added), *abrogated on other grounds by Carpenter v. United States*, 138 S. Ct. 2206 (2018). Cases “involv[ing] *direct* government surveillance activity,” including surreptitiously viewing, listening to, or recording individuals—like the one before us—present a wholly separate question. *Id.*

¹⁵ *Taketa*, for example, held that a state employee could hold an expectation of privacy in his office even though the office was shared with two others. 923 F.2d at 673. “[E]ven ‘private’ business offices are often subject to the legitimate visits of coworkers, supervisors, and the public, without defeating the expectation of privacy unless the office is ‘so open to fellow employees or the public that no

Finally, the case law distinguishes between an expectation of privacy in a place and an expectation of privacy as to whether an individual's conversations or actions in that place would be covertly recorded by persons not themselves present in that place.¹⁶ The Supreme Court has recently emphasized the significant difference between obtaining information in person and recording information electronically. *See Carpenter*, 138 S. Ct. at 2219 (“Unlike the nosy neighbor who keeps an eye on comings and goings, they are ever alert, and their memory is nearly infallible.”). Here, given the intimate and religious nature of the space and the express prohibition on recording, Plaintiffs have adequately alleged that they subjectively believed their conversations would not be covertly recorded by someone not present in the prayer hall for transmission to people not present in the prayer hall.¹⁷

expectation of privacy is reasonable.” *Id.* (quoting *O'Connor v. Ortega*, 480 U.S. 709, 717-18 (1987)).

¹⁶ *See also Taketa*, 923 F.2d at 676 (“Taketa has no general privacy interest in [his co-worker's] office, but he may have an expectation of privacy against being videotaped in it.”); *Trujillo*, 428 F. Supp. 2d at 1102 (considering the secret installation and use of a video camera in a police department's men's locker room, and explaining that it was “immaterial” that the plaintiffs changed their clothes in the presence of others, because “[a] person can have a subjective expectation of privacy that he or she will not be *covertly recorded*, even though he or she knows there are other people in the locker room” (emphasis added)).

¹⁷ The complaint alleges that Plaintiffs lost “confidence in the mosque as a sanctuary” after learning of Monteilh's surveillance. This feeling of the *loss* of privacy reinforces the conclusion that Plaintiffs exhibited an actual expectation of privacy in their conversations in the mosque before the alleged surveillance took place.

Having concluded that Plaintiffs exhibited a subjective expectation of privacy, we now consider whether it was “one that society is prepared to recognize as ‘reasonable.’” *Katz*, 389 U.S. at 361 (Harlan, J., concurring). In assessing whether an individual’s expectation of privacy is reasonable, context is key. *See O’Connor*, 480 U.S. at 715. “Although no single rubric definitively resolves which expectations of privacy are entitled to protection, the analysis is informed by historical understandings ‘of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted.’” *Carpenter*, 138 S. Ct. at 2213-14 (alteration in original) (footnote omitted) (quoting *Carroll v. United States*, 267 U.S. 132, 149 (1925)). Relevant here is the principle that “the extent to which the Fourth Amendment protects people may depend upon *where* those people are.” *Minnesota v. Carter*, 525 U.S. 83, 88 (1998) (emphasis added). We thus “assess the nature of the location where [the] conversations were seized”—here, the mosque prayer hall. *United States v. Gonzalez, Inc.*, 412 F.3d 1102, 1116-17 (9th Cir. 2005), *amended on denial of reh’g*, 437 F.3d 854 (9th Cir. 2006).

The sacred and private nature of the houses of worship Plaintiffs attended distinguishes them from the types of commercial and public spaces in which courts have held that individuals lack a reasonable expectation of privacy.¹⁸ *United States v. Gonzalez*, 328 F.3d 543 (9th Cir. 2003), for example, held that the defendant had

¹⁸ *See, e.g., In re John Doe Trader No. One*, 894 F.2d 240, 243-44 (7th Cir. 1990) (holding that a rule prohibiting tape recorders on the trading floor “aimed at various forms of distracting behavior” and explicitly “designed to protect ‘propriety and decorum’ not privacy” did not support a reasonable expectation of privacy).

no reasonable expectation of privacy in “a large, quasi-public mailroom at a public hospital during ordinary business hours.” *Id.* at 547. The mailroom had open doors, was visible to the outside via large windows, and received heavy foot traffic. *Id.* In addition to focusing on the physical specifics of the mailroom, *Gonzalez* emphasized that public hospitals, “by their nature . . . create a diminished expectation of privacy. The use of surveillance cameras in hospitals for patient protection, for documentation of medical procedures and to prevent theft of prescription drugs is not uncommon.” *Id.* The mosque prayer halls in this case, by contrast, have no characteristics similarly evidencing diminished expectations of privacy or rendering such expectations unreasonable.¹⁹ There are no urgent health or safety

¹⁹ Again, the fact that many people worshipped at the mosque does not render the Plaintiffs’ expectations of privacy in their conversations (or at the very least from, their expectations that their conversations would not be covertly recorded) unreasonable. In *Gonzalez, Inc.*, for example, we held that individuals who owned and managed a small, family-run business with up to 25 employees had “a reasonable expectation of privacy over the on-site business conversations between their agents.” 412 F.3d at 1116-17. The Gonzalez family, whose phone calls were intercepted, were not alone in their place of business, and their calls could have been overheard by others who were present. But we concluded that they nonetheless had a reasonable expectation of privacy over their conversations because they owned the office, had full access to the building, and exercised managerial control over the office’s day-to-day operations. *Id.* Similarly, *United States v. McIntyre*, 582 F.2d 1221 (9th Cir. 1978), rejected the argument that a police officer lacked a reasonable expectation of privacy over conversations had in his office because his office door was open and a records clerk worked nearby in an adjacent room. *Id.* at 1224. “A business office need not be sealed to offer its occupant a reasonable degree of privacy,” we reasoned. *Id.*

needs justifying surveillance. And the use of surveillance equipment at ICOI is not only uncommon, but expressly forbidden.

Our constitutional protection of religious observance supports finding a reasonable expectation of privacy in such a sacred space, where privacy concerns are acknowledged and protected, especially during worship and other religious observance. *Cf. Mockaitis v. Harcleroad*, 104 F.3d 1522, 1533 (9th Cir. 1997) (holding that, based in part on “the nation’s history of respect for religion in general,” a priest had a reasonable expectation of privacy in his conversation with an individual during confession), *overruled on other grounds by City of Boerne v. Flores*, 521 U.S. 507 (1997). Thus, Plaintiffs’ expectation that their conversations in the mosque prayer hall would be confidential among participants (unless shared by one of them with others), and so would not be intercepted by recording devices planted by absent government agents was objectively reasonable.

Finally, “[w]here the materials sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with ‘scrupulous exactitude.’” *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978) (quoting *Stanford v. Texas*, 379 U.S. 476, 485 (1965)). “National security cases,” like the one here, “often reflect a convergence of First and Fourth Amendment values not present in cases of ‘ordinary’ crime.” *United States v. U.S. District Court (Keith)*, 407 U.S. 297, 313 (1972). “Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy. . . . ” *Id.* at 314.

Accordingly, we hold that Plaintiffs had a reasonable expectation of privacy that their conversations in the mosque prayer hall would not be covertly recorded by a government agent not party to the conversations.

As of 2006 and 2007, however, no federal or state court decision had held that individuals generally have a reasonable expectation of privacy from surveillance in places of worship. Our court had declined to read *Katz* as established authority “for the proposition that a reasonable expectation of privacy attaches to church worship services open to the public.” *The Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 527 (9th Cir. 1989). Noting that there was a lack of clearly established law so concluding, *Presbyterian Church* held that Immigration and Naturalization Service (“INS”) officials were entitled to qualified immunity from a Fourth Amendment challenge to undercover electronic surveillance of church services conducted without a warrant and without probable cause. *Id.* No case decided between *Presbyterian Church* and the incidents giving rise to this case decided otherwise. And no case decided during that period addressed circumstances more like those here, in which there are some specific manifestations of an expectation of privacy in the particular place of worship. Arguably pertinent was *Mockaitis*, but that case concerned the confession booth, not the church premises generally. 104 F.3d at 1533. The circumstances here fall between *Presbyterian Church* and *Mockaitis*, so there was no clearly established law here applicable. The Agent Defendants are thus entitled to qualified immunity as to this category of surveillance.

C. Recordings Made by Planted Devices

It was, of course, clearly established in 2006 and 2007 that individuals have a reasonable expectation of privacy from covert recording of conversations in their homes, cars, and offices, and on their phones. *See, e.g., Kyllo*, 533 U.S. at 31 (home); *New York v. Class*, 475 U.S. 106, 115 (1986) (cars); *Katz*, 389 U.S. at 360-61 (Harlan, J., concurring) (enclosed telephone booths); *Taketa*, 923 F.2d at 673 (office); *McIntyre*, 582 F.2d at 1223-24 (office). The Agent Defendants accept these well-established legal propositions. But they maintain that the complaint's allegations that the FBI planted electronic surveillance equipment in Fazaga's office and AbdelRahim's house, car, and phone are too conclusory to satisfy *Iqbal's* plausibility standard, and so do not adequately allege on the merits a violation of Plaintiffs' rights under FISA. *See al-Kidd*, 563 U.S. at 735; *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). We cannot agree.

Plaintiffs offer sufficient well-pleaded facts to substantiate their allegation that some of the Agent Defendants—Allen and Armstrong—were responsible for planting devices in AbdelRahim's house. Specifically, the complaint details one occasion on which Allen and Armstrong asked Monteilh about something that had happened in AbdelRahim's house that Monteilh had not yet communicated to them, and explained that they knew about it because they had audio surveillance in the house.

Plaintiffs also allege sufficient facts with regard to those two Agent Defendants in support of their allegation of electronic surveillance of Fazaga's office in the OCIF mosque in Mission Viejo: Allen and Armstrong

told Monteilh that electronic surveillance was “spread indiscriminately” across “at least eight area mosques including ICOI, and mosques in Tustin, Mission Viejo, Culver City, Lomita, West Covina, and Upland,” and that “they could get in a lot of trouble if people found out what surveillance they had in the mosques.” They also instructed Monteilh to use a video camera hidden in a shirt button to record the interior of OCIF and “get a sense of the schematics of the place—entrances, exits, rooms, bathrooms, locked doors, storage rooms, as well as security measures and whether any security guards were armed.” Armstrong later told Monteilh that he and Allen used the information he recorded to enter OCIF.

As to Tidwell, Walls, and Rose, however, the complaint does not plausibly allege their personal involvement with respect to the planted devices.²⁰ The complaint details Tidwell, Walls, and Rose’s oversight of Monteilh, including that they read his daily notes and were apprised, through Allen and Armstrong, of the information he collected. But the complaint never alleges that *Monteilh* was involved in planting devices in AbdelRahim’s house, car, or phone, or in Fazaga’s office; those actions are attributed only to unnamed FBI agents.

²⁰ Because we concluded with respect to the first two categories of surveillance either that Plaintiffs had no reasonable expectation of privacy or that the expectation was not clearly established in the case law at the pertinent time, we reach the question whether Plaintiffs plausibly allege the personal involvement of Tidwell, Wall, and Rose only with respect to the third category of surveillance.

The complaint also offers general statements that Tidwell, Walls, and Rose supervised Allen and Armstrong.²¹ But “[g]overnment officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*.” *Iqbal*, 556 U.S. at 676. Instead, “a plaintiff must plead that each Government-official defendant, through the official’s own individual actions, has violated the Constitution.” *Id.* Plaintiffs have not done so as to this category of surveillance with regard to Tidwell, Walls, and Rose. The complaint does not allege that the supervisors knew of, much less ordered or arranged for, the planting of the recording devices in AbdelRahim’s home or Fazaga’s office, so the supervisors are entitled to qualified immunity as to that surveillance. *See, e.g., Chavez v. United States*, 683 F.3d 1102, 1110 (9th Cir. 2012); *Ortez v. Washington County*, 88 F.3d 804, 809 (9th Cir. 1996).

In sum, Plaintiffs allege a FISA claim against Allen and Armstrong for recordings made by devices planted by FBI agents in AbdelRahim’s house and Fazaga’s office. As to all other categories of surveillance, the Agent Defendants either did not violate FISA; are entitled to qualified immunity on the FISA claim because Plaintiffs’ reasonable expectation of privacy was not clearly established; or were not plausibly alleged in the

²¹ The relevant allegations were only that Walls and Rose “actively monitored, directed, and authorized the actions of Agents Allen and Armstrong and other agents at all times relevant in this action, for the purpose of surveilling Plaintiffs and other putative class members because they were Muslim” and that Tidwell “authorized and actively directed the actions of Agents Armstrong, Allen, Rose, Walls, and other agents.”

complaint to have committed any FISA violation that may have occurred.

II. The State Secrets Privilege and FISA Preemption

Having addressed the only claim to survive Defendants' motions to dismiss in the district court, we turn to the district court's dismissal of the remaining claims pursuant to the state secrets privilege.²² Plaintiffs argue that reversal is warranted "on either of two narrower grounds." First, Plaintiffs argue that, at this preliminary stage, the district court erred in concluding that further litigation would require the disclosure of privileged information. Second, Plaintiffs maintain that the district court should have relied on FISA's alternative procedures for handling sensitive national security information. Because we agree with Plaintiffs' second argument, we do not decide the first. We therefore need not review the Government's state secrets claim to decide whether the standard for dismissal at this juncture—whether the district court properly "determine[d] with certainty . . . that litigation must be limited or cut off in order to protect state secrets, even before any discovery or evidentiary requests have been made," *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1081 (9th Cir. 2010) (en banc)—has been met.

The initial question as to Plaintiffs' second argument is whether the procedures established under FISA for adjudicating the legality of challenged electronic surveillance replace the common law state secrets privilege

²² Plaintiffs do not dispute at this juncture the district court's conclusion that the information over which the Attorney General asserted the state secrets privilege indeed comes within the privilege. We therefore assume as much for present purposes.

with respect to such surveillance to the extent that privilege allows the categorical dismissal of causes of action. The question is a fairly novel one. We are the first federal court of appeals to address it. Only two district courts, both in our circuit, have considered the issue. Those courts both held that FISA “displace[s] federal common law rules such as the state secrets privilege with regard to matters within FISA’s purview.” *Jewel v. NSA*, 965 F. Supp. 2d 1090, 1105-06 (N.D. Cal. 2013); accord *In re NSA Telecomms. Records Litig. (In re NSA)*, 564 F. Supp. 2d 1109, 1117-24 (N.D. Cal. 2008). We rely on similar reasoning to that in those district court decisions, but reach a narrower holding as to the scope of FISA preemption.

Our analysis of this issue proceeds as follows. First, we offer a brief review of the state secrets privilege. Second, we discuss one reason why the district court should not have dismissed the search claims based on the privilege. Third, we explain why FISA displaces the dismissal remedy of the common law state secrets privilege as applied to electronic surveillance generally. Then we review the situations in which FISA’s procedures under § 1806(f) apply, including affirmative constitutional challenges to electronic surveillance. Finally, we explain why the present case fits at least one of the situations in which FISA’s procedures apply.

Before we go on, we emphasize that although we hold that Plaintiffs’ electronic surveillance claims are not subject to outright dismissal at the pleading stage because FISA displaces the state secrets privilege, the FISA procedure is, not surprisingly, extremely protective of government secrecy. Under that procedure, Plaintiffs’ religion claims will not go forward under the

open and transparent processes to which litigants are normally entitled. Instead, in the interest of protecting national security, the stringent FISA procedures require severe curtailment of the usual protections afforded by the adversarial process and due process. See, e.g., *Yamada v. Nobel Biocare Holding AG*, 825 F.3d 536, 545 (9th Cir. 2016) (holding that the district court’s use of *ex parte*, *in camera* submissions to support its fee order violated defendants’ due process rights); *Intel Corp. v. Terabyte Int’l, Inc.*, 6 F.3d 614, 623 (9th Cir. 1993) (same); *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 505 (9th Cir. 1986) (same). As it is Plaintiffs who have invoked the FISA procedures, we proceed on the understanding that they are willing to accept those restrictions to the degree they are applicable as an alternative to dismissal, and so may not later seek to contest them.²³

A. The State Secrets Privilege

“The Supreme Court has long recognized that in exceptional circumstances courts must act in the interest of the country’s national security to prevent disclosure of state secrets, even to the point of dismissing a case entirely.” *Jeppesen*, 614 F.3d at 1077 (citing *Totten v. United States*, 92 U.S. 105, 107 (1876)). Neither the Supreme Court nor this court has precisely delineated what constitutes a state secret. *Reynolds* referred to “military matters which, in the interest of national security, should not be divulged.” 345 U.S. at 10. *Jeppesen* added that not all classified information is necessarily privileged under *Reynolds*. 614 F.3d at 1082. The

²³ We discuss how the district court is to apply the FISA procedures to Plaintiffs’ surviving claims on remand in *infra* Part V.

state secrets privilege has been held to apply to information that would result in “impairment of the nation’s defense capabilities, disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments, or where disclosure would be inimical to national security.” *Black v. United States*, 62 F.3d 1115, 1118 (8th Cir. 1995) (citations and internal quotation marks omitted). But courts have acknowledged that terms like “military or state secrets” are “amorphous in nature,” *id.* (citation omitted); the phrase “inimical to national security” certainly is. And although purely domestic investigations with no international connection do not involve state secrets, we recognize that the contours of the privilege are perhaps even more difficult to draw in a highly globalized, post-9/11 environment, where the lines between foreign and domestic security interests may be blurred.

We do not attempt to resolve the ambiguity or to explain definitively what constitutes a “state secret.” But we note the ambiguity nonetheless at the outset, largely as a reminder that, as our court has previously noted, “[s]imply saying ‘military secret,’ ‘national security’ or ‘terrorist threat’ or invoking an ethereal fear that disclosure will threaten our nation is insufficient to support the privilege.” *Al-Haramain Islamic Found., Inc. v. Bush (Al-Haramain I)*, 507 F.3d 1190, 1203 (9th Cir. 2007).

Created by federal common law, the modern state secrets doctrine has two applications: the *Totten* bar and the *Reynolds* privilege. The *Totten* bar is invoked “‘where the very subject matter of the action’ is ‘a matter of state secret.’” *Id.* at 1077 (quoting *Reynolds*, 345 U.S. at 11 n.26). It “completely bars adjudication of

claims premised on state secrets.” *Id.*; *see also Totten*, 95 U.S. at 106-07. The *Reynolds* privilege, by contrast, “is an evidentiary privilege rooted in federal common law.” *Kasza v. Browner*, 133 F.3d 1159, 1167 (9th Cir. 1998); *see also Gen. Dynamics Corp. v. United States*, 563 U.S. 478, 485 (2011). It “may be asserted at any time,” and successful assertion “will remove the privileged evidence from the litigation.” *Jeppesen*, 614 F.3d at 1079-80.

Here, after the Attorney General asserted the *Reynolds* privilege and the Government submitted both public and classified declarations setting out the parameters of its state secrets contention, the Government Defendants requested dismissal of Plaintiffs’ religion claims in toto—but not the Fourth Amendment and FISA claims—at the pleading stage. “Dismissal at the pleading stage under *Reynolds* is a drastic result and should not be readily granted.” *Jeppesen*, 614 F.3d at 1089. Only “if state secrets are so central to a proceeding that it cannot be litigated without threatening their disclosure” is dismissal the proper course. *Id.* at 1081 (quoting *El-Masri v. United States*, 479 F.3d 296, 308 (4th Cir. 2007)). Because there is a strong interest in allowing otherwise meritorious litigation to go forward, the court’s inquiry into the need for the secret information should be specific and tailored, not vague and general. *See id.* at 1081-82; *In re Sealed Case*, 494 F.3d 139, 144-54 (D.C. Cir. 2007).

Specifically, the *Reynolds* privilege will justify dismissal of the action in three circumstances: (1) if “the plaintiff cannot prove the *prima facie* elements of her claim with nonprivileged evidence”; (2) if “the privilege

deprives the defendant of information that would otherwise give the defendant a valid defense to the claim”; and (3) if “privileged evidence” is “inseparable from nonprivileged information that will be necessary to the claims or defenses” such that “litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets.” *Jeppesen*, 614 F.3d at 1083 (citations omitted). The district court assumed that Plaintiffs could make a prima facie case without resorting to state secrets evidence, but determined that the second and third circumstances exist in this case and require dismissal.

B. The District Court’s Dismissal of the Search Claims Based on the State Secrets Privilege

As a threshold matter, before determining whether FISA displaces the state secrets privilege with regard to electronic surveillance, we first consider which of Plaintiffs’ claims might otherwise be subject to dismissal under the state secrets privilege. Although the Government expressly did not request dismissal of the Fourth Amendment and FISA claims based on the privilege, the district court nonetheless dismissed the Fourth Amendment claim on that basis. That was error.

The Government must formally claim the *Reynolds* privilege. *Reynolds*, 345 U.S. at 7-8. The privilege is “not simply an administrative formality” that may be asserted by any official. *Jeppesen*, 614 F.3d at 1080 (quoting *United States v. W.R. Grace*, 526 F.3d 499, 507-08 (9th Cir. 2008) (en banc)). Rather, the formal claim must be “lodged by the head of the department which has control over the matter.” *Reynolds*, 345 U.S. at 8. The claim must “reflect the certifying official’s *personal*

judgment; responsibility for [asserting the privilege] may not be delegated to lesser-ranked officials.” *Jeppesen*, 614 F.3d at 1080. And the claim “must be presented in sufficient detail for the court to make an independent determination of the validity of the claim of privilege and the scope of the evidence subject to the privilege.” *Id.* Such unusually strict procedural requirements exist because “[t]he privilege ‘is not to be lightly invoked,’” especially when dismissal of the entire action is sought. *Id.* (quoting *Reynolds*, 345 U.S. at 7).

Here, although the Government has claimed the *Reynolds* privilege over certain state secrets, it has not sought dismissal of the Fourth Amendment and FISA claims based on its invocation of the privilege. In light of that position, the district court should not have dismissed those claims. In doing so, its decision was inconsistent with *Jeppesen*’s observation that, “[i]n evaluating the need for secrecy, ‘we acknowledge the need to defer to the Executive on matters of foreign policy and national security and surely cannot legitimately find ourselves second guessing the Executive in this arena.’” 614 F.3d at 1081-82 (quoting *Al-Haramain I*, 507 F.3d at 1203). Just as the Executive is owed deference when it asserts that exclusion of the evidence or dismissal of the case is necessary to protect national security, so the Executive is necessarily also owed deference when it asserts that national security is not threatened by litigation.

Indeed, *Jeppesen* cautioned that courts should work “to ensure that the state secrets privilege is asserted no more frequently and sweepingly than necessary.” *Id.* at 1082 (quoting *Ellsberg v. Mitchell*, 709 F.2d 51, 58

(D.C. Cir. 1983)). Dismissing claims based on the privilege where the Government has expressly told the court it is not necessary to do so—and, in particular, invoking the privilege to dismiss, at the pleading stage, claims the Government has expressly told the court it need not dismiss on grounds of privilege—cuts directly against *Jeppesen's* call for careful, limited application of the privilege.

Although the Government Defendants expressly did not request dismissal of the search claims under the state secrets privilege, the Agent Defendants did so request. In declining to seek dismissal of the search claims based on the state secrets privilege, the Government explained:

At least at this stage of the proceedings, sufficient non-privileged evidence may be available to litigate these claims should they otherwise survive motions to dismiss on nonprivilege grounds. The FBI has previously disclosed in a separate criminal proceeding that Monteilh collected audio and video information for the FBI, and some of that audio and video information was produced in that prior case. The FBI has been reviewing additional audio and video collected by Monteilh for possible disclosure in connection with further proceedings on the issue of whether the FBI instructed or permitted Monteilh to leave recording devices unattended in order to collect non-consenting communications. The FBI expects that the majority of the audio and video will be available in connection with further proceedings. Thus, while it remains possible that the need to protect properly privileged national security information

might still foreclose litigation of these claims, at present the FBI and official capacity defendants do not seek to dismiss these claims based on the privilege assertion.

The Agent Defendants note that the Government focuses on the public disclosure of recordings collected by Monteilh, and point out that Plaintiffs also challenge surveillance conducted without Monteilh's involvement—namely, the planting of recording devices by FBI agents in Fazaga's office and AbdelRahim's home, car, and phone. Allegations concerning the planting of recording devices by FBI agents other than Monteilh, the Agent Defendants argue, are the "sources and methods" discussed in the Attorney General's invocation of the privilege. The Agent Defendants thus maintain that because the Government's reasons for not asserting the privilege over the search claims do not apply to all of the surveillance encompassed by the search claims, dismissal as to the search claims is in fact necessary.

The Agent Defendants, however, are not uniquely subject to liability for the planted devices. The Fourth Amendment claim against the Government Defendants likewise applies to that category of surveillance. *See infra* Part III.A. The Agent Defendants—officials sued in their individual capacities—are not the protectors of the state secrets evidence; the Government is. Accordingly, and because the Agent Defendants have not identified a reason they specifically require dismissal to protect against the harmful disclosure of state se-

crets where the Government does not, we decline to accept their argument that the Government’s dismissal defense must be expanded beyond the religion claims.²⁴

In short, in determining *sua sponte* that particular claims warrant dismissal under the state secrets privilege, the district court erred. For these reasons, we will not extend FISA’s procedures to challenges to the lawfulness of electronic surveillance to the degree the Government agrees that such challenges may be litigated in accordance with ordinary adversarial procedures without compromising national security.

C. FISA Displacement of the State Secrets Privilege

Before the enactment of FISA in 1978, foreign intelligence surveillance and the treatment of evidence implicating state secrets were governed purely by federal common law. Federal courts develop common law “in the absence of an applicable Act of Congress.” *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981). “Federal common law is,” however, “a ‘necessary expedient’ and when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears.” *Id.* (citation omitted). Once “the field has been made the subject of comprehensive

²⁴ Although the Government may assert the state secrets privilege even when it is not a party to the case, see *Jeppesen*, 614 F.3d at 1080, we have not found—and the Agent Defendants have not cited—any case other than the one at hand in which a court granted dismissal under the privilege as to non-Government defendants, notwithstanding the Government’s assertion that the claims at issue may be litigated with nonprivileged information.

legislation or authorized administrative standards,” federal common law no longer applies. *Id.* (quoting *Texas v. Pankey*, 441 F.2d 236, 241 (10th Cir. 1971)).

To displace federal common law, Congress need not “affirmatively proscribe[] the use of federal common law.” *Id.* at 315. Rather, “to abrogate a common-law principle, the statute must ‘speak directly’ to the question addressed by the common law.” *United States v. Texas*, 507 U.S. 529, 534 (1993) (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)). As we now explain, in enacting FISA, Congress displaced the common law dismissal remedy created by the *Reynolds* state secrets privilege as applied to electronic surveillance within FISA’s purview.²⁵

We have specifically held that because “the state secrets privilege is an evidentiary privilege rooted in federal common law . . . the relevant inquiry in deciding if [a statute] preempts the state secrets privilege is whether the statute ‘[speaks] *directly* to [the] question otherwise answered by federal common law.’” *Kasza*, 133 F.3d at 1167 (second and third alterations in original) (quoting *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 236-37 (1985)).²⁶ Nonetheless, the Government maintains, in a vague and short paragraph in its brief, that Congress cannot displace the state secrets evidentiary privilege absent a clear statement, and

²⁵ Our holding concerns only the *Reynolds* privilege, not the *Totten* justiciability bar.

²⁶ Applying this principle, *Kasza* concluded that section 6001 of the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. § 6961, did not preempt the state secrets privilege as to RCRA regulatory material, as “the state secrets privilege and § 6001 have different purposes.” 133 F.3d at 1168.

that, because Plaintiffs cannot point to a clear statement, “principles of constitutional avoidance” require rejecting the conclusion that FISA’s procedures displace the dismissal remedy of the state secrets privilege with regard to electronic surveillance.

In support of this proposition, the Government cites two out-of-circuit cases, *El-Masri v. United States*, 479 F.3d 296, and *Armstrong v. Bush*, 924 F.2d 282 (D.C. Cir. 1991). *El-Masri* does not specify a clear statement rule; it speaks generally about the constitutional significance of the state secrets privilege, while recognizing its common law roots. 479 F.3d at 303-04. *Armstrong* holds generally that the clear statement rule must be applied “to statutes that significantly alter the balance between Congress and the President,” but does not apply that principle to the state secrets privilege. 924 F.2d at 289. So neither case is directly on point.

Under our circuit’s case law, a clear statement in the sense of an explicit abrogation of the common law state secrets privilege is not required to decide that a statute displaces the privilege. Rather, if “the statute [speaks] *directly* to [the] question otherwise answered by federal common law,” that is sufficient. *Kasza*, 133 F.3d at 1167 (second and third alterations in original) (quoting *Oneida*, 470 U.S. at 236-37); *see also Texas*, 507 U.S. at 534. Although we, as a three-judge panel, could not hold otherwise, we would be inclined in any event to reject any clear statement rule more stringent than *Kasza*’s “speak directly to the question” requirement in this context.

The state secrets privilege may have “a constitutional ‘core’ or constitutional ‘overtones,’” *In re NSA*, 564 F. Supp. 2d at 1124, but, at bottom, it is an evidentiary

rule rooted in common law, *not* constitutional law. The Supreme Court has so emphasized, explaining that *Reynolds* “decided a purely evidentiary dispute by applying evidentiary rules.” *Gen. Dynamics*, 563 U.S. at 485. To require express abrogation, by name, of the state secrets privilege would be inconsistent with the evidentiary roots of the privilege.

In any event, the text of FISA does speak quite directly to the question otherwise answered by the dismissal remedy sometimes required by the common law state secrets privilege. Titled “In camera and ex parte review by district court,” § 1806(f) provides:

Whenever a court or other authority is notified pursuant to subsection (c) or (d) of this section, or whenever a motion is made pursuant to subsection (e) of this section, or whenever any motion or request is made by an aggrieved person pursuant to any other statute or rule of the United States or any State before any court or other authority of the United States or any State to discover or obtain applications or orders or other materials relating to electronic surveillance or to discover, obtain, or suppress evidence or information obtained or derived from electronic surveillance under this chapter, *the United States district court or, where the motion is made before another authority, the United States district court in the same district as the authority, shall, notwithstanding any other law, if the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States, review in camera and ex parte the application, order, and such other materials relating to the surveillance as may be necessary to determine*

whether the surveillance of the aggrieved person was lawfully authorized and conducted. In making this determination, the court may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other materials relating to the surveillance only where such disclosure is necessary to make an accurate determination of the legality of the surveillance.

50 U.S.C. § 1806(f) (emphasis added).

The phrase “notwithstanding any other law,” the several uses of the word “whenever,” and the command that courts “*shall*” use the § 1806(f) procedures to decide the lawfulness of the surveillance if the Attorney General asserts that national security is at risk, confirm Congress’s intent to make the *in camera* and *ex parte* procedure the exclusive procedure for evaluating evidence that threatens national security in the context of electronic surveillance-related determinations. *Id.* (emphasis added). That mandatory procedure necessarily overrides, on the one hand, the usual procedural rules precluding such severe compromises of the adversary process and, on the other, the state secrets evidentiary dismissal option. *See* H.R. Rep. No. 95-1283, pt. 1, at 91 (1978) (“It is to be emphasized that, although a number of different procedures might be used to attack the legality of the surveillance, it is the procedures set out in subsections (f) and (g) ‘notwithstanding any other law’ that must be used to resolve the question.”).²⁷

²⁷ Whether “notwithstanding” language in a given statute should be understood to supersede all otherwise applicable laws or read more narrowly to override only previously existing laws depends on

The procedures set out in § 1806(f) are animated by the same concerns—threats to national security—that underlie the state secrets privilege. *See Jeppesen*, 614 F.3d at 1077, 1080. And they are triggered by a process—the filing of an affidavit under oath by the Attorney General—nearly identical to the process that triggers application of the state secrets privilege, a formal assertion by the head of the relevant department. *See id.* at 1080. In this sense, § 1806(f) “is, in effect, a ‘codification of the state secrets privilege for purposes of relevant cases under FISA, as modified to reflect Congress’s precise directive to the federal courts for the handling of [electronic surveillance] materials and information with purported national security implications.’” *Jewel*, 965 F. Supp. 2d at 1106 (quoting *In re NSA*, 564 F. Supp. 2d at 1119); *see also In re NSA*, 564 F. Supp. 2d at 1119 (holding that “the *Reynolds* protocol has no role where section 1806(f) applies”). That § 1806(f) requires *in camera* and *ex parte* review in the exact circumstance that could otherwise trigger dismissal of the case demonstrates that § 1806(f) supplies an alternative mechanism for the consideration of electronic state secrets evidence. Section 1806(f) therefore eliminates the need to dismiss the case entirely because of the absence of any legally sanctioned mechanism for a major modification of ordinary judicial procedures—*in camera*, *ex parte* decisionmaking.

This conclusion is consistent with the overall structure of FISA. FISA does not concern Congress and

the overall context of the statute. *See United States v. Novak*, 476 F.3d 1041, 1046-47 (9th Cir. 2007) (en banc). Here, the distinction does not matter, as the *Reynolds* common law state secrets evidentiary privilege preceded the enactment of FISA.

the President alone. Instead, the statute creates “a comprehensive, detailed program to regulate foreign intelligence surveillance in the domestic context.” *In re NSA*, 564 F. Supp. 2d at 1118. FISA “set[s] out in detail roles for all three branches of government, providing judicial and congressional oversight of the covert surveillance activities by the executive branch combined with measures to safeguard secrecy necessary to protect national security.” *Id.* at 1115. And it provides rules for the executive branch to follow in “undertak[ing] electronic surveillance and physical searches for foreign intelligence purposes in the domestic sphere.” *Id.*

Moreover, FISA establishes a special court to hear applications for and grant orders approving electronic surveillance under certain circumstances. *See* 50 U.S.C. § 1803. FISA also includes a private civil enforcement mechanism, *see id.* § 1810, and sets out a procedure by which courts should consider evidence that could harm the country’s national security, *see id.* § 1806(f). The statute thus broadly involves the courts in the regulation of electronic surveillance relating to national security, while devising extraordinary, partially secret judicial procedures for carrying out that involvement. And Congress expressly declared that FISA, along with the domestic law enforcement electronic surveillance provisions of the Wiretap Act and the Stored Communications Act, are “the exclusive means by which electronic surveillance . . . may be conducted.” 18 U.S.C. § 2511(2)(f).

The legislative history of FISA confirms Congress’s intent to displace the remedy of dismissal for the common law state secrets privilege. FISA was enacted in response to “revelations that warrantless electronic sur-

veillance in the name of national security ha[d] been seriously abused.” S. Rep. No. 95-604, pt. 1, at 7 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3904, 3908. The Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, a congressional task force formed in 1975 and known as the Church Committee, exposed the unlawful surveillance in a series of investigative reports. The Church Committee documented “a massive record of intelligence abuses over the years,” in which “the Government ha[d] collected, and then used improperly, huge amounts of information about the private lives, political beliefs and associations of numerous Americans.” S. Select Comm. to Study Governmental Operations with Respect to Intelligence Activities, *Book II: Intelligence Activities and the Rights of Americans*, S. Rep. No. 94-755, at 290 (1976). The Committee concluded that these abuses had “undermined the constitutional rights of citizens . . . primarily because checks and balances designed by the framers of the Constitution to assure accountability [were not] applied.” *Id.* at 289.

Urging “fundamental reform,” *id.* at 289, the Committee recommended legislation to “make clear to the Executive branch that it will not condone, and does not accept, any theory of inherent or implied authority to violate the Constitution,” *id.* at 297. Observing that the Executive would have “no such authority after Congress has . . . covered the field by enactment of a comprehensive legislative charter” that would “provide the exclusive legal authority for domestic security activities,” *id.* at 297, the Committee recommended that Congress create civil remedies for unlawful surveillance, both to “afford effective redress to people who are injured by

improper federal intelligence activity” and to “deter improper intelligence activity,” *id.* at 336. Further, in recognition of the potential interplay between promoting accountability and ensuring security, the Committee noted its “belie[f] that the courts will be able to fashion discovery procedures, including inspection of material in chambers, and to issue orders as the interests of justice require, to allow plaintiffs with substantial claims to uncover enough factual material to argue their case, while protecting the secrecy of governmental information in which there is a legitimate security interest.” *Id.* at 337.

FISA implemented many of the Church Committee’s recommendations. In striking a careful balance between assuring the national security and protecting against electronic surveillance abuse, Congress carefully considered the role previously played by courts, and concluded that the judiciary had been unable effectively to achieve an appropriate balance through federal common law:

[T]he development of the law regulating electronic surveillance for national security purposes has been uneven and inconclusive. This is to be expected where the development is left to the judicial branch in an area where cases do not regularly come before it. Moreover, the development of standards and restrictions by the judiciary with respect to electronic surveillance for foreign intelligence purposes accomplished through case law threatens both civil liberties and the national security because that development occurs generally in ignorance of the facts, circumstances, and techniques of foreign intelligence electronic surveillance not present in the particular case

before the court. . . . [T]he tiny window to this area which a particular case affords provides inadequate light by which judges may be relied upon to develop case law which adequately balances the rights of privacy and national security.

H. Rep. No. 95-1283, pt. 1, at 21. FISA thus represents an effort to “provide effective, reasonable safeguards to ensure accountability and prevent improper surveillance,” and to “stri[k]e a fair and just balance between protection of national security and protection of personal liberties.” S. Rep. No. 95-604, pt. 1, at 7.

In short, the procedures outlined in § 1806(f) “provide[] a detailed regime to determine whether surveillance ‘was lawfully authorized and conducted,’” *Al-Haramain I*, 507 F.3d at 1205 (citing 50 U.S.C. § 1806(f)), and constitute “Congress’s specific and detailed description for how courts should handle claims by the government that the disclosure of material relating to or derived from electronic surveillance would harm national security,” *Jewel*, 965 F. Supp. 2d at 1106 (quoting *In re NSA*, 564 F. Supp. 2d at 1119). Critically, the FISA approach does not publicly expose the state secrets. It does severely compromise Plaintiffs’ procedural rights, but not to the degree of entirely extinguishing potentially meritorious substantive rights.

D. Applicability of FISA’s § 1806(f) Procedures to Affirmative Legal Challenges to Electronic Surveillance

Having determined that, where they apply, § 1806(f)’s procedures displace a dismissal remedy for the *Reynolds* state secrets privilege, we now consider

whether § 1806(f)'s procedures apply to the circumstances of this case.

By the statute's terms, the procedures set forth in § 1806(f) are to be used—where the Attorney General files the requisite affidavit—in the following circumstances:

[w]henever a court or other authority is notified pursuant to subsection (c) or (d) of this section, or whenever a motion is made pursuant to subsection (e) of this section, or whenever any motion or request is made by an aggrieved person pursuant to any other statute or rule of the United States or any State before any court or other authority of the United States or any State to discover or obtain applications or orders or other materials relating to electronic surveillance or to discover, obtain, or suppress evidence or information obtained or derived from electronic surveillance under this chapter.

50 U.S.C. § 1806(f). From this text and the cross-referenced subsections, we derive three circumstances in which the *in camera* and *ex parte* procedures are to be used: when (1) a governmental body gives notice of its intent “to enter into evidence or otherwise use or disclose in *any* trial, hearing, or other proceeding in or before *any* court, department, officer, agency, regulatory body, or other authority of the United States, against an aggrieved person, any information obtained or derived from an electronic surveillance,” *id.* § 1806(c) (emphases added);²⁸ (2) an aggrieved person moves to suppress the

²⁸ The text of § 1806(f) refers to notice “pursuant to subsection (c) or (d) of this section.” 50 U.S.C. § 1806(f) (emphasis added). Section 1806(d) describes verbatim the same procedures as contained in

evidence, *id.* § 1806(e); or (3) an aggrieved person makes “any motion or request . . . pursuant to *any* other statute or rule . . . to discover or obtain applications or orders or other materials relating to electronic surveillance or to discover, obtain, or suppress evidence or information obtained or derived from electronic surveillance under this chapter,” *id.* § 1806(f) (emphasis added).

The case at hand fits within the contemplated circumstances in two respects. First, although the Government has declined to confirm or deny in its public submissions that the information with respect to which it has invoked the state secrets privilege was obtained or derived from FISA-covered electronic surveillance of Plaintiffs, *see id.* § 1806(c), the complaint alleges that it was. The Attorney General’s privilege assertion encompassed, among other things, “any information obtained during the course of” Operation Flex, the “results of the investigation,” and “any results derived from” the “sources and methods” used in Operation Flex. It is precisely because the Government would like to use this information to defend itself that it has asserted the state secrets privilege. The district court’s dismissal ruling was premised in part on the potential use of state secrets material to defend the case. Because the district court made the ruling after reviewing the surveillance materials, it is aware whether the allegations in the complaint concerning electronic surveillance are factually supported. Of course, if they are not, then the district court

§ 1806(c), except as applied to States and political subdivisions rather than to the United States. *Id.* § 1806(d). For convenience, we refer only to § 1806(c) in this opinion, but our analysis applies to § 1806(d) with equal force.

can decide on remand that the FISA procedures are inapplicable. For purposes of this opinion, we proceed on the premise that the Attorney General's invocation of the state secrets privilege relied on the potential use of material obtained or derived from electronic surveillance, as alleged in the complaint.

Second, in their prayer for relief, Plaintiffs have requested injunctive relief “ordering Defendants to destroy or return any information gathered through the unlawful surveillance program by Monteilh and/or Operation Flex described above, and any information derived from that unlawfully obtained information.” Plaintiffs thus have requested, in the alternative, to “obtain” information gathered during or derived from electronic surveillance. *See id.* § 1806(f).

The Government disputes that FISA applies to this case. Its broader contention is that § 1806(f)'s procedures do not apply to any affirmative claims challenging the legality of electronic surveillance or the use of information derived from electronic surveillance, whether brought under FISA's private right of action or any other constitutional provision, statute, or rule. Instead, the Government maintains, FISA's procedures apply only when the government initiates the legal action, while the state secrets privilege applies when the government defends affirmative litigation brought by private parties.

The plain text and statutory structure of FISA provide otherwise. To begin, the language of the statute simply does not contain the limitations the Government suggests. As discussed above, § 1806(f)'s procedures are to be used in any one of three situations, each of which is separated in the statute by an “or.” *See id.* The first situation—when “the Government intends to enter

into evidence or otherwise use or disclose information obtained or derived from an electronic surveillance . . . against an aggrieved person” in “*any* trial, hearing, or other proceeding,” *id.* § 1806(c) (emphasis added) —unambiguously encompasses affirmative as well as defensive challenges to the lawfulness of surveillance.²⁹ The conduct governed by the statutory provision is the Government’s intended entry into evidence or other use or disclosure of information obtained or derived from electronic surveillance. “[A]gainst an aggrieved person” refers to and modifies the phrase “any information obtained or derived.” *Id.* As a matter of ordinary usage, the phrase “against an aggrieved person” cannot modify “any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States.” *Id.*

²⁹ In full, § 1806(c) reads:

Whenever the Government intends to enter into evidence or otherwise use or disclose in any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, against an aggrieved person, any information obtained or derived from an electronic surveillance of that aggrieved person pursuant to the authority of this subchapter, the Government shall, prior to the trial, hearing, or other proceeding or at a reasonable time prior to an effort to so disclose or so use that information or submit it in evidence, notify the aggrieved person and the court or other authority in which the information is to be disclosed or used that the Government intends to so disclose or so use such information.

50 U.S.C. § 1806(c). Again, we refer to the text of § 1806(c) because § 1806(f)’s procedures apply “[w]henver a court or other authority is notified pursuant to subsection (c) or (d) of this section.” *Id.* § 1806(f).

Evidence—such as “any information obtained or derived from an electronic surveillance”—can properly be said to be “against” a party. *See, e.g.*, U.S. Const. amend. V (“No person . . . shall be compelled in any criminal case to be *a witness against himself*. . . .”); *Miranda v. Arizona*, 384 U.S. 436, 460 (1966) (“[O]ur accusatory system of criminal justice demands that the government seeking to punish an individual produce *the evidence against him* by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth.” (emphasis added)). But a “trial, hearing, or other proceeding” is not for or against either party; such a proceeding is just an opportunity to introduce evidence. Also, as the phrase is set off by commas, “against an aggrieved person” is grammatically a separate modifier from the list of proceedings contained in § 1806(f). Were the phrase meant to modify the various proceedings, there would be no intervening comma setting it apart.

The third situation—when a “motion or request is made by an aggrieved person pursuant to any other statute or rule . . . before any court . . . to discover or obtain applications or orders or other materials relating to electronic surveillance or to discover, obtain, or suppress evidence or information obtained or derived from electronic surveillance under this chapter,” *id.* § 1806(f)—also by its plain text encompasses affirmative challenges to the legality of electronic surveillance. When an aggrieved person makes such a motion or request, or the government notifies the aggrieved person and the court that it intends to use or disclose information obtained or derived from electronic surveillance, the statute requires a court to use § 1806(f)’s procedures “to determine whether the surveillance . . . was

lawfully authorized and conducted.” *Id.* In other words, a court must “determine whether the surveillance was authorized and conducted in a manner which did not violate any constitutional or statutory right.” S. Rep. No. 95-604, pt. 1, at 57; *accord* S. Rep. No. 95-701, at 63.

The inference drawn from the text of § 1806 is bolstered by § 1810, which specifically creates a private right of action for an individual subjected to electronic surveillance in violation of FISA. FISA prohibits, for example, electronic surveillance of a U.S. person “solely upon the basis of activities protected by the first amendment to the Constitution of the United States.” 50 U.S.C. § 1805(a)(2)(A). Here, Plaintiffs allege they were surveilled solely on account of their religion. If true, such surveillance was necessarily unauthorized by FISA, and § 1810 subjects any persons who intentionally engaged in such surveillance to civil liability. It would make no sense for Congress to pass a comprehensive law concerning foreign intelligence surveillance, expressly enable aggrieved persons to sue for damages when that surveillance is unauthorized, *see id.* § 1810, and provide procedures deemed adequate for the review of national security-related evidence, *see id.* § 1806(f), but not intend for those very procedures to be used when an aggrieved person sues for damages under FISA’s civil enforcement mechanism. Permitting a § 1810 claim to be dismissed on the basis of the state secrets privilege because the § 1806(f) procedures are unavailable would dramatically undercut the utility of § 1810 in deterring FISA violations. Such a dismissal also would undermine the overarching goal of FISA more broadly—“curb[ing] the practice by which the Ex-

ecutive Branch may conduct warrantless electronic surveillance on its own unilateral determination that national security justifies it.” S. Rep. No. 95-604, pt. 1, at 8.

FISA’s legislative history confirms that § 1806(f)’s procedures were designed to apply in both civil and criminal cases, and to both affirmative and defensive use of electronic surveillance evidence. The Senate bill initially provided a single procedure for criminal and civil cases, while the House bill at the outset specified two separate procedures for determining the legality of electronic surveillance.³⁰ In the end, the conference committee adopted a slightly modified version of the Senate bill, agreeing “that an *in camera* and *ex parte* proceeding is appropriate for determining the lawfulness of electronic surveillance in both criminal and civil cases.” H.R. Rep. No. 95-1720, at 32.

In the alternative, the Government suggests that § 1806(f)’s procedures for the use of electronic surveillance in litigation are limited to affirmative actions brought directly under § 1810. We disagree. The § 1806(f) procedures are expressly available, as well as

³⁰ Under the House bill, in criminal cases there would be an *in camera* proceeding, and the court could, but need not, disclose the materials relating to the surveillance to the aggrieved person “if there were a reasonable question as to the legality of the surveillance [sic] and if disclosure would likely promote a more accurate determination of such legality, or if disclosure would not harm the national security.” H.R. Rep. No. 95-1720, at 31 (1978) (Conf. Rep.), *reprinted in* 1978 U.S.C.C.A.N. 4048, 4060. In civil suits, there would be an *in camera* and *ex parte* proceeding before a court of appeals, and the court would disclose to the aggrieved person the materials relating to the surveillance “only if necessary to afford due process to the aggrieved person.” *Id.* at 32.

mandatory, for affirmative claims brought “by an aggrieved person pursuant to *any . . . statute or rule of the United States . . . before any court . . . of the United States.*” 50 U.S.C. § 1806(f) (emphasis added). This provision was meant “to make very clear that these procedures apply *whatever* the underlying rule or statute” at issue, so as “to prevent these carefully drawn procedures from being bypassed by the inventive litigant using a new statute, rule or judicial construction.” H.R. Rep. No. 95-1283, pt. 1, at 91 (emphasis added).

Had Congress wanted to limit the use of § 1806(f)’s procedures only to affirmative claims alleging lack of compliance with FISA itself, it could have so specified, as it did in § 1809 and § 1810. Section 1810 creates a private right of action only for violations of § 1809. 50 U.S.C. § 1810. Section 1809 prohibits surveillance not authorized by FISA, the Wiretap Act, the Stored Communications Act, and the pen register statute. *Id.* § 1809(a). That § 1809 includes only certain, cross-referenced statutes while § 1810 is limited to violations of § 1809 contrasts with the broad language of § 1806(f) as to the types of litigation covered—litigation “pursuant to *any . . . statute or rule of the United States.*” *Id.* § 1806(f) (emphasis added).

Furthermore, if—as here—an aggrieved person brings a claim under § 1810 and a claim under another statute or the Constitution based on the same electronic surveillance as is involved in the § 1810 claim, it would make little sense for § 1806(f) to require the court to consider *in camera* and *ex parte* the evidence relating to electronic surveillance for purposes of the claim under § 1810 of FISA but not permit the court to consider the exact same evidence in the exact same way for purposes

of the non-FISA claim. Once the information has been considered by a federal judge *in camera* and *ex parte*, any risk of disclosure—which Congress necessarily considered exceedingly small or it would not have permitted such examination—has already been incurred. There would be no point in dismissing other claims because of that same concern.

We are not the first to hold that § 1806(f)'s procedures may be used to adjudicate claims beyond those arising under § 1810. The D.C. Circuit expressly so held in *ACLU Foundation of Southern California v. Barr*, 952 F.2d 457 (D.C. Cir. 1991):

When a district court conducts a § 1806(f) review, its task is not simply to decide whether the surveillance complied with FISA. Section 1806(f) requires the court to decide whether the surveillance was “lawfully authorized and conducted.” The Constitution is law. Once the Attorney General invokes § 1806(f), the respondents named in that proceeding therefore must present not only their statutory but also their constitutional claims for decision.

Id. at 465; accord *United States v. Johnson*, 952 F.2d 565, 571-73, 571 n.4 (1st Cir. 1991) (using § 1806(f)'s *in camera* and *ex parte* procedures to review constitutional challenges to FISA surveillance).

In sum, the plain language, statutory structure, and legislative history demonstrate that Congress intended FISA to displace the state secrets privilege and its dismissal remedy with respect to electronic surveillance. Contrary to the Government's contention, FISA's § 1806(f) procedures are to be used when an aggrieved

person affirmatively challenges, in any civil case, the legality of electronic surveillance or its use in litigation, whether the challenge is under FISA itself, the Constitution, or any other law.³¹

³¹ The Agent Defendants suggest that using the § 1806 procedures would violate their Seventh Amendment jury trial right and their due process rights.

Any Seventh Amendment argument is premature. Any hypothetical interference with a jury trial would arise only if a series of contingencies occurred on remand. First, given our various rulings precluding certain of Plaintiffs' claims and the narrow availability of *Bivens* remedies under current law, there are likely to be few, if any, remaining *Bivens* claims against the Agent Defendants. See *infra* Part I; *supra* Part III.B; *supra* Part IV.B. Second, as to any remaining claims against the Agent Defendants, the district court might determine that there was no unlawful surveillance after reviewing the evidence under the *in camera*, *ex parte* procedures, or the Agent Defendants may prevail on summary judgment. Moreover, it is possible that the district court's determination of whether the surveillance was lawful will be a strictly legal decision—analogueous to summary judgment—made on the record supplied by the government. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 336 (1979) (noting that procedural devices like summary judgment are not “inconsistent” with the Seventh Amendment).

Should the various contingencies occur and leave liability issues to be determined, the Agent Defendants are free at that time to raise their Seventh Amendment arguments on remand. But, as the Seventh Amendment issue was not decided by the district court, may never arise, and, if it does, may depend on the merits on exactly how it arises, we decline to address the hypothetical constitutional question now.

With respect to the Agent Defendants' due process arguments, we and other courts have upheld the constitutionality of FISA's *in camera* and *ex parte* procedures with regard to criminal defendants. See *United States v. Abu-Jihaad*, 630 F.3d 102, 117-29 (2d Cir. 2010); *United States v. Damrah*, 412 F.3d 618, 625 (6th Cir. 2005); *United States v. Ott*, 827 F.2d 473, 476-77, 477 n.5 (9th Cir. 1987); *United*

E. Aggrieved Persons

We now consider more specifically whether FISA's § 1806(f) procedures may be used in this case. Because the procedures apply when evidence will be introduced "against an aggrieved person," 50 U.S.C. § 1806(c), and when "any motion or request is made by an aggrieved person," *id.* § 1806(f), Plaintiffs must satisfy the definition of an "aggrieved person," *see id.* § 1801(k).

We addressed the "aggrieved person" requirement in part in the discussion of Plaintiffs' § 1810 claim against the Agent Defendants. As we there explained, because Fazaga had a reasonable expectation of privacy in his office, and AbdelRahim had a reasonable expectation of privacy in his home, car, and phone, Plaintiffs are properly considered aggrieved persons as to those categories of surveillance. *See supra* Part I.C. And although we noted that the Agent Defendants are entitled to qualified immunity on Plaintiffs' FISA § 1810 claim with respect to the recording of conversation in the mosque prayer halls, Plaintiffs had a reasonable expectation of privacy in those conversations and thus are still properly considered aggrieved persons as to that category of surveillance as well. *See supra* Part I.B.

Again, because Plaintiffs are properly considered "aggrieved" for purposes of FISA, two of the situations referenced in § 1806(f) are directly applicable here. The Government intends to use "information obtained or derived from an electronic surveillance" against Plaintiffs, who are

States v. Belfield, 692 F.2d 141, 148-49 (D.C. Cir. 1982); *United States v. Nicholson*, 955 F. Supp. 588, 590-92, 590 n.3 (E.D. Va. 1997) (collecting cases). Individual defendants in a civil suit are not entitled to more stringent protections than criminal defendants.

“aggrieved person[s].” 50 U.S.C. § 1806(c). And Plaintiffs are “aggrieved person[s]” who have attempted “to discover or obtain applications or orders or other materials relating to electronic surveillance.” *Id.* § 1806(f).

* * * *

We next turn to considering whether the claims other than the FISA § 1810 claim must be dismissed for reasons independent of the state secrets privilege, limiting ourselves to the arguments for dismissal raised in Defendants’ motions to dismiss.

III. Search Claims

In this part, we discuss (1) the Fourth Amendment injunctive relief claim against the official-capacity defendants; and (2) the Fourth Amendment *Bivens* claim against the Agent Defendants.

A. Fourth Amendment Injunctive Relief Claim Against the Official-Capacity Defendants

The Government’s primary argument for dismissal of the constitutional claims brought against the official-capacity defendants, including the Fourth Amendment claim, is that the injunctive relief sought—the expungement of all records unconstitutionally obtained and maintained—is unavailable under the Constitution. Not so.

We have repeatedly and consistently recognized that federal courts can order expungement of records, criminal and otherwise, to vindicate constitutional rights.³²

³² See, e.g., *United States v. Sumner*, 226 F.3d 1005, 1012 (9th Cir. 2000) (“A district court has the power to expunge a criminal record under . . . the Constitution itself.”); *Burnsworth v. Gunderson*, 179 F.3d 771, 775 (9th Cir. 1999) (holding that expungement of an

The Privacy Act, 5 U.S.C. § 552a, which (1) establishes a set of practices governing the collection, maintenance, use, and dissemination of information about individuals maintained in records systems by federal agencies, and (2) creates federal claims for relief for violations of the Act's substantive provisions, does not displace the availability of expungement relief under the Constitution.³³

escape conviction from prison records was an appropriate remedy for a due process violation); *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1275 (9th Cir. 1998) (explaining that expungement of unconstitutionally obtained medical records “would be an appropriate remedy for the alleged violation”); *United States v. Smith*, 940 F.2d 395, 396 (9th Cir. 1991) (per curiam) (explaining that “recognized circumstances supporting expunction” include an unlawful or invalid arrest or conviction and government misconduct); *Fendler v. U.S. Parole Comm’n*, 774 F.2d 975, 979 (9th Cir. 1985) (“Federal courts have the equitable power ‘to order the expungement of Government records where *necessary* to vindicate rights secured by the Constitution or by statute.’” (quoting *Chastain v. Kelley*, 510 F.2d 1232, 1235 (D.C. Cir. 1975))); *Maurer v. Pitchess*, 691 F.2d 434, 437 (9th Cir. 1982) (“It is well settled that the federal courts have inherent equitable power to order ‘the expungement of local arrest records as an appropriate remedy in the wake of police action in violation of constitutional rights.’” (quoting *Sullivan v. Murphy*, 478 F.2d 938, 968 (D.C. Cir. 1973))); *Shipp v. Todd*, 568 F.2d 133, 134 (9th Cir. 1978) (“It is established that the federal courts have inherent power to expunge criminal records when necessary to preserve basic legal rights.” (quoting *United States v. McMains*, 540 F.2d 387, 389 (8th Cir. 1976))).

³³ The cases cited by the Government to the contrary are inapposite. See *City of Milwaukee*, 451 U.S. at 314-16 (addressing the congressional displacement of federal common law through legislation, not the elimination of injunctive remedies available under the Constitution); *Bush v. Lucas*, 462 U.S. 367, 386-88 (1983) (discussing preclusion of a *Bivens* claim for damages where Congress had already designed a comprehensive remedial scheme, not whether a statute can displace a recognized constitutional claim for injunctive

Previous cases involving claims brought under both the Privacy Act and the Constitution did not treat the Privacy Act as displacing a constitutional claim, but instead analyzed the claims separately.³⁴ And the circuits that have directly considered whether the Privacy Act displaces parallel constitutional remedies have all concluded that a plaintiff may pursue a remedy under both the Constitution and the Privacy Act.³⁵

In addition to its Privacy Act displacement theory, the Government contends that even if expungement relief is otherwise available under the Constitution, it is not available here, as Plaintiffs “advance no plausible claim of an ongoing constitutional violation.” Again, we disagree.

relief); *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 936-37 (D.C. Cir. 2003) (discussing the displacement of a common law right of access to public records by the Freedom of Information Act in a case not involving the Privacy Act or a claim for injunctive relief from an alleged ongoing constitutional violation).

³⁴ See *Hewitt v. Grabicki*, 794 F.2d 1373, 1377, 1380 (9th Cir. 1986) (addressing separately a claim for damages under the Privacy Act and a procedural due process claim); *Fendler*, 774 F.2d at 979 (considering a prisoner's Privacy Act claims and then, separately, his claim for expungement relief under the Constitution).

³⁵ See *Abdelfattah v. U.S. Dep't of Homeland Sec.*, 787 F.3d 524, 534 (D.C. Cir. 2015) (“We have repeatedly recognized a plaintiff may request expungement of agency records for both violations of the Privacy Act and the Constitution.”); *Clarkson v. IRS*, 678 F.2d 1368, 1376 n.13 (11th Cir. 1982) (“[W]e of course do not intend to suggest that the enactment of the Privacy Act in any way precludes a plaintiff from asserting a constitutional claim for violation of his privacy or First Amendment rights. Indeed, several courts have recognized that a plaintiff is free to assert both Privacy Act and constitutional claims.”).

This court has been clear that a determination that records were obtained and retained in violation of the Constitution supports a claim for expungement relief of existing records so obtained. As *Norman-Bloodsaw* explained:

Even if the continued storage, against plaintiffs' wishes, of intimate medical information that was allegedly taken from them by unconstitutional means does not *itself* constitute a violation of law, it is clearly an ongoing "effect" of the allegedly unconstitutional and discriminatory testing, and expungement of the test results would be an appropriate remedy for the alleged violation. . . . At the very least, the retention of undisputedly intimate medical information obtained in an unconstitutional and discriminatory manner would constitute a continuing "irreparable injury" for purposes of equitable relief.

135 F.3d at 1275; *see also Wilson v. Webster*, 467 F.2d 1282, 1283-84 (9th Cir. 1972) (holding that plaintiffs had a right to show that records of unlawful arrests "should be expunged, for their continued existence may seriously and unjustifiably serve to impair fundamental rights of the persons to whom they relate").

In short, expungement relief is available under the Constitution to remedy the alleged constitutional violations.³⁶ Because the Government raises no other argument for dismissal of the Fourth Amendment injunctive relief claim, it should not have been dismissed.

³⁶ We do not at this stage, of course, address whether Plaintiffs are actually entitled to such a remedy.

B. Fourth Amendment *Bivens* Claim Against the Agent Defendants

Alleging that the Agent Defendants violated the Fourth Amendment, Plaintiffs seek monetary damages directly under the Constitution under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). In *Bivens*, the Supreme Court “recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen’s constitutional rights.” *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001). “The purpose of *Bivens* is to deter individual federal officers from committing constitutional violations.” *Id.* at 70.

Bivens itself concerned a Fourth Amendment violation by federal officers. As we have recognized, a Fourth Amendment damages claim premised on unauthorized electronic surveillance by FBI agents and their surrogates “fall[s] directly within the coverage of *Bivens*.” *Gibson v. United States*, 781 F.2d 1334, 1341 (9th Cir. 1986); see also *Mitchell v. Forsyth*, 472 U.S. 511, 513 (1985) (considering, under *Bivens*, an alleged “warrantless wiretap” conducted in violation of the Fourth Amendment). Recent cases, however, have severely restricted the availability of *Bivens* actions for new claims and contexts. See *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856-57 (2017).³⁷

Here, the substance of Plaintiffs’ Fourth Amendment *Bivens* claim is identical to the allegations raised in their FISA § 1810 claim. Under our rulings regarding the reach of the § 1806(f) procedures, almost all of the

³⁷ The parties have not briefed before us the impact of *Abbasi* on the *Bivens* claims.

search-and-seizure allegations will be subject to those procedures. Thus, regardless of whether a *Bivens* remedy is available, Plaintiffs' underlying claim—that the Agent Defendants engaged in unlawful electronic surveillance violative of the Fourth Amendment—would proceed in the same way.

Moreover, if the Fourth Amendment *Bivens* claim proceeds, the Agent Defendants are entitled to qualified immunity on Plaintiffs' Fourth Amendment *Bivens* claim to the same extent they are entitled to qualified immunity on Plaintiffs' FISA claim. In both instances, the substantive law derives from the Fourth Amendment, and in both instances, government officials in their individual capacity are subject to liability for damages only if they violated a clearly established right to freedom from governmental intrusion where an individual has a reasonable expectation of privacy. *See supra* Part I.B. Under our earlier rulings, the FISA search-and-seizure allegations may proceed against only two of the Agent Defendants, and only with respect to a narrow aspect of the alleged surveillance.

In light of the overlap between the *Bivens* claim and the narrow range of the remaining FISA claim against the Agent Defendants that can proceed, it is far from clear that Plaintiffs will continue to press this claim. We therefore decline to address whether Plaintiffs' *Bivens* claim remains available after the Supreme Court's decision in *Abbasi*. On remand, the district court may determine—if necessary—whether a *Bivens* remedy is appropriate for any Fourth Amendment claim against the Agent Defendants.

IV. Religion Claims

The other set of Plaintiffs' claims arise from their allegation that they were targeted for surveillance solely because of their religion.³⁸ In this part, we discuss Plaintiffs' (1) First and Fifth Amendment injunctive relief claims against the official-capacity defendants; (2) First and Fifth Amendment *Bivens* claims against the Agent Defendants; (3) § 1985(3) claims for violations of the Free Exercise Clause, Establishment Clause, and equal protection guarantee; (4) RFRA claim; (5) Privacy Act claim; and (6) FTCA claims. Our focus throughout is whether there are grounds for dismissal independent of the Government's invocation of the state secrets privilege.

A. First Amendment and Fifth Amendment Injunctive Relief Claims Against the Official-Capacity Defendants

Plaintiffs maintain that it violates the First Amendment's Religion Clauses and the equal protection component of the Fifth Amendment for the Government to target them for surveillance because of their adherence to and practice of Islam. The Government does not challenge the First and Fifth Amendment claims substantively. It argues only that injunctive relief is unavailable and that litigating the claims is not possible without risking the disclosure of state secrets. We have already concluded that injunctive relief, including expungement, is available under the Constitution where there is a substantively viable challenge to government

³⁸ The operative complaint alleges as a factual matter that Plaintiffs were surveilled solely because of their religion. We limit our legal discussion to the facts there alleged.

action, *see supra* Part III.A, and that dismissal because of the state secrets concern was improper because of the availability of the § 1806(f) procedures, *see supra* Part II. Accordingly, considering only the arguments put forward by the Government, we conclude that the First and Fifth Amendment claims against the official-capacity defendants may go forward.

B. First Amendment and Fifth Amendment *Bivens* Claims Against the Agent Defendants

Plaintiffs seek monetary damages directly under the First Amendment’s Establishment and Free Exercise Clauses and the equal protection component of the Fifth Amendment’s Due Process Clause, relying on *Bivens v. Six Unknown Named Agents*.

We will not recognize a *Bivens* claim where there is “‘any alternative, existing process for protecting’ the plaintiff’s interests.” *W. Radio Servs. Co. v. U.S. Forest Serv.*, 578 F.3d 1116, 1120 (9th Cir. 2009) (quoting *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007)). The existence of such an alternative remedy raises the inference that Congress “‘expected the Judiciary to stay its *Bivens* hand’ and ‘refrain from providing a new and free-standing remedy in damages.’” *Id.* (quoting *Wilkie*, 551 U.S. at 550, 554); *see also Abbasi*, 137 S. Ct. at 1863; *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988). Accordingly, we “refrain[] from creating a judicially implied remedy even when the available statutory remedies ‘do not provide complete relief’ for a plaintiff that has suffered a constitutional violation.” *W. Radio Servs.*, 578 F.3d at 1120 (quoting *Malesko*, 534 U.S. at 69). As long as “an avenue for some redress” exists, “bedrock princi-

ples of separation of powers foreclose[s] judicial imposition of a new substantive liability.’” *Id.* (alteration in original) (quoting *Malesko*, 534 U.S. at 69).

Here, we conclude that the Privacy Act, 5 U.S.C. § 552a, and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*, taken together, provide an alternative remedial scheme for some, but not all, of Plaintiffs’ First and Fifth Amendment *Bivens* claims. As to the remaining *Bivens* claims, we remand to the district court to decide whether a *Bivens* remedy is available in light of the Supreme Court’s decision in *Abbasi*.

As to the collection and maintenance of records, Plaintiffs could have, and indeed did, challenge the FBI’s surveillance of them under the Privacy Act’s remedial scheme. Again, the Privacy Act, 5 U.S.C. § 552a, creates a set of rules governing how such records should be kept by federal agencies. *See supra* Part III.A. Under § 552a(e)(7), an “agency that maintains a system of records shall maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity.”³⁹ When an agency fails to comply with § 552a(e)(7), an individual may bring a civil action against the agency for damages. *Id.* § 552a(g)(1)(D), (g)(4). Thus, § 552a(e)(7) limits the government’s ability to collect, maintain, use, or disseminate information on an individual’s religious activity protected by the First Amendment’s Religion Clauses.

³⁹ The term “maintain” is defined to mean “maintain, collect, use, or disseminate.” 5 U.S.C. § 552a(a)(3).

We have not addressed the availability of a *Bivens* action where the Privacy Act may be applicable. But two other circuits have, and both held that the Privacy Act supplants *Bivens* claims for First and Fifth Amendment violations. See *Wilson v. Libby*, 535 F.3d 697, 707-08 (D.C. Cir. 2008) (holding, in response to claims alleging harm from the improper disclosure of information subject to the Privacy Act’s protections, that the Privacy Act is a comprehensive remedial scheme that precludes an additional *Bivens* remedy); *Downie v. City of Middleburg Heights*, 301 F.3d 688, 696 & n.7 (6th Cir. 2002) (holding that the Privacy Act displaces *Bivens* for claims involving the creation, maintenance, and dissemination of false records by federal agency employees). We agree with the analyses in *Wilson* and *Downie*.

Although the Privacy Act provides a remedy only against the FBI, not the individual federal officers, the lack of relief against some potential defendants does not disqualify the Privacy Act as an alternative remedial scheme. Again, a *Bivens* remedy may be foreclosed “even when the available statutory remedies ‘do not provide complete relief’ for a plaintiff,” as long as “the plaintiff ha[s] an avenue for *some* redress.” *W. Radio Servs.*, 578 F.3d at 1120 (alteration in original) (emphasis added) (quoting *Malesko*, 534 U.S. at 69). Thus, to the extent that Plaintiffs’ *Bivens* claims involve improper collection and retention of agency records, the Privacy Act precludes such *Bivens* claims.

As to religious discrimination more generally, we conclude that RFRA precludes some, but not all, of Plaintiffs’ *Bivens* claims. RFRA provides that absent a “compelling governmental interest” and narrow tailoring,

42 U.S.C. § 2000bb-1(b), the “Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability.” *Id.* § 2000bb-1(a). The statute was enacted “to provide a claim or defense to persons whose religious exercise is substantially burdened by government.” *Id.* § 2000bb(b)(2). It therefore provided that “[a] person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.” *Id.* § 2000bb-1(c). RFRA thus provides a means for Plaintiffs to seek relief for the alleged burden of the surveillance itself on their exercise of their religion.

RFRA does not, however, provide an alternative remedial scheme for all of Plaintiffs’ discrimination-based *Bivens* claims. RFRA was enacted in response to *Employment Division v. Smith*, 494 U.S. 872 (1990), which, in Congress’s view, “virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion,” 42 U.S.C. § 2000bb(a)(4). Accordingly, “to restore the compelling interest test . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened,” *id.* § 2000bb(b)(1), RFRA directs its focus on “rule[s] of general applicability” that “substantially burden a person’s exercise of religion,” *id.* § 2000bb-1(a).

Here, many of Plaintiffs’ allegations relate not to neutral and generally applicable government action, but to conduct motivated by intentional discrimination against Plaintiffs because of their Muslim faith. Regardless of the magnitude of the burden imposed, “if the object of a

law is to infringe upon or restrict practices *because* of their religious motivation, the law is not neutral” and “is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) (emphasis added). It is the Free Exercise Clause of the First Amendment—not RFRA—that imposes this requirement.

Moreover, by its terms, RFRA applies only to the “free exercise of religion,” 42 U.S.C. § 2000bb(a)(1); indeed, it expressly disclaims any effect on “that portion of the First Amendment prohibiting laws respecting the establishment of religion,” *id.* § 2000bb-4. But intentional religious discrimination is “subject to heightened scrutiny whether [it] arise[s] under the Free Exercise Clause, the Establishment Clause, or the Equal Protection Clause.” *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1266 (10th Cir. 2008) (citations omitted). Here, Plaintiffs have raised religion claims based on all three constitutional provisions. Because RFRA does not provide an alternative remedial scheme for protecting these interests, we conclude that RFRA does not preclude Plaintiffs’ religion-based *Bivens* claims.

We conclude that the Privacy Act and RFRA, taken together, function as an alternative remedial scheme for protecting some, but not all, of the interests Plaintiffs seek to vindicate via their First and Fifth Amendment *Bivens* claims. The district court never addressed whether a *Bivens* remedy is available for any of the religion claims because it dismissed the claims in their entirety based on the state secrets privilege. In addition, *Abbasi* has now clarified the standard for determining

when a *Bivens* remedy is available for a particular alleged constitutional violation. And, as we have explained, the scope of the religion claims to which a *Bivens* remedy might apply is considerably narrower than those alleged, given the partial displacement by the Privacy Act and RFRA. If asked, the district court should determine on remand, applying *Abbasi*, whether a *Bivens* remedy is available to the degree the damages remedy is not displaced by the Privacy Act and RFRA.

C. 42 U.S.C. § 1985(3) Claims Against the Agent Defendants

Plaintiffs allege that the Agent Defendants conspired to deprive Plaintiffs of their rights under the First Amendment’s Establishment and Free Exercise Clauses and the due process guarantee of the Fifth Amendment, in violation of 42 U.S.C. § 1985(3).

To state a violation of § 1985(3), Plaintiffs must “allege and prove four elements”:

(1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

United Bhd. of Carpenters & Joiners of Am., Local 610 v. Scott, 463 U.S. 825, 828-29 (1983). The Defendants attack these claims on various grounds, but we reach only one—whether § 1985(3) conspiracies among employees of the same government entity are barred by the intra-corporate conspiracy doctrine.

Abbasi makes clear that intracorporate liability was not clearly established at the time of the events in this case and that the Agent Defendants are therefore entitled to qualified immunity from liability under § 1985(3). *See* 137 S. Ct. at 1866.

In *Abbasi*, men of Arab and South Asian descent detained in the aftermath of September 11 sued two wardens of the federal detention center in Brooklyn in which they were held, along with several high-level Executive Branch officials who were alleged to have authorized their detention. *Id.* at 1853. They alleged, among other claims, a conspiracy among the defendants to deprive them of the equal protection of the laws under § 1985(3).⁴⁰ *Id.* at 1853-54. *Abbasi* held that, even assuming these allegations to be “true and well pleaded,” the defendants were entitled to qualified immunity on the § 1985(3) claim. *Id.* at 1866-67. It was not “clearly established” at the time, the Court held, that the intracorporate conspiracy doctrine did not bar § 1985(3) liability for employees of the same government department who conspired among themselves. *Id.* at 1867-68. “[T]he fact that the courts are divided as to whether or not a § 1985(3) conspiracy can arise from official discussions between or among agents of the same entity demonstrates that the law on the point is not well established.” *Id.* at 1868. “[R]easonable officials in petitioners’ positions would not have known, and could not

⁴⁰ Specifically, Plaintiffs alleged that these officials “conspired with one another to hold respondents in harsh conditions because of their actual or apparent race, religion, or national origin.” *Abbasi*, 137 S. Ct. at 1854.

have predicted, that § 1985(3) prohibited their joint consultations.” *Id.* at 1867. The Court declined, however, to resolve the issue on the merits. *Id.*

Abbasi controls. Although the underlying facts here differ from those in *Abbasi*, the dispositive issue here, as in *Abbasi*, is whether the Agent Defendants could reasonably have known that agreements entered into or agreed-upon policies devised with other employees of the FBI could subject them to conspiracy liability under § 1985(3). At the time Plaintiffs allege they were surveilled, neither this court nor the Supreme Court had held that an intracorporate agreement could subject federal officials to liability under § 1985(3), and the circuits that had decided the issue were split.⁴¹ There was therefore, as in *Abbasi*, no clearly established law on the question. As the Agent Defendants are entitled to qualified immunity on the § 1985(3) allegations in the complaint, we affirm their dismissal on that ground.

⁴¹ Two circuits have held that the intracorporate conspiracy doctrine does not extend to civil rights cases. *See Brever v. Rockwell Int'l Corp.*, 40 F.3d 1119, 1127 (10th Cir. 1994); *Novotny v. Great Am. Fed. Sav. & Loan Ass'n*, 584 F.2d 1235, 1257-58 (3d Cir. 1978) (en banc), *vacated on other grounds*, 442 U.S. 366 (1979); *see also Stathos v. Bowden*, 728 F.2d 15, 20-21 (1st Cir. 1984) (expressing “doubt” that the intracorporate conspiracy doctrine extends to conspiracy under § 1985(3)). The majority of the circuits have reached a contrary result. *See Hartline v. Gallo*, 546 F.3d 95, 99 n.3 (2d Cir. 2008); *Meyers v. Starke*, 420 F.3d 738, 742 (8th Cir. 2005); *Dickerson v. Alachua Cty. Comm'n*, 200 F.3d 761, 767-68 (11th Cir. 2000); *Benningfield v. City of Houston*, 157 F.3d 369, 378 (5th Cir. 1998); *Wright v. Ill. Dep't of Children & Family Servs.*, 40 F.3d 1492, 1508 (7th Cir. 1994); *Hull v. Cuyahoga Valley Joint Vocational Sch. Dist. Bd. of Educ.*, 926 F.2d 505, 509-10 (6th Cir. 1991); *Buschi v. Kirven*, 775 F.2d 1240, 1252-53 (4th Cir. 1985).

**D. Religious Freedom Restoration Act Claim
Against the Agent Defendants and Government
Defendants**

Plaintiffs allege that the Defendants violated the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, by substantially burdening Plaintiffs' exercise of religion, and did so neither in furtherance of a compelling governmental interest nor by adopting the least restrictive means of furthering any such interest. The Government Defendants offer no argument for dismissal of the RFRA claim other than the state secrets privilege. The Agent Defendants, however, contend that they are entitled to qualified immunity on the RFRA claim because Plaintiffs failed to plead a substantial burden on their religion, and if they did so plead, no clearly established law supported that conclusion at the relevant time.⁴²

To establish a prima facie claim under RFRA, a plaintiff must “present evidence sufficient to allow a trier of fact rationally to find the existence of two elements.” *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1068 (9th Cir. 2008) (en banc). “First, the activities the

⁴² The parties do not dispute that qualified immunity is an available defense to a RFRA claim. We therefore assume it is. See *Paddilla v. Yoo*, 678 F.3d 748, 768 (9th Cir. 2012); *Lebron v. Rumsfeld*, 670 F.3d 540, 560 (4th Cir. 2012).

Tidwell and Walls also contend that Plaintiffs' RFRA claim was properly dismissed because RFRA does not permit damages suits against individual-capacity defendants. Because we affirm dismissal on another ground, we do not reach that issue. We note, however, that at least two other circuits have held that damages are available for RFRA suits against individual-capacity defendants. See *Tanvir v. Tanzin*, 894 F.3d 449, 467 (2d Cir. 2018); *Mack v. Warden Loretto FCI*, 839 F.3d 286, 302 (3d Cir. 2016).

plaintiff claims are burdened by the government action must be an ‘exercise of religion.’” *Id.* (quoting 42 U.S.C. § 2000bb-1(a)). “Second, the government action must ‘substantially burden’ the plaintiff’s exercise of religion.” *Id.* Once a plaintiff has established those elements, “the burden of persuasion shifts to the government to prove that the challenged government action is in furtherance of a ‘compelling governmental interest’ and is implemented by ‘the least restrictive means.’” *Id.* (quoting 42 U.S.C. § 2000bb-1(b)).

“Under RFRA, a ‘substantial burden’ is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit . . . or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions. . . .” *Id.* at 1069-70; *see also Oklevueha Native Am. Church of Haw., Inc. v. Lynch*, 828 F.3d 1012, 1016 (9th Cir. 2016). An effect on an individual’s “subjective, emotional religious experience” does not constitute a substantial burden, *Navajo Nation*, 535 F.3d at 1070, nor does “a government action that decreases the spirituality, the fervor, or the satisfaction with which a believer practices his religion,” *id.* at 1063.

Plaintiffs do allege that they altered their religious practices as a result of the FBI’s surveillance: Malik trimmed his beard, stopped regularly wearing a skull cap, decreased his attendance at the mosque, and became less welcoming to newcomers than he believes his religion requires. AbdelRahim “significantly decreased his attendance to mosque,” limited his donations to mosque institutions, and became less welcoming to newcomers than he believes his religion requires. Fazaga, who provided counseling at the mosque as an imam and

an intern therapist, stopped counseling congregants at the mosque because he feared the conversations would be monitored and thus not confidential.

But it was not clearly established in 2006 or 2007 that covert surveillance conducted on the basis of religion would meet the RFRA standards for constituting a substantial religious burden on individual congregants. There simply was no case law in 2006 or 2007 that would have put the Agent Defendants on notice that covert surveillance on the basis of religion could violate RFRA. And at least two cases from our circuit could be read to point in the opposite direction, though they were brought under the First Amendment's Religion Clauses rather than under RFRA. *See Vernon v. City of Los Angeles*, 27 F.3d 1385, 1394 (9th Cir. 1994); *Presbyterian Church*, 870 F.2d at 527.⁴³

Presbyterian Church concerned an undercover investigation by INS of the sanctuary movement. 870 F.2d at 520. Over nearly a year, several INS agents infiltrated four churches in Arizona, attending and secretly recording church services. *Id.* The covert surveillance was later publicly disclosed in the course of criminal proceedings against individuals involved with the sanctuary movement. *Id.* The four churches

⁴³ *Presbyterian Church* predates *Employment Division v. Smith*, which declined to use the compelling interest test from *Sherbert v. Verner*, 374 U.S. 398 (1963). *Smith*, 494 U.S. at 883-85. The other case, *Vernon*, postdates RFRA, which in 1993 restored *Sherbert's* compelling interest test. *See* 27 F.3d at 1393 n.1; *see also* 42 U.S.C. § 2000bb(b). Although the compelling interest balancing test was in flux during this period, the notion that a burden on religious practice was required to state a claim was not. RFRA continued the same substantial burden standard as was required by the constitutional cases. *See Vernon*, 27 F.3d at 1393.

brought suit, alleging a violation of their right to free exercise of religion. *Id.* We held that the individual INS agents named as defendants were entitled to qualified immunity because there was “no support in the preexisting case law” to suggest that “it must have been apparent to INS officials that undercover electronic surveillance of church services without a warrant and without probable cause violated the churches’ clearly established rights under the First . . . Amendment[.]” *Id.* at 527.

In *Vernon*, the Los Angeles Police Department (“LAPD”) investigated Vernon, the Assistant Chief of Police of the LAPD, in response to allegations that Vernon’s religious beliefs had interfered with his ability or willingness to fairly perform his official duties. 27 F.3d at 1389. Vernon filed a § 1983 action, maintaining that the preinvestigation activities and the investigation itself violated the Free Exercise Clause. *Id.* at 1390. In his complaint, Vernon alleged that the investigation “chilled [him] in the exercise of his religious beliefs, fearing that he can no longer worship as he chooses, consult with his ministers and the elders of his church, participate in Christian fellowship and give public testimony to his faith without severe consequences.” *Id.* at 1394. We held that Vernon failed to demonstrate a substantial burden on his religious observance and so affirmed the district court’s dismissal of his free exercise claim. *Id.* at 1395. We noted that Vernon “failed to show any concrete and demonstrable injury.” *Id.* “Vernon complain[ed] that the existence of a government investigation has discouraged him from pursuing his personal religious beliefs and practices—in other words, mere subjective chilling effects with neither ‘a claim of specific present objective harm [n]or a threat of

specific future harm.’” *Id.* (quoting *Laird v. Tatum*, 408 U.S. 1, 14 (1972)).

Vernon and *Presbyterian Church* were decided before the surveillance Plaintiffs allege substantially burdened their exercise of religion. Both cases cast doubt upon whether surveillance such as that alleged here constitutes a substantial burden upon religious practice. There is no pertinent case law indicating otherwise. It was therefore not clearly established in 2006 or 2007 that Defendants’ actions violated Plaintiffs’ freedom of religion, protected by RFRA.⁴⁴

As to the Agent Defendants, therefore, we affirm the dismissal of the RFRA claim. But because the Government Defendants are not subject to the same qualified immunity analysis and made no arguments in support of dismissing the RFRA claim other than the state secrets privilege, we hold that the complaint substantively states a RFRA claim against the Government Defendants.⁴⁵

⁴⁴ These cases may not, however, entitle the Agent Defendants to qualified immunity as to claims involving *intentional* discrimination based on Plaintiffs’ religion. As we noted, *see supra* Part IV.B, we are not deciding whether there is an available *Bivens* action for those claims. As we decline to anticipate whether Plaintiffs will pursue their *Bivens* claims on the religious discrimination issues and, if so, whether the claims will be allowed to go forward, we leave any surviving qualified immunity issue for the district court to decide in the first instance.

⁴⁵ We do not address any other defenses the Government Defendants may raise before the district court in response to Plaintiffs’ RFRA claim.

E. Privacy Act Claim Against the FBI

Plaintiffs allege that the FBI violated the Privacy Act, 5 U.S.C. § 552a(e)(7),⁴⁶ by collecting and maintaining records describing how Plaintiffs exercised their First Amendment rights. As a remedy, Plaintiffs seek only injunctive relief ordering the destruction or return of unlawfully obtained information. *Cell Associates, Inc. v. National Institutes of Health*, 579 F.2d 1155 (9th Cir. 1978), which interpreted the scope of Privacy Act remedies, precludes such injunctive relief.

The “Civil remedies” section of the Privacy Act, 5 U.S.C. § 552a(g), lists four types of agency misconduct and the remedies applicable to each. The statute expressly provides that injunctive relief is available when an agency improperly denies a request to amend or disclose an individual’s record, *see* 5 U.S.C. § 552a(g)(1)(A), (2)(A), (1)(B), (3)(A), but provides only for damages when the agency “fails to maintain any record” with the “accuracy, relevance, timeliness, and completeness” required for fairness, *id.* § 552a(g)(1)(C), or if the agency “fails to comply with any other provision” of the Privacy Act, *id.* § 552a(g)(1)(D). *See id.* § 552a(g)(4). *Cell Associates* concluded that this distinction was purposeful—that is, that Congress intended to limit the availability

⁴⁶ The header to Plaintiffs’ Eighth Cause of Action reads broadly, “Violation of the Privacy Act, 5 U.S.C. § 552a(a)-(l).” As actually pleaded and briefed, however, the substance of Plaintiffs’ Privacy Act claim is limited to § 552a(e)(7). The complaint states that “Defendant FBI . . . collected and maintained records . . . in violation of 5 U.S.C. § 552a(e)(7).” And Plaintiffs’ reply brief states that they “seek expungement . . . under 5 U.S.C. § 552a(e)(7).”

of injunctive relief to the categories of agency misconduct for which injunctive relief was specified as a remedy:

The addition of a right to injunctive relief for one type of violation, coupled with the failure to provide injunctive relief for another type of violation, suggests that Congress knew what it was about and intended the remedies specified in the Act to be exclusive. While the right to damages might seem an inadequate safeguard against unwarranted disclosures of agency records, we think it plain that Congress limited injunctive relief to the situations described in 5 U.S.C. § 552a(g)(1)(A) and (2) and (1)(B) and (3).

579 F.2d at 1161.

A violation of § 552a(e)(7) falls within the catch-all remedy provision, applicable if the agency “fails to comply with any other provision” of the Privacy Act. 5 U.S.C. § 552a(g)(1)(D). As the statute does not expressly provide for injunctive relief for a violation of this catch-all provision, *Cell Associates* precludes injunctive relief for a violation of § 552a(e)(7).

Plaintiffs attempt to avoid the precedential impact of *Cell Associates* on the ground that it “nowhere mentions Section 552a(e)(7).” That is so, but the holding of *Cell Associates* nonetheless applies directly to this case. The Privacy Act specifies that injunctive relief *is* available for violations of some provisions of the Act, but not for a violation of § 552a(e)(7). Under *Cell Associates*,

Plaintiffs cannot obtain injunctive relief except for violations as to which such relief is specifically permitted.⁴⁷

Plaintiffs' complaint expressly provides that "[t]he FBI is sued for injunctive relief only." Accordingly, because their sole requested remedy is unavailable, Plaintiffs fail to state a claim under the Privacy Act.

F. FTCA Claims

The FTCA constitutes a waiver of sovereign immunity "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1). "State substantive law applies" in FTCA actions. *Liebsack v. United States*, 731 F.3d 850, 856 (9th Cir. 2013). If an individual federal employee is sued, the United States shall, given certain conditions are satisfied, "be substituted as the party defendant." 28 U.S.C. § 2679(d)(1).

Plaintiffs allege that the United States is liable under the FTCA for invasion of privacy under California law, violation of the California constitutional right to privacy, violation of California Civil Code § 52.1, and intentional infliction of emotional distress. We first consider Defendants' jurisdictional arguments, and then discuss their implications for the substantive FTCA claims.

⁴⁷ Plaintiffs also argue that *MacPherson v. IRS*, 803 F.2d 479 (9th Cir. 1986) is "binding Ninth Circuit authority . . . [that] makes clear that courts have authority to order expungement of records maintained in violation of its [§ 552a(e)(7)] requirements." But *MacPherson* does not state whether the plaintiff there sought injunctive relief and so is unclear on this point.

1. FTCA Judgment Bar

The FTCA's judgment bar provides that "[t]he judgment in an action under [the FTCA] shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. § 2676. The judgment bar provision has no application here.

The judgment bar provision precludes claims against individual defendants in two circumstances: (1) where a plaintiff brings an FTCA claim against the government and non-FTCA claims against individual defendants in the same action and obtains a judgment against the government, *see Kreines v. United States*, 959 F.2d 834, 838 (9th Cir. 1992); and (2) where the plaintiff brings an FTCA claim against the government, judgment is entered in favor of either party, and the plaintiff then brings a subsequent non-FTCA action against individual defendants, *see Gasho v. United States*, 39 F.3d 1420, 1437-38 (9th Cir. 1994); *Ting v. United States*, 927 F.2d 1504, 1513 n.10 (9th Cir. 1991). The purposes of this judgment bar are "to prevent dual recoveries," *Kreines*, 959 F.2d at 838, to "serve[] the interests of judicial economy," and to "foster more efficient settlement of claims," by "encourag[ing plaintiffs] to pursue their claims concurrently in the same action, instead of in separate actions," *Gasho*, 39 F.3d at 1438.

Neither of those two circumstances, nor their attendant risks, is present here. Plaintiffs brought their FTCA claim, necessarily, against the United States, and their non-FTCA claims against the Agent Defendants, in the same action. They have not obtained a judgment against the government. *Kreines* held that "an FTCA

judgment in favor of the government did not bar the *Bivens* claim [against individual employees] when the judgments are ‘contemporaneous’ and part of the same action.” *Gasho*, 39 F.3d at 1437 (quoting *Kreines*, 959 F.2d at 838). By “contemporaneous,” *Kreines* did not require that judgments on the FTCA and other claims be entered simultaneously, but rather that they result from the same action.

The FTCA’s judgment bar does not operate to preclude Plaintiffs’ claims against the Agent Defendants.

2. *FTCA Discretionary Function Exception*

The discretionary function exception provides that the FTCA shall not apply to “[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, . . . or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.” 28 U.S.C. § 2680(a). “[T]he discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow.” *Berkovitz v. United States*, 486 U.S. 531, 536 (1988). “[G]overnmental conduct cannot be discretionary if it violates a legal mandate.” *Galvin v. Hay*, 374 F.3d 739, 758 (9th Cir. 2004) (quoting *Nurse v. United States*, 226 F.3d 996, 1002 (9th Cir. 2000)). Moreover, “the Constitution can limit the discretion of federal officials such that the FTCA’s discretionary function exception will not apply.” *Id.* (quoting *Nurse*, 226 F.3d at 1002 n.2).

We cannot determine the applicability of the discretionary function exception at this stage in the litigation. If, on remand, the district court determines that Defendants did not violate any federal constitutional or statutory directives, the discretionary function exception will bar Plaintiffs' FTCA claims.⁴⁸ But if the district court instead determines that Defendants did violate a nondiscretionary federal constitutional or statutory directive, the FTCA claims may be able to proceed to that degree.

Because applicability of the discretionary function will largely turn on the district court's ultimate resolution of the merits of Plaintiffs' various federal constitutional and statutory claims, discussing whether Plaintiffs substantively state claims as to the state laws underlying the FTCA claim would be premature. We therefore decline to do so at this juncture.

V. Procedures on Remand

On remand, the FISA and Fourth Amendment claims, to the extent we have held they are validly pleaded in the complaint and not subject to qualified immunity, should proceed as usual. *See supra* Part II.B. In light of our conclusion regarding the reach of FISA § 1806(f), the district court should, using § 1806(f)'s *ex parte* and *in camera* procedures, review any "materials relating to the surveillance as may be necessary," 50 U.S.C. § 1806(f), including the evidence over which the Attorney General asserted the state secrets privilege, to

⁴⁸ We note that the judgment bar, 28 U.S.C. § 2676, does not apply to FTCA claims dismissed under the discretionary function exception. *See Simmons v. Himmelreich*, 136 S. Ct. 1843, 1847-48 (2016).

determine whether the electronic surveillance was lawfully authorized and conducted. That determination will include, to the extent we have concluded that the complaint states a claim regarding each such provision, whether Defendants violated any of the constitutional and statutory provisions asserted by Plaintiffs in their complaint. As permitted by Congress, “[i]n making this determination, the court may disclose to [plaintiffs], under appropriate security procedures and protective orders, portions of the application, order, or other materials relating to the surveillance only where such disclosure is necessary to make an accurate determination of the legality of the surveillance.” *Id.*⁴⁹

The Government suggests that Plaintiffs’ religion claims cannot be resolved using the § 1806(f) procedures because, as the district court found, “the central subject matter [of the case] is Operation Flex, a group of counterterrorism investigations that extend well beyond the purview of electronic surveillance.” Although the larger *factual* context of the case involves more than electronic surveillance, a careful review of the “Claims for Relief” section of the complaint convinces us that all of Plaintiffs’ *legal* causes of action relate to electronic surveillance, at least for the most part, and in nearly all instances entirely, and thus require a determination as to the lawfulness of the surveillance. Moreover,

⁴⁹ Our circuit has not addressed the applicable standard for reviewing the district court’s decision not to disclose FISA materials. Other circuits, however, have adopted an abuse of discretion standard. See *United States v. Ali*, 799 F.3d 1008, 1022 (8th Cir. 2015); *United States v. El-Mezain*, 664 F.3d 467, 567 (5th Cir. 2011); *United States v. Damrah*, 412 F.3d 618, 624 (6th Cir. 2005); *United States v. Badia*, 827 F.2d 1458, 1464 (11th Cir. 1987); *United States v. Belfield*, 692 F.2d 141, 147 (D.C. Cir. 1982).

§ 1806(f) provides that the district court may consider “other materials *relating* to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted,” thereby providing for consideration of all parties’ factual submissions and legal contentions regarding the background of the surveillance. *Id.* (emphasis added).

We did explain in Part I, *supra*, that not all of the surveillance detailed in the complaint as the basis for Plaintiffs’ legal claims constitutes electronic surveillance as defined by FISA. *See id.* § 1801(k). Also, two of Plaintiffs’ causes of action can be read to encompass more conduct than just electronic surveillance. Plaintiffs’ RFRA claim, their Fifth Cause of Action, is not limited to electronic surveillance. Plaintiffs broadly allege that “[t]he actions of Defendants substantially burdened [their] exercise of religion.” The FTCA claim for intentional infliction of emotional distress, the Eleventh Cause of Action, is also more broadly pleaded. It is far from clear, however, that as actually litigated, either claim will involve more than the electronic surveillance that is otherwise the focus of the lawsuit.⁵⁰

At this stage, it appears that, once the district court uses § 1806(f)’s procedures to review the state secrets evidence *in camera* and *ex parte* to determine the law-

⁵⁰ For example, whether the official-capacity defendants targeted Plaintiffs for surveillance in violation of the First Amendment will in all likelihood be proven or defended against using the same set of evidence regardless of whether the court considers the claim in terms of electronic surveillance in the mosque prayer hall or conversations to which Monteilh was a party.

fulness of that surveillance, it could rely on its assessment of the same evidence—taking care to avoid its public disclosure—to determine the lawfulness of the surveillance falling outside FISA’s purview, should Plaintiffs wish to proceed with their claims as applied to that set of activity. Once the sensitive information has been considered *in camera* and *ex parte*, the small risk of disclosure—a risk Congress thought too small to preclude careful *ex parte*, *in camera* consideration by a federal judge—has already been incurred. The scope of the state secrets privilege “is limited by its underlying purpose.” *Halpern v. United States*, 258 F.2d 36, 44 (2d Cir. 1958) (quoting *Roviaro v. United States*, 353 U.S. 53, 60 (1957)). It would stretch the privilege beyond its purpose to require the district court to consider the state secrets evidence *in camera* and *ex parte* for one claim, but then, when considering another claim, ignore the evidence and dismiss the claim even though it involves the exact same set of parties, facts, and alleged legal violations.

Should our prediction of the overlap between the information to be reviewed under the FISA procedures to determine the validity of FISA-covered electronic surveillance and the information pertinent to other aspects of the religion claims prove inaccurate, or should the FISA-covered electronic surveillance drop out of consideration,⁵¹ the Government is free to interpose a specifically tailored, properly raised state secrets privilege defense. Should the Government do so, at that point the district court should consider anew whether “simply excluding or otherwise walling off the privileged information

⁵¹ As could happen if, for instance, Plaintiffs are unable to substantiate their factual allegations as to the occurrence of the surveillance.

may suffice to protect the state secrets,” *Jeppesen*, 614 F.3d at 1082, or whether dismissal is required because “the privilege deprives the defendant[s] of information that would otherwise give the defendant[s] a valid defense to the claim[s],” *id.* at 1083 (quoting *Kasza*, 133 F.3d at 1166), or because the privileged and nonprivileged evidence are “inseparable” such that “litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets,” *id.*

Because *Jeppesen* did not define “valid defense,” we briefly address its meaning, so as to provide guidance to the district court on remand and to future courts in our circuit addressing the implications of the Government’s invocation of the state secrets privilege.

The most useful discussion of the meaning of “valid defense” in the state secrets context is in the D.C. Circuit’s decision in *In re Sealed Case*, 494 F.3d 139, cited by *Jeppesen*, 614 F.3d at 1083. We find the D.C. Circuit’s definition and reasoning persuasive, and so adopt it. Critically, *In re Sealed Case* explained that “[a] ‘valid defense’ . . . is meritorious and not merely plausible and would require judgment for the defendant.” 494 F.3d at 149. The state secrets privilege does not require “dismissal of a complaint for any plausible or colorable defense.” *Id.* at 150. Otherwise, “virtually every case in which the United States successfully invokes the state secrets privilege would need to be dismissed.” *Id.* Such an approach would constitute judicial abdication from the responsibility to decide cases on the basis of evidence “in favor of a system of conjecture.” *Id.* And the Supreme Court has cautioned against “precluding review of constitutional claims” and “broadly interpreting evidentiary privileges.” *Id.* at 151 (first citing

Webster v. Doe, 486 U.S. 592, 603-04 (1988), and then citing *United States v. Nixon*, 418 U.S. 683, 710 (1974)). “[A]llowing the mere prospect of a privilege defense,” without more, “to thwart a citizen’s efforts to vindicate his or her constitutional rights would run afoul” of those cautions. *Id.* Thus, where the government contends that dismissal is required because the state secrets privilege inhibits it from presenting a valid defense, the district court may properly dismiss the complaint only if it conducts an “appropriately tailored *in camera* review of the privileged record,” *id.*, and determines that defendants have a legally meritorious defense that prevents recovery by the plaintiffs, *id.* at 149 & n.4.

CONCLUSION

The legal questions presented in this case have been many and difficult. We answer them on purely legal grounds, but of course realize that those legal answers will reverberate in the context of the larger ongoing national conversation about how reasonably to understand and respond to the threats posed by terrorism without fueling a climate of fear rooted in stereotypes and discrimination. In a previous case, we observed that the state secrets doctrine strikes a “difficult balance . . . between fundamental principles of our liberty, including justice, transparency, accountability and national security,” and sometimes requires us to confront “an irreconcilable conflict” between those principles. *Jeppesen*, 614 F.3d at 1073. In holding, for the reasons stated, that the Government’s assertion of the state secrets privilege does not warrant dismissal of this litigation in its entirety, we, too, have recognized the need for balance, but also have heeded the conclusion at the heart of Congress’s enactment of FISA: the fundamental principles

of liberty include devising means of forwarding accountability while assuring national security.

Having carefully considered the Defendants' various arguments for dismissal other than the state secrets privilege, we conclude that some of Plaintiffs' search and religion allegations state a claim, while others do not. We therefore affirm in part and reverse in part the district court's orders, and remand for further proceedings in accordance with this opinion.

AFFIRMED in part, REVERSED in part, and REMANDED.

GOULD and BERZON, Circuit Judges, joined by WARDLAW, FLETCHER, and PAEZ, Circuit Judges, concurring in the denial of rehearing en banc:

Judge Bumatay's dissent from the denial of rehearing (the "dissent") is a veritable Russian doll of nestled mistakes and misleading statements—open one, and another stares back at you. The panel opinion itself belies most of the accusations. For brevity, we pay particular attention here to the dissent's most fundamental misperceptions of the panel's holdings.

I

At the core of this case lies a series of interwoven statutory interpretation issues surrounding the application of the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. §§ 1801 *et seq*, in a civil action. The panel opinion concluded that a provision of that statute, 50 U.S.C. § 1806(f), supersedes the common law state secrets evidentiary privilege's limited dismissal remedy—not the protection of state secrets from disclosure—

with regard to evidence or information related to electronic surveillance, and that the secrecy-protective procedures established by 50 U.S.C. § 1806(f), designed precisely for matters implicating national security concerns, apply to the plaintiffs' claims in this case against the government.

In concluding that § 1806(f)'s procedures apply, the panel opinion decidedly did *not*, as the dissent asserts, second guess the Executive's capacity to determine that certain evidence related to electronic surveillance is classified or touches on issues of national security, and therefore deserves protection from disclosure to litigants or the public. *See Mohamed v. Jeppesen Data-plan, Inc.*, 614 F.3d 1070, 1081-82 (9th Cir. 2010) (en banc). Instead, the panel opinion resolved the discrete issue of what should happen in a civil case that involves such information: Need the case be dismissed, as it sometimes is to implement the common law state secrets privilege, or can it go forward but *without* disclosure of the information to the plaintiffs, under specially tailored litigation procedures that would in other contexts be impermissible as violative of the plaintiffs' rights as litigants?

Critically for present purposes, the classified material at issue is protected from disclosure under § 1806(f), just as it is under the state secrets privilege's dismissal option—it is just protected differently. To ensure that sensitive information is not inadvertently disclosed to the public, the § 1806(f) procedures require the district court to consider the material *ex parte* and *in camera*. The government uses these very same procedures all the time when prosecuting suspected terrorists; the government does so by choice, and without any evident

handwringing over whether the use of the § 1806(f) procedures might lead to the disclosure of state secrets. And the same *ex parte* and *in camera* review takes place when the state secrets privilege is invoked, to ascertain whether it is properly applicable and, if so, whether the case can go forward without the sensitive evidence or must be dismissed; that is exactly what happened in this case in the district court.¹

II

The dissent’s misleading assertions about the nature of the § 1806(f)’s procedures underpin its two major legal propositions, neither of which is rooted in the facts of this case, the text of FISA, or any binding precedent.

A

The dissent insists that the panel should have applied a “clear statement” rule to the question whether the

¹ The dissent notes § 1806(f) and (g)’s disclosure provisions, which are available only in exceptional circumstances. As far as we are aware, there has *never* been a disclosure under FISA. And, as the panel opinion noted: “As it is Plaintiffs who have invoked the FISA procedures, we proceed on the understanding that they are willing to accept those restrictions to the degree they are applicable as an alternative to dismissal, and so may not later seek to contest them.” Amended Opinion at 49. In the unprecedented event that a district court *does* order disclosure, nothing in the panel opinion prevents the government from invoking the state secrets privilege’s dismissal remedy as a backstop at that juncture. Finally, the panel does not, as the dissent asserts, “warn” district judges that failure to disclose evidence could constitute an abuse of discretion. Dissent at 134 n.9. The panel does not take any position on the appropriate standard of review for a district court’s decision regarding the disclosure of FISA materials. Rather, we merely note the approach adopted in other circuits.

§ 1806(f) *ex parte*, *in camera* method of litigation displaces the state secrets evidentiary privilege’s dismissal remedy.

The panel could not have applied a “clear statement” analysis. Our Circuit’s binding precedent required the panel to ask whether FISA’s § 1806(f)’s procedures “speak[] directly” to the question otherwise answered by the dismissal remedy in cases involving classified material related to electronic surveillance. *See Kasza v. Browner*, 133 F.3d 1159, 1167 (9th Cir. 1998) (internal quotation marks and emphasis omitted). As the panel opinion explained, the text, practice, purpose, and history of FISA and § 1806(f) all quite clearly demonstrate that the *ex parte* and *in camera* review established by § 1806(f) squarely answers the “speak directly” question.

The dissent maintains the “speaks directly” standard adopted in *Kasza* is wrong, because the state secrets evidentiary privilege has constitutional origins. *See* Dissent at 119, 129. The proposed new “clear statement” requirement—effectively, that Congress had to name the state secrets privilege, including its contingent dismissal remedy, to replace that remedy—is improper in the current context for two reasons.

First, no matter the origins or role of the state secrets privilege, at issue here is only the *dismissal remedy* that sometimes follows the successful invocation of the state secrets evidentiary privilege, when the case cannot as a practical matter be litigated without the privileged evidence. *Jeppesen Dataplan, Inc.*, 614 F.3d at 1082-83. “Ordinarily, simply excluding or otherwise walling off the privileged information may suffice to protect the state secrets,” but, “[i]n some instances . . .

application of the privilege may require dismissal of the action.” *Id.*

The dissent portrays the state secrets privilege as a magic wand that the Executive may wave to remove certain information from litigation or, if necessary, end the case. Not so. “The privilege belongs to the Government and must be asserted by it,” but “[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege.” *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953); *see also El-Masri v. United States*, 479 F.3d 296, 312 (4th Cir. 2007). And the role of the court is especially pronounced when it must determine whether dismissal is necessary. *See Jeppesen Dataplan, Inc.*, 614 F.3d at 1082-83. So the dismissal remedy is not the state secrets privilege itself but a procedural exigency, sometimes imposed by the courts to prevent unfairness to the litigants once the evidentiary exclusion privilege is invoked and recognized with regard to certain evidence. Dismissal in the state secrets context is thus not grounded in separation of powers concerns.

Second, and more generally, as the panel opinion recounts, at heart the state secrets privilege is an *evidentiary* privilege, not a constitutional one. Amended Opinion at 58-59; *see In re United States*, 872 F.2d 472, 474-75 (D.C. Cir. 1989). *Reynolds*, which the dissent recognizes as the wellspring of “the modern state secrets doctrine,” Dissent at 128, itself made this point:

We have had broad propositions pressed upon us for decision. On behalf of the Government it has been urged that the executive department heads have power to withhold any documents in their custody from judicial view if they deem it to be in the public

interest. Respondents have asserted that the executive's power to withhold documents was waived by the Tort Claims Act. Both positions have constitutional overtones which we find it unnecessary to pass upon, there being a narrower ground for decision.

345 U.S. at 6. As *General Dynamics Corp. v. United States*, 563 U.S. 478, 485 (2011), summarized, "*Reynolds* was about the admission of evidence. It decided a purely evidentiary dispute by applying evidentiary rules: The privileged information is excluded, and the trial goes on without it."

Or the trial doesn't go on, if the district court decides that dismissal is necessary. But in the narrow context of classified information related to electronic surveillance, FISA's procedures do away with the need for dismissal, by allowing the court to consider the relevant materials during the course of the litigation in the truncated and secrecy-protective manner established by § 1806(f).

B

The dissent also strives to insulate the government from suit by paring back the coverage of § 1806(f) and related provisions so as not to cover at all suits against the government. The dissent thus presents FISA, and specifically § 1806(f), as single-mindedly concerned with protecting the government's ability to prosecute criminal defendants without revealing national security secrets.

FISA is decidedly not so one-sided. The dissent never mentions a FISA provision, 50 U.S.C. § 1810, which authorizes affirmative actions against the government

challenging electronic surveillance material as unlawfully obtained. Ignoring § 1810, the dissent puts forward a view of the reach of § 1806(f)'s procedures much too narrow to accommodate the statute's provision for affirmative relief. Were the dissent's one-way-ratchet position correct, in a § 1810 affirmative suit, the need to consider the same evidence that was or should have been excluded in a prosecution of a defendant (because the surveillance used to collect the evidence is alleged to have been unlawful) could lead to dismissal of a § 1810 suit seeking damages for that same illegal surveillance.

To position these procedures as a one-way ratchet for the government, the dissent takes every opportunity to shrink the reach of § 1806(f) and related provisions to a scope much more circumscribed than their terms and purpose support. To highlight four of the dissent's efforts:

- To fit the dissent's narrative that § 1806(f) applies only when the government is on the offensive, the dissent maintains that the government does not intend to "use" the relevant information over which it has asserted the state secrets privilege—a requisite for the application of § 1806(f)'s procedures. But here, the government's primary reason for invoking the state secrets privilege's dismissal remedy *is* its asserted need to use classified information to defend itself if the case went forward. The government submitted, alongside the Attorney General's invocation of the state secrets privilege, an unclassified declaration stating that "[a]ddressing plaintiffs' allegations in this case will risk or require the

disclosure of certain sensitive information concerning counterterrorism investigative activity in Southern California, including in particular the nature and scope of Operation Flex.”

- The dissent also takes the word “use” out of context. FISA’s procedures apply “[w]henever the Government intends to enter into evidence or *otherwise use* or disclose in any trial, hearing, or other proceeding . . . any information obtained or derived from an electronic surveillance[.]” 50 U.S.C. § 1806(c) (emphasis added). In other words, the procedures apply whenever the government uses the information in “another way” or “any other way” than entering it into evidence. *See Otherwise*, The Oxford English Dictionary Online, <https://www.oed.com/view/Entry/133247?redirectedFrom=otherwise#eid> (last visited June 22, 2020).
- The dissent argues that, to trigger FISA’s review procedures, “an aggrieved person” must be the defendant. Dissent at 138-139. But the statute is not unidirectional. The dissent takes the “against an aggrieved person” phrase out of context to suit the dissent’s preferred ends. The statutory scheme establishes that § 1806(f)’s procedures apply “[w]henever the Government intends to enter into evidence or otherwise use or disclose in any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, against an aggrieved person, any information obtained or derived from an

electronic surveillance of that aggrieved person.” § 1806(c). A “trial, hearing, or other proceeding” involves two parties, providing either an opportunity to introduce evidence—it is the *evidence* that is “against” someone.

- The dissent states that “§ 1806(f) authorizes the review of only a limited set of documents: the FISA ‘application, order, and such other materials.’” Dissent at 132. But that is not what the statute says, and the full text of the relevant phrase tells an entirely different story: § 1806(f) authorizes the district court to review the “application, order, and *such other materials relating to the surveillance as may be necessary* to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted.” § 1806(f) (emphasis added). As used in the actual statute as opposed to the dissent’s truncated version, “such” does not, as the dissent erroneously claims, refer only backwards to “application” and “order;” it also, and most prominently, applies forward to “materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted.” § 1806(f); see *Such*, Merriam-Webster Online, <https://www.merriamwebster.com/dictionary/such> (last visited June 22, 2020) (defining “such” principally to mean “of a kind or character *to be* indicated or suggested”) (emphasis added).

In conjunction with misreading the statute in these and other respects, the dissent avows that the panel opinion gives “unintended breadth” to FISA. Dissent

at 142 (quoting *Yates v. United States*, 135 S. Ct. 1074, 1085 (2015)). But the only way to know what “breadth” is “intended” is to read the statute. Section 1806(f) speaks in the broadest language possible. The procedures apply “*whenever* the Government intends to enter into evidence or otherwise use or disclose in *any* trial, hearing, or proceeding . . . *any* information obtained or derived from an electronic surveillance” or “*whenever any* motion or request is made . . . pursuant to *any other* statute or rule of the United States or *any* State before *any* court or *other* authority.” (Emphases added). If that capacious language were not enough to maximize the provision’s reach, every conceivable clause is separated by a disjunctive “or.” Rather than “jam a square peg into a round hole,” Dissent at 143, or “hide elephants in mouseholes,” Dissent at 142 (quoting *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001)), the panel opinion acknowledged that, when statutes use expansive language, we should understand that Congress did not mean for us to read in limitations that are not there.

* * *

The dissent is replete with quotations from Washington, Hamilton, and Jefferson, all making the indisputable point that, to protect our national interest, our government must be able to keep certain information secret. Neither the Founding Fathers’ concerns about governmental secrecy nor broad issues of executive authority are at issue in this case. The question presented to the panel here was not whether the government should be able to keep classified material secret but how. The procedures established by § 1806(f) (which

the government leans on heavily when it is the prosecutor) ensure secrecy. Under any reasonable reading of the statute, these procedures, when otherwise applicable, supersede the state secrets privilege's contingent dismissal remedy and apply to the information at issue in this case.

For the forgoing reasons, we concur in the denial of rehearing en banc.

STEEH, Senior District Judge, statement regarding the denial of rehearing en banc:

Although, as a visiting judge sitting by designation, I am not permitted to vote on a petition for rehearing en banc, I agree with the views expressed by Judges Berzon and Gould in their concurrence in the denial of rehearing en banc.

BUMATAY, Circuit Judge, with whom CALLAHAN, IKUTA, BENNETT, R. NELSON, BADE, LEE, VANDYKE, Circuit Judges, join, and COLLINS and BRESS, Circuit Judges, join except for Section III.A.2, dissenting from the denial of rehearing en banc:

From the earliest days of our Nation's history, all three branches of government have recognized that the Executive has authority to prevent the disclosure of information that would jeopardize national security. Embodied in the state secrets privilege, such discretion lies at the core of the executive power and the President's authority as Commander in Chief. Indeed, these powers were vested in a single person precisely so that the

Executive could act with the requisite “[d]ecision, activity, *secrecy*, and d[i]spatch.” The Federalist No. 70 (Alexander Hamilton) (emphasis added).

In contrast to the broad constitutional design of the state secrets privilege, Congress passed the Foreign Intelligence Surveillance Act (“FISA”) for a limited function—to establish procedures for the lawful electronic surveillance of foreign powers and their agents. Among other things, FISA provides a mechanism for in camera, ex parte judicial review of electronic surveillance evidence when the government tries to use such evidence, or a surveilled party tries to suppress it. See 50 U.S.C. § 1806(f).¹

By its plain text and context, § 1806(f) provides procedures to determine the *admissibility* of electronic surveillance evidence—a commonplace gatekeeping function exercised by courts throughout this country. When the provision is triggered, courts review only a limited set of documents, the FISA application, order, and like materials, and may generally only suppress the evidence if it was unlawfully obtained. § 1806(f), (g). Thus, § 1806(f) coexists with the state secrets privilege by providing judicial oversight over the government’s affirmative use of electronic surveillance evidence, while

¹ All statutory references are to Title 50 of the United States Code. In relevant part, § 1806(f) provides, when triggered, “the United States district court . . . shall, notwithstanding any other law, if the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States, review in camera and ex parte the application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted.”

preserving the Executive's constitutional prerogative to protect national security information.

But today, the Ninth Circuit, once again, strains the meaning of a statute and adopts a virtually boundless view of § 1806(f). Under the court's reading, this narrow provision authorizes judicial review of any evidence, on any claim, for any purpose, as long as the party's allegations relate to electronic surveillance. With this untenably broad interpretation, the court then rules that the judicial branch will not recognize the state secrets privilege over evidence with any connection to electronic surveillance. Most alarming, this decision may lead to the disclosure of state secrets to the very subjects of the foreign-intelligence surveillance. With this, I cannot agree.

Our court's decision ignores that Congress articulated no directive in FISA to displace the state secrets privilege—even under the most generous abrogation standards. More fundamentally, the court should have ensured that Congress was unmistakably clear before vitiating a core constitutional privilege. When the Supreme Court confronts a legislative enactment implicating constitutional concerns—federalism or separation of powers—it has commonly required a clear statement from Congress before plowing ahead. It has done so out of a due respect for those constitutional concerns. The state secrets privilege deserves the same respect.

In discovering abrogation of the state secrets privilege more than 40 years after FISA's enactment, our court disrupts the balance of powers among Congress, the Executive, and the Judiciary. We have previously recognized that the state secrets doctrine preserves the difficult balance among “fundamental principles of our

liberty, including justice, transparency, accountability and national security.” *Mohamed v. Jeppesen Data-plan, Inc.*, 614 F.3d 1070, 1073 (9th Cir. 2010) (en banc). Our refusal to reexamine this case now tips that balance in favor of inventive litigants and overzealous courts, to the detriment of national security. Moving forward, litigants can dodge the state secrets privilege simply by invoking “electronic surveillance” somewhere within the Ninth Circuit. And in defending such cases, the government may be powerless to prevent the disclosure of state secrets. For this reason, I respectfully dissent from the denial of rehearing en banc.

I.

In this case, Yassir Fazaga and his co-plaintiffs sued the United States, the FBI, and FBI special agents, for using an informant to gather information from the Muslim community in Southern California. Their complaint asserted numerous constitutional and statutory causes of action alleging unlawful searches and surveillance and violations of their religious liberty.

Soon after the suit was filed, the FBI asserted the state secrets privilege over information related to its investigation. Through a declaration of the Attorney General, the government warned that proceeding on the claims risked the disclosure of state secrets.² Accordingly, the government moved to dismiss the religious liberty claims.

² Specifically, the government sought to withhold evidence that would (1) confirm or deny the particular targets of the investigation; (2) reveal the initial reasons for opening the investigation, the materials uncovered, or the status and results of the investigation; and (3) reveal particular sources or methods used.

After scrutinizing the government’s classified and unclassified declarations, the district court validated its assertion of the privilege. The court found that the litigation involved intelligence that, if disclosed, would significantly compromise national security. Because the risk of disclosure could not be averted through protective orders or other restrictions, the court dismissed all but one of the claims.

On appeal, a panel of this court reversed. The panel first held that FISA abrogated the state secrets privilege. It thought that § 1806(f) “speaks directly” to the same concerns as the state secrets privilege and, thus, displaced it—despite recognizing that the privilege “may” have a “constitutional core” or “constitutional overtones.” Am. Op. at 58-59. Next, the court held that § 1806(f)’s review procedures were triggered in this case. As a result, the court instructed the district court to use those procedures to review *any* evidence relating to the alleged electronic surveillance—even the evidence that the government asserted constituted state secrets.

Because each of these holdings is erroneous, we should have reviewed this case en banc.

II.

Abrogation of ordinary common law is rooted in due respect for Congress. “Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision.” *City of Milwaukee v. Illinois*, 451 U.S. 304, 312 (1981). Accordingly, once “the field has been made the subject of comprehensive legislation,” federal common law must yield to the legislative enactment. *Id.* at 314. In the ordinary case, Congress

need not affirmatively proscribe the use of federal common law, but it must “speak directly” to the questions previously addressed by common law. *Id.* at 315.

Yet this is no ordinary case. Here, the court didn’t abrogate run-of-the-mill, judicially created common law—it displaced an executive privilege. And it did so while summarily dismissing the constitutional and separation-of-powers implications of its holding. Before supplanting a privilege held by a co-equal branch of government, courts would be wise to consider the Constitution and the history of the privilege at issue. As Justice Scalia recognized, “a governmental practice [that] has been open, widespread, and unchallenged since the early days of the Republic” deserves special deference. *NLRB v. Noel Canning*, 573 U.S. 513, 572 (2014) (Scalia, J., concurring) (citations omitted). This approach should guide our analysis here.

A.

Article II of the Constitution commands that “[t]he executive Power shall be vested in a President of the United States of America.” U.S. Const. art. II, § 1. And the President is also designated as the “Commander in Chief of the Army and Navy of the United States.” U.S. Const. art. II, § 2.

By these terms, the Constitution was originally understood to vest the President with broad authority to protect our national security. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 580 (2004) (Thomas, J., dissenting) (“The Founders intended that the President have primary responsibility—along with the necessary power—to protect the national security and to conduct the Nation’s foreign relations.”). As Hamilton observed, a single

Executive could better act with “[d]ecision, activity, secrecy, and d[i]spatch” as would be required to respond to the national security crises of the day. The Federalist No. 70 (Alexander Hamilton).

Secrecy, at least at times, is a necessary concomitant of the executive power and command of the Nation’s military. As commander of the Continental Army, George Washington explained to Patrick Henry that “naturally . . . there are some Secrets, on the keeping of which so, depends, oftentimes, the salvation of an Army: Secrets which cannot, at least ought not to, be [e]ntrusted to paper; nay, which none but the Commander in Chief at the time, should be acquainted with.”³

Given the Executive’s inherent need for secrecy, it comes as no surprise that early presidents regularly asserted a privilege over the disclosure of sensitive information.⁴ In 1792, when President Washington found himself faced with the first-ever congressional request for presidential materials, he recognized an executive privilege to avoid disclosure of secret material. See Abraham D. Sofaer, *Executive Power and the Control of*

³ Letter from George Washington to Patrick Henry (Feb. 24, 1777), Library of Congress, <https://www.loc.gov/resource/mgw3h.001/?sp=26&st=text>.

⁴ Although this history recounts executive privileges in general, the state secrets privilege has been described as a “branch of the executive privilege.” *Marriott Int’l Resorts, L.P. v. United States*, 437 F.3d 1302, 1307 (Fed. Cir. 2006). To the extent there are distinctions among executive privileges, the state secrets privilege is more inviolable. See *United States v. Nixon*, 418 U.S. 683, 706 (1974) (distinguishing between privileges based “solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations” with those asserted from the “need to protect military, diplomatic, or sensitive national security secrets”).

Information: Practice Under the Framers, 1977 Duke L.J. 1, 5-6. Washington’s Cabinet, including Hamilton and Jefferson, agreed “that the executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public.” *Id.* at 6 (quoting *The Complete Jefferson* 1222 (S. Padover ed. 1943)); *see also* Mark J. Rozell, *Restoring Balance to the Debate over Executive Privilege: A Response to Berger*, 8 Wm. & Mary Bill Rts. J. 541, 556 (2000).

President Jefferson, even as a prominent critic of an overly strong executive branch, held the same view on the need for secrecy. As he put it in 1807, “[a]ll nations have found it necessary, that for the advantageous conduct of their affairs, some of these proceedings, at least, should remain known to their executive functionary only. He, of course, from the nature of the case, must be the sole judge of which of them the public interests will permit publication.”⁵ Similarly, Jefferson wrote to the prosecutor of the Aaron Burr case to explain that it was “the necessary right of the President . . . to decide, independently of all other authority, what papers, coming to him as President, the public interests permit to be communicated, & to whom.”⁶

Founding-era Presidents were not alone in their view. Members of Congress also respected some degree of executive privilege. When Washington refused

⁵ Letter from Thomas Jefferson to George Hay (June 17, 1807), Library of Congress, https://www.loc.gov/resource/mtj1.038_0446_0446/?st=text.

⁶ Letter from Thomas Jefferson to George Hay (June 12, 1807), Library of Congress, https://www.loc.gov/resource/mtj1.038_0446_0446/?st=text.

a congressional request for materials, then-Representative James Madison disagreed with Washington's refusal, but also recognized that "the Executive had a right, under a due responsibility, also, to withhold information, when of a nature that did not permit a disclosure of it at the time." 5 Annals of Cong. 773 (1796); Sofaer, *supra* at 12. Others went further, asserting, for example, that the President "had an undoubted Constitutional right, and it would be his duty to exercise his discretion on this subject, and withhold any papers, the disclosure of which would, in his judgment, be injurious to the United States." 5 Annals of Cong. 675 (1796) (remarks of Rep. Hillhouse).

Congress's early actions also reflected a deference to the Executive's authority to limit disclosures. When seeking information from the President, Congress narrowed its requests to such presidential papers "of a public nature," 3 Annals of Cong. 536 (1792), or "as he may think proper," 4 Annals of Cong. 250-51 (1794), and excluded "such [papers] as he may deem the public welfare to require not to be disclosed." 16 Annals of Cong. 336 (1807). Thus, early Congresses "practically always" qualified their requests for foreign-affairs information to those documents that "in [the President's] judgment [were] not incompatible with the public interest." Henry M. Wriston, *Executive Agents in American Foreign Relations* 121-22 (1929).

Like the Executive and Congress, the Judiciary has long recognized an executive privilege over sensitive information. Chief Justice Marshall suggested that if the Attorney General "thought that any thing was communicated to him in confidence he was not bound to disclose it" in the litigation. *Marbury v. Madison*, 5 U.S. 137,

144 (1803); *see also* Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 *Geo. Wash. L. Rev.* 1249, 1271 (2007). And in response to President Jefferson's objection to producing a letter in the Burr trial, Chief Justice Marshall explained that there was "nothing before the court which shows that the letter in question contains any matter the disclosure of which would endanger the public safety," but "[t]hat there may be matter, the production of which the court would not require, is certain." *United States v. Burr*, 25 F. Cas. 30, 37 (C.C.D. Va. 1807); *see also* Chesney, *supra* at 1272-73 (arguing that the Burr trial is significant for Marshall's introduction of the idea that "risk to public safety might impact discoverability of information held by the government"). Perhaps anticipating the modern-day state secrets privilege, Marshall made clear "that the remedy he contemplated for executive withholding would be dismissal of the prosecution, rather than an order directing the President to appear or punishing any executive officer." Sofaer, *supra* at 17.

The Supreme Court also recognized that President Lincoln "was undoubtedly authorized during the war, as commander-in-chief of the armies of the United States, to employ secret agents to enter the rebel lines and obtain information respecting the strength, resources, and movements of the enemy[.]" *Totten v. United States*, 92 U.S. 105, 106 (1875). In *Totten*, the Court dismissed a contract claim where the very existence of the alleged contract needed to be concealed. *Id.* Such concealment was a reality "in all secret employments of the government in time of war, or upon matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our government in its

public duties, or endanger the person or injure the character of the agent.” *Id.*

Consistent with early historical practice and Founding-era understandings, modern courts have recognized the Article II dimension of executive privileges. *See Nixon*, 418 U.S. at 711 (explaining that when a privilege against disclosure relates to the “effective discharge of a President’s powers, it is constitutionally based”); *Franchise Tax Bd. of California v. Hyatt*, 139 S. Ct. 1485, 1498-99 (2019) (identifying the “executive privilege” as one of the “constitutional doctrines” that are “implicit in the [Constitution’s] structure and supported by historical practice”); *see also Dep’t of Navy v. Egan*, 484 U.S. 518, 527 (1988) (“The authority to protect [national-security] information falls on the President as head of the Executive Branch and as Commander in Chief.”).⁷ As Justice Jackson succinctly put it: “The President, both as Commander-in-Chief and as the Nation’s organ for foreign affairs, has available intelligence services whose reports neither are nor ought to be published to the world.” *Chicago & S. Air Lines v. Waterman S. S. Corp.*, 333 U.S. 103, 111 (1948).

This brings us to the modern state secrets doctrine, articulated in *United States v. Reynolds*, 345 U.S. 1 (1953). In *Reynolds*, the Court recognized the Executive’s “well established” privilege against revealing military and state secrets. *Id.* at 7-8. The Court held

⁷ None of this is to say that the Executive has an absolute privilege to prevent the disclosure of material under any circumstance. I explore this history only insofar as it bears on the particular issue in this case—the proper standard to apply before abrogating the state secrets privilege.

that “even the most compelling necessity cannot overcome the claim of privilege” if state secrets are at stake. *Id.* at 11; *see also El-Masri v. United States*, 479 F.3d 296, 303 (4th Cir. 2007) (“Although the state secrets privilege was developed at common law, it performs a function of constitutional significance, because it allows the executive branch to protect information whose secrecy is necessary to its military and foreign-affairs responsibilities.”). As an en banc court, we’ve respected the ability of the government to seek to “completely remove[]” state secrets from litigation or even seek “dismissal of the action.” *Jeppesen*, 614 F.3d at 1082-83. And in evaluating the assertion of the privilege, we “defer to the Executive on matters of foreign policy and national security.” *Id.*

B.

Given this constitutional and historical background, courts ought to tread carefully before jettisoning the state secrets privilege. Here, we should have done so by requiring a clear congressional statement before displacing the privilege. By waiting for a clear statement, we would have avoided assuming that Congress has “by broad or general language, legislate[d] on a sensitive topic inadvertently or without due deliberation.” *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 139 (2005) (plurality opinion). Instead, the court today undermines a longstanding executive privilege by finding abrogation lurking in FISA’s murky text.

Unlike abrogation of ordinary common law, which shows our deference to Congress, the displacement of the state secrets privilege creates a tension between Congress and the Executive because we elevate a statute over a constitutionally based privilege. As the

Court advises, we should be “reluctant to intrude upon the authority of the Executive in military and national security affairs” until “Congress specifically has provided otherwise.” *Egan*, 484 U.S. at 530. Thus, whether FISA merely “speaks directly” to the same concerns as the privilege should not be sufficient to deprive the Executive of a constitutionally derived right. Instead, we should have constrained ourselves to respecting the privilege unless and until a statute unmistakably and unquestionably dictates otherwise.

This is not a novel idea. When a matter implicates constitutional concerns, the Court has regularly required a clear statement. *See, e.g., Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 65 (1989) (requiring Congress to be “unmistakably clear” before altering the “usual constitutional balance between the States and the Federal Government”); *Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992) (requiring an express statement before subjecting presidential action to APA review “[o]ut of respect for the separation of powers and the unique constitutional position of the President”). The Court has likewise required a clear statement before abrogating Indian treaty rights, out of a respect for tribal sovereignty. *See United States v. Dion*, 476 U.S. 734, 739 (1986) (explaining the reluctance to find abrogation absent “explicit statutory language”).

Applying such a standard is also consistent with the constitutional-avoidance canon. *See United States ex rel. Attorney Gen. v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909) (“[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which

such questions are avoided, our duty is to adopt the latter.”). Thus, when “a particular interpretation of a statute invokes the outer limits of Congress’ power,” as is the case here, we should “expect a clear indication that Congress intended that result.” *I.N.S. v. St. Cyr*, 533 U.S. 289, 299 (2001).

All in all, we should be “loath to conclude that Congress intended to press ahead into dangerous constitutional thickets in the absence of firm evidence that it courted those perils.” *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 466 (1989). But the court here is undeterred. It reads FISA as abrogating the privilege despite the lack of any firm evidence that Congress sought to do so. And rather than consulting the Constitution or the history of the state secrets privilege, the court simply waves off the privilege as something that “may” have a “constitutional core” or “constitutional overtones.” Am. Op. at 58-59. Respectfully, when we suspect that an executive privilege “may” have a “constitutional core,” we should do more before tossing it aside. Had we done so here, perhaps we would’ve recognized that the Article II roots of the privilege and its long history require that Congress be unmistakably clear before we simply replace it with a congressional enactment. And because FISA makes *no* mention of the state secrets privilege, the statute would fall pitifully short of this standard.

C.

Even if we should stick with the run-of-the-mill, “speaks directly” standard for displacement, FISA still falls short. Demonstrating that a statute speaks directly to the same questions as the common law is no low bar. *See, e.g., United States v. Texas*, 507 U.S. 529, 535

(1993) (holding that silence in a statute “falls far short of an expression of legislative intent to supplant the existing common law in that area”). The court’s analysis does not clear this bar.

At the outset, the court’s opinion critically fails to recognize the circumscribed purpose of § 1806(f)—to provide a mechanism to review the admissibility of electronic surveillance evidence. *See infra* section III. Determining the admissibility of evidence is an everyday function of courts. Section 1806(f) merely adds extra precautions in the case of electronic surveillance evidence. Nothing more. The statute’s design is in stark contrast to the constitutional purpose of the state secrets privilege—to ensure our “defer[ence] to the Executive on matters of foreign policy and national security” and to prevent courts from “second guessing the Executive in this arena.” *Jeppesen*, 614 F.3d at 1081-82. Contrary to the court’s interpretation, § 1806(f) and the state secrets privilege stand side by side, maintaining the Judiciary’s control over the admissibility of evidence on one hand while deferring to the Executive’s authority to protect national security information on the other.

Relatedly, the court also overlooks a significant limitation on § 1806(f)’s scope of review. Section 1806(f) authorizes the review of only a limited set of documents: the FISA “application, order, and such other materials.” The court’s decision treats this language as allowing review of “any” materials tangentially related to electronic surveillance. *Am. Op.* at 102-103. But the phrase “such other materials” cannot be read so boundlessly. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001) (“[W]here general words follow specific words in

a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.”). Even without this canon, ordinary users of the English language understand the word “such” to mean “something similar,” “of the same class, type, or sort,” or “of the character, quality, or extent previously indicated or implied.” *Such*, Webster’s Ninth New Collegiate Dictionary (1986).⁸

Thus, the phrase “such other material” refers to documentary evidence like the “application” and “order”; in other words, materials containing information necessary to authorize the surveillance. *See, e.g.*, § 1804(c) (“The judge may require the applicant to furnish *such other information* as may be necessary to make the determinations required [to authorize the surveillance under § 1804].”) (emphasis added). It does not broadly reach *any* evidence related to electronic surveillance as the court’s decision assumes. It certainly does not reach the evidence over which the government asserted the privilege—which goes far beyond FISA documents. *See supra* note 2.

Furthermore, § 1806(f) didn’t create anything novel to suggest displacement of the state secrets privilege. The court’s opinion treats § 1806(f) as enacting “an alternative mechanism” of *ex parte*, in camera review, which shows Congress’s intent to “eliminate[] the need to dismiss the case entirely” under the state secrets

⁸ Continuing to ignore this longstanding canon of interpretation, the concurrence to the denial of rehearing en banc doubles down on a boundless reading of this phrase. But this reading treats the word “such” as if it meant “any.” We should apply the statute as Congress wrote it, not as we might wish it to be.

privilege. Am. Op. at 61-62. Not so. Pre-FISA courts already conducted in camera and ex parte review with regularity. See *United States v. Belfield*, 692 F.2d 141, 149 (D.C. Cir. 1982) (recognizing that prior to FISA courts had “constantly” and “uniformly” held that “the legality of electronic, foreign intelligence surveillance may, even should, be determined on an in camera, ex parte basis”). Given that ex parte, in camera review procedures coexisted with the state secrets privilege before FISA, there’s no reason to construe Congress’s codification of such procedures as an intent to eliminate the privilege.

Nor does § 1806(f)’s triggering process—the filing of an affidavit under oath by the Attorney General—support abrogation. The court views the superficial similarity between the assertion of the state secrets privilege by the head of a department, see *Jeppesen*, 614 F.3d at 1080, and § 1806(f)’s affidavit requirement as evidence that Congress intended abrogation. Such evidence actually cuts the other way. Under FISA, the definition of “Attorney General” permits a number of lower-ranked Department of Justice officials to invoke FISA’s judicial review procedures, see § 1801(g), which makes sense given its main use in criminal prosecutions. By contrast, the head of *any* department has the *non-delegable* authority to assert the state secrets privilege. *Jeppesen*, 614 F.3d at 1080. Nothing in FISA’s text suggests that Congress sought to remove the privilege from the hands of the Secretary of State, the Director of National Intelligence, and other cabinet heads, and simply transfer it to the Attorney General and his subordinates. Contrary to the court’s assessment, the difference between who can assert the privilege and who

can invoke § 1806(f) reaffirms that FISA coexists with, rather than displaces, the state secrets privilege.

Finally, the court's view of FISA as a replacement for the state secrets privilege ignores that the provision not only authorizes but *mandates* disclosure. *See* § 1806(g) (requiring the court to disclose evidence “to the extent that due process requires discovery or disclosure”); *see also* § 1806(f) (authorizing the court to disclose evidence to the aggrieved person when “necessary to make an accurate determination of the legality of the surveillance”). And under the court's broad reading, FISA may very well authorize disclosure of state secrets to the very subjects of the surveillance. *See* Am. Op. 68 (holding that plaintiffs' request for electronic surveillance evidence triggers § 1806(f) review).⁹

⁹ For the first time, Judge Berzon announces that the panel's opinion is actually limited to the state secrets privilege's dismissal remedy and that the government is free to reassert the privilege if the district court orders disclosure. *See* Concurrence at 110 n.1. This is news to anyone reading the panel opinion, which explicitly authorizes the district court to “disclose” state secrets evidence to the “plaintiffs.” *See* Am. Op. at 103. The opinion goes so far to warn that “*not*” disclosing such evidence could constitute an abuse of discretion. *Id.* at 103 n.49 (emphasis added).

Nevertheless, that the panel needs to amend its opinion through a nonbinding concurrence is reason enough for us to have reheard this case en banc. We owe the district courts and litigants a clear statement of the law—especially in a case implicating national security concerns. More fundamentally, this newly crafted limitation of the court's holding doesn't alter any of the concerns raised in this dissent and in many ways exacerbates them. The court's holding, even as purportedly limited, impinges on a constitutionally based privilege based on a misreading of FISA. And if raising concerns

But the state secrets privilege does not tolerate *any* disclosure—not even in camera and ex parte—if it can be avoided. See *Reynolds*, 345 U.S. at 10 (“[T]he court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.”). Such disclosures, when involving national security secrets, are inimical to the secrecy afforded to the Executive under Article II. Thus, FISA fails to speak directly to the paramount concern for the secrecy at the heart of the state secrets privilege.

Given the silence of the statutory text, it’s unsurprising that the court’s opinion resorts to legislative history to support abrogation. But “legislative history is not the law.” *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1631 (2018). We “have no authority to enforce a principle gleaned solely from legislative history that has no statutory reference point.” *Shannon v. United States*, 512 U.S. 573, 584 (1994) (cleaned up). Even so, from hundreds of pages of legislative history, the court excavates only vague quotes describing FISA as a “fundamental reform” aimed at curbing unchecked executive surveillance. See Am. Op. at 63-64. The court can’t even muster up a single floor statement mentioning the state secrets privilege. Even for those who would rely on legislative history, this alone should end the inquiry.

Nevertheless, the legislative history shows that—contrary to the court’s view—the state secrets privilege coexists with FISA. For example, a committee report notes that preexisting “defenses against disclosure,”

about the court’s degradation of separation of powers and our constitutional design makes me a “veritable Russian doll” maker, see Concurrence at 108, then bring on the dolls.

which would include the state secrets privilege, were intended to be undisturbed by FISA. See H.R. Rep. No. 95-1283, at 93 (1978). Another report explained that even when § 1806(f) applied, the government could still “prevent[]” the court’s “adjudication of legality” simply by “forgo[ing] the use of the surveillance-based evidence” where disclosure of such evidence “would damage the national security.” S. Rep. No. 95-701, at 65 (1978). And another explains that § 1806(f) was crafted “to prevent these carefully drawn procedures from being bypassed by the inventive litigant.” H.R. Rep. No. 95-1283, at 91.

Ultimately, despite the lengthy excursion into FISA’s legislative history, the court simply ignores material that undermines its interpretation. We’re instead offered only generic, cherry-picked quotes about FISA — proving yet again that relying on legislative history is “an exercise in looking over a crowd and picking out your friends.” *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (cleaned up). But if § 1806(f) was not meant for “inventive litigants,” it was equally not meant for inventive courts.

III.

Most frustrating about our court’s decision here is that § 1806(f) *doesn’t even apply* to plaintiffs’ case. Section 1806(f) isn’t a freestanding vehicle to litigate the merits of any case involving electronic surveillance. FISA’s review procedures are triggered only to determine the admissibility of the government’s electronic surveillance evidence. In this case, the government never sought to admit and plaintiffs never sought to suppress any such evidence. Accordingly, § 1806(f) wasn’t invoked. Yet the court creatively interprets two

clauses of the statute to foist FISA's review mechanism into this case. We should have corrected this misinterpretation through en banc review.

A.

Section 1806(f)'s review procedures are triggered if the government gives notice that it "intends to enter into evidence or otherwise use or disclose in any trial, hearing, or other proceeding . . . , against an aggrieved person, any information obtained or derived from an electronic surveillance of that aggrieved person[.]" § 1806(c), (f). The court held that when the government asserted the state secrets privilege it effectively gave notice that it intended to "use" the evidence against plaintiffs. This is wrong for two separate reasons.

1.

First, § 1806(c) doesn't apply because the government isn't seeking to *use* the state secrets as evidence. By asserting the privilege, the government is not *using* evidence in any reasonable sense of the word. Quite the opposite: the government seeks to remove this evidence to avoid disclosing state secrets. *See Jeppesen*, 614 F.3d at 1079 ("A successful assertion of privilege under *Reynolds* will remove the privileged evidence from the litigation."). The court suggests that it "is precisely because the Government would like to use this information to defend itself that it has asserted the state secrets privilege." Am. Op. at 67. But this is precisely backwards. It transforms the government's expressed *inability to use* evidence into an expressed intent to use it. Such upside-down logic should not stand.

And no matter what tortured conception of “use” the court conjures up here, to “use” something means to do so for its intended purpose. *Smith v. United States*, 508 U.S. 223, 242 (1993) (Scalia, J., dissenting). “When someone asks, ‘Do you use a cane?’, he is not inquiring whether you have your grandfather’s silver-handled walking stick on display in the hall; he wants to know whether you *walk* with a cane.” *Id.* So too here: the government is not “using” the evidence merely by asserting the privilege over it. Evidence is “used” when it is being offered for admission or disclosed for some other evidentiary purpose.

2.

Second, it’s doubtful that § 1806(c) could apply here since there was no proceeding against “an aggrieved person.” By its terms, this provision applies only to a “trial, hearing, or other proceeding” “against an aggrieved person.” § 1806(c). This interpretation flows from the nearest-reasonable-referent canon. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 140-41 (2012) (“When the syntax involves something other than a parallel series of nouns or verbs, a prepositive or postpositive modifier normally applies only to the nearest reasonable referent.”). It’s also consistent with ordinary usage. Although the court now proclaims the opposite, *see* Am. Op. at 70, we commonly refer to trials, hearings, and proceedings as being “against” a party.¹⁰ Instead, the court curiously views

¹⁰ *See, e.g., Paine v. City of Lompoc*, 265 F.3d 975, 986 (9th Cir. 2001) (“trial against these two defendants”); *United States v. Branch*, 368 F. App’x 842, 844 (9th Cir. 2010) (“misconduct hearing against the government”); *Lopez-Aguilar v. Barr*, 948 F.3d 1143, 1146 (9th Cir. 2020) (“removal proceedings against Lopez-Aguilar”).

“against an aggrieved person” as modifying the phrase “information obtained or derived.” But under that odd interpretation, this phrase would be modified *twice* by “aggrieved person.” The statute would be triggered by the government’s use of “any information obtained or derived [against the aggrieved person] from an electronic surveillance of that aggrieved person.” § 1806(c). That is not a sensical reading.¹¹

B.

Perhaps sensing the weakness of its § 1806(c) reasoning, the court serves an alternative explanation for how FISA’s review procedures were triggered. Section 1806(f) also provides that its procedures are invoked:

whenever any motion or request is made by an aggrieved person pursuant to any other statute or rule . . . to discover or obtain applications or orders or other materials relating to electronic surveillance or

¹¹ The phrase “against an aggrieved person” also doesn’t modify “enter into evidence or otherwise use or disclose.” For adherents to the familiar surplusage canon, this reading would render the phrase completely superfluous. After all, who else is the government going to use the evidence against but the aggrieved person? Additionally, in ordinary English, we don’t often speak about “disclos[ing]” information “against” someone. And if this construction was intended, we would have expected Congress to make this point clear by placing the phrase closer to the verbs it modifies. See *United States v. Nader*, 542 F.3d 713, 717-18 (9th Cir. 2008) (“A prepositional phrase with an adverbial or adjectival function should be as close as possible to the word it modifies to avoid awkwardness, ambiguity, or unintended meanings.”) (quoting *The Chicago Manual of Style* ¶ 5.167 (15th ed. 2003)).

to discover, obtain, or suppress evidence or information obtained or derived from electronic surveillance under this chapter[.]

§ 1806(f).

By its context, this clause is designed to funnel an aggrieved person’s evidentiary motions and requests—which could be brought under a myriad of preexisting statutes or rules—into § 1806(f)’s admissibility review procedures. It is not an independent grant of authority to force government disclosure under § 1806(f) anytime, for any reason, for any evidence, as long as a party has some claim relating to electronic surveillance.

But the court holds that the clause was triggered because the plaintiffs’ complaint requested injunctive relief ordering the government to destroy or return any unlawfully obtained materials. According to the court, by asking for the “return” of electronic surveillance, the complaint’s *prayer for relief* serves as a “request[.]” to “obtain” that information within the meaning of § 1806(f). Am. Op. 68.

Contrary to the court’s expansive interpretation, this clause is limited to procedural motions pertaining to the admissibility of evidence, like the familiar “motion[s]” to “discover, obtain, or suppress.” § 1806(f). The clause’s use of the word “request” does not change this analysis since it must be read alike with “motion.” See *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 634-35 (2012) (applying the “commonsense canon” that “a word is given more precise content by the neighboring words with which it is associated”). In this context, these two terms refer to procedural actions such as a “production

request” or a “motion to discover evidence,” not substantive requests for relief.¹²

We’re also not to read “motion or request” in a vacuum. The provision refers to motions and requests “[made] pursuant to any other statute or rule . . . to discover, obtain, or suppress evidence or information.” § 1806(f). This context makes clear that that the provision covers only procedural motions or requests, not plaintiffs’ substantive claims for relief. It likewise confirms that the clause is not an independent grant of authority, but relies on other statutes and rules—which would remain subject to evidentiary privileges.

In treating plaintiffs’ complaint as a request sufficient to trigger § 1806(f), the court reads too much into the word “obtain,” which must be read in the context of “the company it keeps.” *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995). Here, “obtain” is spliced between “discover” and “suppress,” both of which are procedural, evidentiary actions having nothing to do with substantive claims or injunctive relief. Accordingly, “obtain” is similarly limited to pretrial actions aimed at evaluating the admissibility of evidence. *See, e.g.*, Fed. R. Civ. P. 26(b)(1) (“Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case[.]”).

¹² Seemingly whenever the phrase “motion or request” appears it refers to a procedural action. *See, e.g.*, 17 U.S.C. § 803(b)(6)(C)(v) (“motion or request to compel production”); Fed. R. Crim. P. 29, Advisory Comm. Notes to 2005 amendments (“motion or request” for an extension of time); Charles A. Wright et al., *Federal Practice and Procedure: Criminal* § 261 (4th ed. 2020 Update) (Rule 12(c) authorizes time for “making of pre-trial motions or requests”).

FISA’s structure also confirms the clause’s limitation to pretrial motions relating to the admissibility of evidence. All of the other triggering mechanisms of § 1806(f)—subsections (c), (d), and (e)—are pretrial, procedural actions to secure a ruling on the admissibility of evidence. This clause must be read in a similar light to avoid “giving unintended breadth to the Acts of Congress.” *Yates v. United States*, 135 S. Ct. 1074, 1085 (2015). It would be odd for Congress to ambiguously bury a substantive right for plaintiffs to “obtain” national security secrets in the muddled language of § 1806(f). We know that this can’t be the case because Congress does not “hide elephants in mouseholes.” *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001).

Additionally, FISA does not recognize injunctive relief. *ACLU Found. of S. California v. Barr*, 952 F.2d 457, 470 (D.C. Cir. 1991) (“Not only does § 1806(f) not create or recognize a cause of action for an injunction or for a declaratory judgment, but the scheme it sets up makes clear that nothing in FISA can be read to create such a cause of action.”). It can’t be the case that § 1806(f) is triggered by a request for substantive relief that FISA itself does not contemplate.¹³

¹³ The concurrence makes much ado over § 1810, which authorizes a cause of action for FISA violations. But the fact that the privilege “could” lead to a dismissal of a § 1810 suit, Concurrence at 113-114, is largely irrelevant. The same is true of any other cause of action. And just because claims *could* be dismissed after a valid privilege assertion doesn’t mean all of them will be. Look no further than *this very case*: the government did not move to dismiss Plaintiffs’ § 1810 claim based on the privilege and the claim is going forward (and would’ve gone forward even without the panel’s abrogation of the privilege).

Finally, this clause must be read in context of FISA's single remedy after § 1806(f) review—the “suppress[ion of] the evidence” or “*otherwise* grant[ing] the motion of the aggrieved person.” § 1806(g) (emphasis added). Thus, these motions and requests, however styled, all lead down the same road—suppression of evidence, or relief in aid of that remedy. *Cf. James v. United States*, 550 U.S. 192, 218 (2007) (Scalia, J., dissenting) (recognizing that “‘otherwise’ is defined as ‘[i]n a different manner’ or ‘in another way,’” so the use of the word signals other ways of doing something of the same *character* as what preceded it). As the heading of this provision confirms, the district court’s review can result in either “[s]uppression of evidence” or “denial of motion.” § 1806(g) (heading). Thus, whether they’re to “discover, obtain, or suppress,” these motions and requests only relate to the ultimate determination of the admissibility of evidence. Here, plaintiffs have neither a “motion to suppress,” nor any other motion to “otherwise grant,” should the district court rule in their favor after the § 1806(f) review. Accordingly, try as it might, the court can’t jam a square peg into a round hole. Section 1806(f) doesn’t apply here.

IV.

The court’s decision today seriously degrades the Executive’s ability to protect our Nation’s secrets and I fear it is only a stepping stone to further erosions. By abrogating the state secrets privilege, we not only upset the balance of power among co-equal branches of government, but we also do damage to a right inherent in the constitutional design and acknowledged since our Nation’s founding. And we do so without clear evidence

that this is the result Congress sought. For these reasons, I respectfully dissent from the denial of rehearing en banc.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

Case No. 8:11-cv-00301-CJC(VBKx)
YASSIR FAZAGA, ALI UDDIN MALIK,
YASSER ABDELRAHIM, PLAINTIFFS

v.

FEDERAL BUREAU OF INVESTIGATION, ET AL.,
DEFENDANTS

Aug. 14, 2012

**ORDER GRANTING DEFENDANTS' MOTIONS TO
DISMISS BASED ON THE STATE SECRETS
PRIVILEGE**

CORMAC J. CARNEY, District Judge.

I. INTRODUCTION

The present case involves a group of counterterrorism investigations by the Federal Bureau of Investigation (“FBI”), dubbed “Operation Flex,” in which the FBI engaged a covert informant to help gather information on certain, unidentified individuals from 2006 to 2007. Although some of the general facts about Operation Flex, including the identity of one informant, Craig Monteilh, have been disclosed to the public, much

of the essential details of the operation remain classified. After disclosure of Monteilh's identity, Plaintiffs, three Muslim residents of Southern California, filed a putative class action against the FBI, the United States of America, and two FBI officers sued in their official capacities (together, the "Government") as well as five FBI agents sued in their individual capacities (collectively, "Defendants"). Plaintiffs allege that Defendants conducted an indiscriminate "dragnet" investigation and gathered personal information about them and other innocent Muslim Americans in Southern California based on their religion. In doing so, Plaintiffs allege that Defendants violated their constitutional and civil rights under the First Amendment Free Exercise Clause and Establishment Clause, the Religious Freedom Restoration Act ("RFRA"), the Fifth Amendment Equal Protection Clause, the Privacy Act, the Fourth Amendment, the Foreign Intelligence Surveillance Act ("FISA"), and the Federal Tort Claims Act ("FTCA"). Defendants currently move to dismiss Plaintiffs' claims and for summary judgment pursuant to Federal Rules of Civil Procedure 12 and 56 on various grounds, including the state secrets privilege. Defendants argue that all of Plaintiffs' claims, aside from their FISA and Fourth Amendment claims, must be dismissed because litigation of those claims would risk or require disclosure of certain evidence properly protected by the Attorney General's assertion of the state secrets privilege.

The Attorney General's privilege claim in this action requires the Court to wrestle with the difficult balance that the state secrets doctrine strikes between the fundamental principles of liberty, including judicial transparency, and national security. Although, as the Ninth Circuit aptly opined, "as judges we strive to honor *all* of

these principles, there are times when exceptional circumstances create an irreconcilable conflict between them.” *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1073 (9th Cir. 2010), *cert. denied*, — U.S. —, 131 S. Ct. 2442, 179 L. Ed. 2d 1235 (2011). “On those rare occasions, we are bound to follow the Supreme Court’s admonition that ‘even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that [state] secrets are at stake.’” *Id.* (quoting *United States v. Reynolds*, 345 U.S. 1, 11, 73 S. Ct. 528, 97 L. Ed. 727 (1953)). Such is the case here. After careful deliberation and skeptical scrutiny of the public and classified filings, the Court concludes that Plaintiffs’ claims against Defendants, aside from their FISA claim, must be dismissed under the state secrets privilege.¹ Further litigation of those claims would require or unjustifiably risk disclosure of secret and classified information regarding the nature and scope of the FBI’s counterterrorism investigations, the specific individuals under investigation and their associates, and the tactics and sources of information used in combating possible terrorist attacks on the United States and its allies. The state secrets privilege is specifically designed to protect against disclosure of such

¹ Defendants’ motions to dismiss Plaintiffs’ FISA claim are discussed in the Court’s separate, concurrently-issued Order. The Court finds that dismissal of Plaintiffs’ FISA claim against the Government is warranted because sovereign immunity has not been waived. The Court, however, finds that Plaintiffs have alleged sufficient facts to state a FISA claim against the individual-capacity Agent Defendants, who are not entitled to qualified immunity at this stage of the proceeding based on the allegations pled in the First Amended Complaint.

information that is so vital to our country's national security.

II. BACKGROUND

The central subject matter of this case is a group of counterterrorism investigations by the FBI, known as "Operation Flex," which focused on fewer than 25 individuals and "was directed at detecting and preventing possible terrorist attacks." (Pub. Giuliano Decl. ¶ 11.) During the investigations, the FBI utilized Craig Monteilh as a confidential informant from 2006 to 2007. (*Id.* ¶¶ 6, 11.) "The goal of Operation Flex was to determine whether particular individuals were involved in the recruitment and training of individuals in the United States or overseas for possible terrorist activity." (*Id.* ¶ 11.) Plaintiffs allege that as part of Operation Flex, Defendants directed Monteilh to infiltrate mosques and indiscriminately collect information about Plaintiffs and other members of the Los Angeles and Orange County Muslim community because of their adherence to and practice of the religion of Islam from July 2006 to October 2007. (First Amended Complaint ("FAC") ¶¶ 1-3, 86, 167.)

The FBI has only acknowledged that Monteilh engaged in confidential source work and disclosed limited information concerning Monteilh's actions. (Pub. Giuliano Decl. ¶ 6.) For example, in an unrelated criminal proceeding in this district, *United States v. Niazi*, Case No. 8:09-cr-28-CJC(ANx), the FBI disclosed to the defendant Ahmadullah Niazi the content of the audio and video recordings containing conversations between him and Monteilh and others. (*Id.* ¶ 12.) The FBI also acknowledged in the *Niazi* case that Monteilh provided

handwritten notes to the FBI and that it produced certain notes provided by Monteilh concerning Niazi. (*Id.*)² However, essential details regarding Operation Flex and Monteilh’s activities have not been disclosed, and the Government asserts that this information “remains highly sensitive information concerning counterterrorism matters that if disclosed reasonably could be expected to cause significant harm to national security.” (*Id.* ¶ 6.) The allegedly privileged information includes (i) the identities of the specific individuals who have or have not been the subject of counterterrorism investigations, (ii) the reasons why individuals were subject to investigation, including in Operation Flex, and their status and results, and (iii) the particular sources and methods used in obtaining information for counterterrorism investigations, including in Operation Flex. (Holder Decl. ¶ 4; Pub. Giuliano Decl. ¶ 6.) The Government provides a more fulsome discussion of the non-disclosed matters in its *ex parte, in camera* materials that include two classified declarations and a classified supplemental memorandum. (Dkt. Nos. 35, 36, 56.)

A. The Parties

Plaintiffs, Sheikh Yassir Fazaga, Ali Uddin Malik, and Yasser AbdelRahim (collectively, “Plaintiffs”), are resident members of the Muslim community in Southern California. (FAC ¶¶ 12-14.) Fazaga, a U.S. citizen born in Eritrea, has served as an “imam” or religious

² With regard to these materials obtained by Monteilh, the FBI states that is it “presently assessing whether additional audio, video, or notes can be disclosed without risking disclosure of the privileged information . . . and [risking] significant harm to national security interests in protecting counterterrorism investigations.” (Pub. Giuliano Decl. ¶ 12.)

leader of the Orange County Islamic Foundation (“OCIF”), a mosque in Mission Viejo, California, and has lectured widely on topics of Islam and American Muslims. (*Id.* ¶¶ 12, 55-56.) Malik, a U.S. citizen born in Southern California, is a resident of Orange County and has regularly attended religious services at the Islamic Center of Irvine (“ICOI”), a mosque in Irvine, California. (*Id.* ¶¶ 13, 68-69.) AbdelRahim, a U.S. permanent resident from Egypt, has regularly attended religious services at the ICOI. (*Id.* ¶¶ 14, 80.)

The Government Defendants consist of the FBI and the United States of America as well as Robert Mueller, Director of the FBI, and Steven M. Martinez, Assistant Director in Charge of the FBI Los Angeles Field Office, sued in their official capacities. (*Id.* ¶¶ 15-17, 255.) Defendants also include five FBI agents, Kevin Armstrong, Paul Allen, J. Stephen Tidwell, Barbara Walls, and Pat Rose (collectively, “Agent Defendants”), who are sued in their individual capacities. (*Id.* ¶¶ 18-22.) Defendants Armstrong and Allen, who were both assigned to the Orange County area, were handlers for Monteilh and allegedly directed Monteilh to gather information on the Muslim community in Orange County and also supervised his purported surveillance activities. (*Id.* ¶¶ 18-19, 87.) Defendant Rose, who was assigned to the FBI’s Santa Ana branch office, supervised the FBI’s Orange County national security investigations and directly supervised Allen and Armstrong. (*Id.* ¶ 22.) Defendant Walls, the head of the FBI’s Santa Ana branch office, directly supervised Allen, Armstrong, and Rose. (*Id.* ¶ 21.) Defendant Tidwell served as the Assistant Director in Charge of the FBI’s Los Angeles Field Office from August 2005 to December 2007, and in that capacity, supervised operations in the

Central District of California. (*Id.* ¶ 20.) Plaintiffs allege Tidwell authorized the selection of Monteilh as an informant and directed the actions of Armstrong, Allen, Rose, Walls, and other agents in the handling of Monteilh. (*Id.*)

B. Operation Flex³

Plaintiffs allege many disturbing facts about Operation Flex and wrongdoing by Defendants. Sometime prior to July 2006, Plaintiffs allege that the FBI hired Monteilh to be a paid informant to covertly gather information about Muslims in the Irvine area. (FAC ¶ 48.) Monteilh became a Muslim convert, began to attend the ICOI and five of the other largest mosques in Orange County, and assumed the name Farouk al-Aziz. (*Id.* ¶¶ 49-50, 92.) Monteilh interacted with many members of the Muslim community in Southern California during the relevant time period, including Plaintiffs, as part of a “broader pattern of dragnet surveillance program that Monteilh engaged in at the behest of his FBI handlers,” known as “Operation Flex,” which referenced Monteilh’s cover as a fitness instructor. (*Id.* ¶¶ 54-85, 86, 88.) Armstrong and Allen, who supervised all of Monteilh’s work, informed Monteilh that Operation Flex was part of a broader surveillance program that went beyond his work. (*Id.* ¶ 88.) Defendants did not limit Monteilh to specific targets on which they wanted information, but “repeatedly made clear that they were interested simply in Muslims” and that he

³ The Court emphasizes that the facts regarding Operation Flex are only *allegations* from the FAC and do not constitute established facts or disclosures by Defendants. The FBI has neither confirmed nor denied that Monteilh collected information specifically in connection with any of the Plaintiffs or the putative class members.

should gather “as much information on as many people in the Muslim community as possible,” with heightened attention to particularly religious members and those who attracted Muslim youths. (*Id.* ¶¶ 89, 90, 98.) Plaintiffs allege that “[t]he central feature of the FBI agents’ instructions to Monteilh was their directive that he gather information on Muslims, without any further specification,” and indiscriminately gather information about them under the maximum that “everybody knows somebody” who may have some connection with the Taliban, Hezbollah, and Hamas. (*Id.* ¶¶ 89, 117.)

Over the course of Operation Flex, Plaintiffs allege that Armstrong and Allen sent Monteilh to conduct surveillance and audio recording in approximately ten mosques in Los Angeles and Orange County. (*Id.* ¶ 92.) Defendants provided Monteilh with surveillance tools, including sophisticated audio and video recording devices, such as key fobs with audio recording capability and a hidden camera outfitted to his shirt, to conduct an “indiscriminate surveillance” of Muslims, who were targeted “solely due to their religion.” (*Id.* ¶¶ 86, 122, 124, 128.) Defendants gathered information about Plaintiffs and other members of the Muslim community through these devices and from extensive review of Monteilh’s handwritten notes about all aspects of his daily interactions with Muslims. (*Id.* ¶ 122.) Plaintiffs allege that Armstrong and Allen were well aware that many of the surveillance tools they had given Monteilh were being used illegally without warrants. (*Id.* ¶ 136.)

Plaintiffs allege that the FBI Agents instructed Monteilh to utilize surveillance strategies aimed at gathering information on Muslims in an indiscriminate manner.

(*Id.* ¶ 99.) The Agents' key directive was that Monteilh gather information from "anyone from any mosque without any specific target, for the purpose of collecting as much information as possible about Muslims in the community." (*Id.* ¶ 114.) Armstrong and Allen instructed Monteilh to obtain information through various methods, including seizing every opportunity to meet people, obtain their contact information, and learn about their background and religious and political views. (*Id.* ¶ 101.) Monteilh did not limit surveillance to any particular group of people but instead socialized widely with different groups and individuals regardless of their ethnic origin or language. (*Id.* ¶¶ 102-103.) Armstrong and Allen further instructed Monteilh to gather information on Muslims' charitable givings, attend Muslim fundraising events, collect information on travel plans of Muslims in the community, attend lectures by Muslim scholars and other guest speakers, attend classes and dawn prayers at mosques, track followers of extremist jihadist websites, elicit people's views on extremist scholars and thinkers, work out with Muslims he met at a local gym, and gather any compromising information about Muslims that Defendants could use against them to persuade them to become informants. (*Id.* ¶¶ 105-16.) Plaintiffs allege that the consistent theme throughout these different surveillance gathering strategies was in Armstrong's and Allen's "expressed interest in gathering information only on Muslims," and their setting aside any non-Muslims who were identified through surveillance Monteilh performed. (*Id.* ¶ 120.)

Plaintiffs allege that through Monteilh, Defendants gathered information on Muslims and their associates consisting of hundreds of phone numbers and thousands

of email addresses; background information on hundreds of individuals; hundreds of hours of video recordings that captured the interiors of mosques, homes, businesses, and the associations of Muslims; and thousands of hours of audio recordings of conversations as well as recordings of religious lectures, discussion groups, classes, and other Muslim religious and cultural events occurring in mosques. (*Id.* ¶¶ 2, 137.) Plaintiffs allege that the FBI’s “dragnet investigation did not result in even a single conviction related to counterterrorism” because, unsurprisingly, “the FBI did not gather the information based on suspicion of criminal activity, but instead gathered the information simply because the targets were Muslim.” (*Id.* ¶ 3.) Plaintiffs allege Monteilh discontinued working for Defendants as an informant around September 2007. (*Id.* ¶ 151.)

C. Disclosure of Monteilh’s Identity

In February 2009, the FBI acknowledged that it had utilized Monteilh as a confidential informant during a criminal proceeding in the *Niazi* case. (Pub. Giuliano Decl. ¶ 11; FAC ¶¶ 155-59.)⁴ Subsequent to this disclosure, Monteilh has provided numerous statements to the media discussing his purported activities on behalf of the FBI. (Pub. Giuliano Decl. ¶ 14; FAC ¶ 162.)⁵ In January 2010, Monteilh also filed a civil lawsuit under 42 U.S.C. §§ 1983 and 1985 in this district against the FBI, its agents, and the City of Irvine in *Monteilh v. FBI*,

⁴ This Court dismissed the *Niazi* indictment without prejudice on September 30, 2010. (Case No. 8:09-cr-28-CJC (ANx), Ct. Order, Dkt. No. 40, Sept. 30, 2010.)

⁵ See, e.g., Jerry Markon, *Tension Grows between Calif. Muslims, FBI after Informant Infiltrates Mosque*, WASH. POST (Dec. 5, 2010).

Case No. 8:10-cv-102-JVS(RNBx). In that case, Monteilh made allegations related to his work as an FBI source in Operation Flex. (Pub. Giuliano Decl. ¶ 14; FAC ¶ 164.) The FBI has neither confirmed nor denied any of Monteilh's public allegations concerning his work for the agency, and the FBI maintains that Monteilh's allegations do not constitute a disclosure or confirmation by the FBI of any information concerning his activities as an informant. (Pub. Giuliano Decl. ¶ 14; FAC ¶ 164.) In this case, Monteilh has submitted a declaration, dated April 23, 2010, in support of Plaintiffs' opposition to Defendants' motions to dismiss in which he makes allegations regarding his work for the FBI in Operation Flex similar to those asserted in the FAC. (Dkt. No. 66; FAC ¶ 167.)

D. The Lawsuit

On February 22, 2011, Plaintiffs filed the instant suit against the FBI and its officers and agents. (Dkt. No. 1.) On August 1, 2011, the FBI, Mueller, and Martinez moved to dismiss the Complaint and for summary judgment on the grounds, *inter alia*, that certain evidence needed to litigate Plaintiffs' claims is properly protected by the Attorney General's assertion of the state secrets privilege. (Dkt. No. 32.) In support of their privilege claim, they submitted for *ex parte, in camera* review by the Court (i) a classified declaration of Mark F. Giuliano, FBI Assistant Director, Counterterrorism Division and (ii) a classified supplemental memorandum. (Dkt. Nos. 35, 36.) The Agent Defendants also separately moved to dismiss the Complaint. (Dkt. Nos. 41-42.) Shortly thereafter, Plaintiffs moved *ex parte* to stay the Court's review of the classified filings until after its consideration of whether the state secrets argument would apply

in this case as a matter of law. (Dkt. No. 39.) Plaintiffs argued that such a ruling would prevent the Court from unnecessarily reviewing information that could be highly prejudicial to Plaintiffs and not properly subject to consideration by the Court. (Pls. Ex Parte App., at 8.) The Court denied Plaintiffs' *ex parte* application because the Court determined that there was no legal bar to its review of the classified submissions and because it was confident that its independent evaluation would not be compromised by the contents of those submissions. (Ct. Order, Dkt. No. 46, Aug. 11, 2011.)

On September 13, 2011, Plaintiffs filed the operative FAC, adding a claim under the FTCA against the United States. (Dkt. No. 49.) Plaintiffs assert a total of eleven causes of action against Defendants: (1) violation of the First Amendment Establishment Clause under *Bivens* and 28 U.S.C. § 1331 (against all Defendants except the FBI and United States); (2) violation of the First Amendment Establishment Clause under 42 U.S.C. § 1985(3) and 28 U.S.C. § 1343 (against Agent Defendants); (3) violation of the First Amendment Free Exercise Clause under *Bivens* and 28 U.S.C. § 1331 (against all Defendants except the FBI and United States); (4) violation of the First Amendment Free Exercise Clause under 42 U.S.C. § 1985(3) and 28 U.S.C. § 1343 (against Agent Defendants); (5) violation of RFRA, 42 U.S.C. § 2000bb-1 (against all Defendants); (6) violation of the Fifth Amendment Equal Protection Clause under *Bivens* and 28 U.S.C. § 1331 (against all Defendants except the FBI and United States); (7) violation of the Equal Protection Clause under 42 U.S.C. § 1985(3) and 28 U.S.C. § 1343 (against Agent Defendants); (8) violation of the Privacy Act, 5 U.S.C. § 552a(a)-(l) (against the FBI); (9) violation of the Fourth Amendment under

Bivens and 28 U.S.C. § 1331 (against the FBI and United States); (10) violation of FISA, 50 U.S.C. § 1810 (against all Defendants); and (11) invasion of privacy, violation of Cal. Civ. Code § 52.1, and intentional infliction of emotion distress under the FTCA, 28 U.S.C. §§ 1346(b), 2671, *et seq.* (against the United States).⁶ Plaintiffs request damages as well as injunctive relief in the form of the destruction or return of any information gathered through Operation Flex. Plaintiffs further seek certification of “[a]ll individuals targeted by Defendants for surveillance or information-gathering through Monteilh and Operation Flex, on account of their religion, and about whom the FBI thereby gathered personally identifiable information.” (FAC ¶ 219.)

On November 4, 2011, the Government moved to dismiss the FAC and for summary judgment pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and 56. (Dkt. No. 55.) The Government moves to dismiss all of Plaintiffs’ claims, aside from the FISA and Fourth Amendment claims, on the grounds that, *inter alia*, litigation of these claims would risk or require the disclosure of certain evidence properly protected by the Attorney General’s assertion of the state secrets privilege. In support of their privilege claim, the Government relies on its previously-filed public declaration from the Attorney General, Eric H. Holder, dated July 29, 2011, (Dkt. No. 32-3), and a public declaration from Mark Giuliano, dated July 25, 2011, (Dkt. No. 33). The Government also relies on its previously-lodged, August 1, 2011

⁶ For claims 1, 3, 6, and 9, Plaintiffs assert claims for damages under *Bivens* against individual-capacity Agent Defendants and assert claims for injunctive relief under Section 1331 against the official-capacity Defendants. (See FAC ¶ 226 n.37.)

in camera filings, the classified declaration of Giuliano and the classified supplemental memorandum, (Dkt. Nos. 35, 36). In addition, the Government lodged a classified supplemental declaration of Giuliano on November 4, 2011, which provided a status update on certain investigations discussed in the classified Giuliano Declaration. (Dkt. No. 56.)

Defendants Tidwell and Walls separately moved to dismiss claims against them under Federal Rule of Civil Procedure 12(b)(6). (Dkt. No. 58.) Tidwell and Walls argue, in part, that the Government's assertion of the state secrets privilege mandates dismissal of Counts 1 through 7. (Tidwell/Walls Br., at 9-12.) Defendants Rose, Armstrong, and Allen also moved to dismiss the FAC under Rule 12(b)(6) and joined in the motions to dismiss filed by the Government and Defendants Tidwell and Walls. (Dkt. No. 57.) On December 23, 2011, Plaintiffs opposed the Government's motion and filed a combined opposition to the Agent Defendants' motions to dismiss. (Dkt. Nos. 63, 64.) Defendants filed replies in support of their respective motions to dismiss on January 20, 2012. (Dkt. Nos. 69-71.) After granting the parties' requests for continuances of the hearing on Defendants' motions to dismiss, the Court heard extended oral arguments on the motions from the parties' counsel on August 14, 2012.

III. LEGAL STANDARD

A. The State Secrets Doctrine

“The Supreme Court has long recognized that in exceptional circumstances courts must act in the interest of the country's national security to prevent disclosure of state secrets, even to the point of dismissing a case

entirely.” *Jeppesen Dataplan*, 614 F.3d at 1077 (citing *Totten v. United States*, 92 U.S. 105, 107, 23 L. Ed. 605 (1875)). Created by federal common law, the state secrets doctrine bars litigation of an action entirely or excludes certain evidence because the case or evidence risks disclosure of “state secrets”—that is, “matters which, in the interest of national security, should not be divulged.” *Reynolds*, 345 U.S. at 10, 73 S. Ct. 528. Although developed at common law, the state secrets doctrine also “performs a function of constitutional significance, because it allows the executive branch to protect information whose secrecy is necessary to its military and foreign-affairs responsibilities.” *El-Masri v. United States*, 479 F.3d 296, 303 (4th Cir. 2007). At the same time, the state secrets doctrine does not represent an abdication of judicial control over access to the courts, as the judiciary is ultimately tasked with deciding whether the doctrine properly applies to a particular case. *Id.* at 312. The state secrets doctrine thus attempts to strike a difficult balance between the Executive’s duty to protect national security information and the judiciary’s obligation to preserve judicial transparency in its search for the truth. *Id.* at 303-305.

There are two modern applications of the state secrets doctrine: (1) a justiciability bar that forecloses litigation altogether because the very subject matter of the case is a state secret (the “*Totten* bar”) and (2) an evidentiary privilege that excludes certain evidence because it implicates secret information and may result in dismissal of claims (the “*Reynolds* privilege”). *Jeppesen Dataplan*, 614 F.3d at 1077-80. While distinct, the *Totten* bar and the *Reynolds* privilege converge in situations where the government invokes the privilege—as it

may properly do—before waiting for an evidentiary dispute to arise during discovery or trial. *Id.* at 1080 (“The privilege may be asserted at any time, even at the pleading stage.”). The privilege indisputably may be raised with respect to discovery requests seeking allegedly privileged information or to prevent disclosure of such information in a responsive pleading. *Id.* at 1081. Alternatively, “the government may assert a *Reynolds* privilege claim prospectively, even at the pleading stage, rather than waiting for an evidentiary dispute to arise during discovery or trial.” *Id.* In such circumstances, the *Totten* bar necessarily informs the *Reynolds* privilege in a “continuum of analysis.” *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1201 (9th Cir. 2007).

1. The Totten Bar

The Supreme Court in *Totten v. United States* articulated the general principle that “public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential.” 92 U.S. at 107. The *Totten* bar is a categorical bar “where the very subject matter of the action . . . [is] a matter of state secret,” such that the action is “dismissed on the pleadings without ever reaching the question of evidence since it [is] so obvious that the action should never prevail over the privilege.” *Reynolds*, 345 U.S. at 11 n.26, 73 S. Ct. 528; accord *Jeppesen Dataplan*, 614 F.3d at 1077-78; see also *Al-Haramain*, 507 F.3d at 1197 (“[W]here the very subject matter of a lawsuit is a matter of state secret, the action must be dismissed without reaching the question of evidence.”). The purpose of the *Totten* bar is not merely to defeat the asserted

claims, but to foreclose judicial inquiry altogether. *Tenet v. Doe*, 544 U.S. 1, 6 n.4, 125 S. Ct. 1230, 161 L. Ed. 2d 82 (2005); *Jeppesen Dataplan*, 614 F.3d at 1078.

The Supreme Court has very sparingly applied this bar to preclude judicial review of an action entirely. *See Totten*, 92 U.S. at 106-107 (barring suit by Civil War spy against the United States for alleged failure to pay for espionage services because the case was predicated on the existence of an undisclosed contract for secret services with the government); *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139, 146-47, 102 S. Ct. 197, 70 L. Ed. 2d 298 (1981) (holding action against the United States Navy exceeded judicial scrutiny based on state secrets because it implicated information regarding nuclear weapons storage that the Navy could not admit or deny); *Tenet*, 544 U.S. at 8-10, 125 S. Ct. 1230 (precluding judicial review of action by former Cold War spies against the Central Intelligence Agency for allegedly reneging on promise to pay for espionage services because plaintiffs' relationship with the government was state secrets). Beyond these three cases, the Supreme Court has not provided further guidance on what subject matters would constitute state secrets. The Ninth Circuit in *Jeppesen*, however, declined to interpret the *Totten* bar as only applying to certain types of cases, such as those involving covert espionage agreements, but emphasized that "the *Totten* bar rests on a general principle that extends beyond that specific context" and applies "where the very subject matter of the action' is 'a matter of state secret.'" 614 F.3d at 1078-79 (quoting *Reynolds*, 345 U.S. at 11 n.26, 73 S. Ct. 528). The *El-Masri* court further clarified that "[t]he controlling inquiry is not whether the general

subject matter of an action can be described without resort to state secrets”; rather, it must be ascertained “whether an action can be *litigated* without threatening the disclosure of such state secrets.” *El-Masri*, 479 F.3d at 308. “Thus, for purposes of the state secrets analysis, the ‘central facts’ and ‘very subject matter’ of an action are those facts that are essential to prosecuting the action or defending against it.” *Id.*

2. The Reynolds Privilege

The second application of the state secrets doctrine is an evidentiary privilege against revealing state secrets. *Jeppesen Dataplan*, 614 F.3d at 1079. Derived from *United States v. Reynolds*, this privilege applies when the court is satisfied “from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose . . . matters which, in the interest of national security, should not be divulged.” *Reynolds*, 345 U.S. at 10, 73 S. Ct. 528; see also *id.* at 10-11, 73 S. Ct. 528 (finding that the government made a sufficient showing of privilege, “under circumstances indicating a reasonable possibility that military secrets were involved,” to cut off demand for an accident investigation report of an aircraft testing secret electronic equipment). A successful assertion of the *Reynolds* privilege will remove the privileged evidence from the case. *Jeppesen Dataplan*, 614 F.3d at 1079. In some instances, however, “the assertion of the privilege will require dismissal because it will become apparent during the *Reynolds* analysis that the case cannot proceed without privileged evidence, or that litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets.” *Id.* The Ninth Circuit in *Jeppesen Dataplan* applied

the *Reynolds* privilege to dismiss an action brought by foreign nationals who were allegedly transported in secret to other countries where they were detained and interrogated under the Central Intelligence Agency's ("CIA") extraordinary rendition program. 614 F.3d at 1085-90. The Ninth Circuit held that dismissal under the state secrets privilege was required under *Reynolds* because there was no feasible way to litigate the defendant's liability without creating "an unjustifiable risk of divulging state secrets" related to the CIA's secret intelligence activities. *Id.* at 1087. When such dismissal is required, the *Reynolds* privilege converges with the *Totten* bar. *Id.* at 1083.

An analysis of claims under the *Reynolds* privilege involves three steps. First, the court must ascertain whether the procedural requirements for invoking the privilege, consisting of a formal claim by the government, have been satisfied. *Id.* at 1080. Second, the court must independently determine whether the information is privileged. *Id.* Third, the court must determine how the case should proceed in light of the successful privilege claim. *Id.* Once the privilege is properly invoked, and the court is satisfied as to the danger of disclosing state secrets, the privilege is absolute. *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998); *see also Reynolds*, 345 U.S. at 11, 73 S. Ct. 528 ("[E]ven the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that [state] secrets are at stake."); *In re United States*, 872 F.2d 472, 476 (D.C. Cir. 1989) ("No competing public or private interest can be advanced to compel disclosure [of privileged information].") (citation and quotes omitted). This is because, in determining whether the privilege applies to a particular case, "the balance has already

been struck in favor of protecting secrets of state over the interest of a particular litigant.” *In re United States*, 872 F.2d at 476 (citation and quotes omitted). The Supreme Court has therefore cautioned that the privilege “is not to be lightly invoked,” and must be applied no more often or extensively than necessary. *Reynolds*, 345 U.S. at 7-8, 73 S. Ct. 528; *see also Jeppesen Dataplan*, 614 F.3d at 1080.

B. Threshold Considerations

Plaintiffs raise two threshold issues with regard to whether the state secrets doctrine may apply in this case, neither of which are persuasive. First, Plaintiffs argue that FISA preempts the state secrets privilege. Plaintiffs insist that because most, if not all, of the conduct at issue in this case involves electronic surveillance in the name of foreign intelligence gathering in the domestic context, the Court should adhere to the procedures that Congress has set for the treatment of secret evidence in FISA.⁷ (Pls. Opp’n to Gov’t, at 20-21, 26-31.) The Court disagrees. As a preliminary matter, the question of whether FISA preempts the state secrets privilege is not at issue because Defendants have not moved to dismiss the FISA claim on privilege grounds. Moreover, even if FISA preempts the state secrets privilege with respect to a FISA claim, as ruled by the Northern District of California in *In re Nat’l Sec. Agency Telecomms. Records Litig.*, 564 F. Supp. 2d 1109, 1120 (N.D. Cal. 2008),⁸ Plaintiffs cite no authority

⁷ *See* the Court’s concurrently-filed Order, which discusses the FISA claim in detail.

⁸ The Court in *In re National Security* determined that “FISA should displace federal common law rules such as the state secrets privilege with regard to matters within FISA’s purview.” 564

for the proposition that FISA also preempts non-FISA claims. Nor has the Court found any statute, including the language of FISA, or case law supporting an expansive application of FISA to Plaintiffs' non-FISA claims in this case. Plaintiffs rely on *In re National Security Agency*, 564 F. Supp. 2d at 1118, for the proposition that FISA preempts the state secrets privilege in cases, as here, which involve electronic surveillance undertaken in the name of national security. (Pls. Opp'n to Gov't, at 26, 29). However, the court in that case clarified that "FISA does not preempt the state secrets privilege as to matters that are not within FISA's purview,"—that is, "activities [that] include foreign intelligence surveillance." *In re National Security Agency*, 564 F. Supp. 2d at 1118. In the present action, however, the central subject matter is Operation Flex, a group of counterterrorism investigations that extend well beyond the purview of electronic surveillance as discussed in the Government's public and classified filings. Plaintiffs' non-FISA claims also rely upon allegations far broader in scope than allegations upon which the FISA claim is predicated, and litigating those non-FISA claims will require information, including privileged evidence, beyond that contemplated by FISA. (*See infra* Part IV.C.)

Second, Plaintiffs argue that the Constitution prohibits dismissal of this case on state secret grounds because they seek injunctive relief from on-going constitutional

F. Supp. 2d at 1120. As the Government does not move to dismiss the FISA claim on the basis of state secrets, the Court need not and does not decide at this time whether FISA preempts the state secrets privilege with respect to a FISA claim.

violations. (Pls. Opp’n to Gov’t, at 20, 40-51.) This argument, likewise, is unsupported by any authority, let alone Ninth Circuit or Supreme Court precedent. The principles of the state secrets doctrine make clear that it is analyzed and applied to cases irrespective of the types of claims or relief sought. *See Tenet*, 544 U.S. at 8, 125 S. Ct. 1230 (“[P]ublic policy forbids the maintenance of *any suit* in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential.” (quoting *Totten*, 92 U.S. at 107)); *Kasza*, 133 F.3d at 1166 (“Once the privilege is properly invoked and the court is satisfied as to the danger of divulging state secrets, the privilege is absolute . . . ”); *Jeppesen Dataplan*, 614 F.3d at 1081 (“If this standard [for privilege] is met, the evidence is absolutely privileged, irrespective of the plaintiffs’ countervailing need for it.”). In fact, in *Al-Haramain*, the Ninth Circuit found that the state secrets privilege applied to and warranted dismissal of constitutional claims involving requests for injunctive relief. 507 F.3d at 1205. In that case, Al-Haramain Islamic Foundation, a designated terrorist organization, and two of its attorneys brought suit against the government in connection with the government’s Terrorist Surveillance Program. 507 F.3d at 1193. The plaintiffs in that case alleged that they were subject to warrantless electronic surveillance in violation of FISA and various provisions of the Constitution. *Id.* In addition to a request to enjoin further warrantless surveillance, the plaintiffs sought the same injunctive relief as Plaintiffs here do—disclosure and/or destruction of information and records acquired from allegedly unlawful surveillance—and also similarly alleged violations under the First and Fourth Amendments. *Al-Haramain Islamic Found., Inc. v. Bush*,

451 F. Supp. 2d 1215, 1218 (D. Or. 2006), *rev'd and remanded by Al-Haramain*, 507 F.3d 1190. The Ninth Circuit in *Al-Haramain* found dismissal of the action appropriate under the *Reynolds* privilege because the defendant could not establish standing without the privileged information. 507 F.3d at 1205.⁹ Accordingly, the Court finds that the state secrets doctrine may properly be considered in this case.

IV. APPLICATION OF THE STATE SECRETS DOCTRINE

The Government requests dismissal of all of Plaintiffs' claims against Defendants, aside from the FISA and Fourth Amendment claims, under the *Reynolds* privilege. The Government argues that dismissal of these claims under the state secrets privilege is appropriate because it has satisfied the procedural requirements for invoking the privilege and further litigation of the action would risk or require the disclosure of state secrets related to Operation Flex. More specifically, the Government contends that because Plaintiffs' claims are premised on their core allegation that Defendants conducted an indiscriminate religion-based investigation, any rebuttal against this allegation would risk or require disclosure of privileged information—whom and what the FBI was investigating under Operation Flex and why—in order to establish that the investigation was properly predicated and focused. (Gov't Br., at 5-6, 45-53.) The Court agrees. As discussed more fully

⁹ Plaintiffs' argument is additionally misplaced because, even assuming that their argument regarding constitutional claims for injunctive relief had merit, it would be inapplicable as to their claims for damages against Defendants.

below, because further litigation of this action would require or, at the very least, create an unjustifiable risk of disclosure of state secrets, the Court finds that dismissal of Plaintiffs' claims, aside from their FISA claim, is required under the *Reynolds* privilege.

A. Procedural Requirements

The *Reynolds* privilege may only be asserted by the government, and a private party can neither claim nor waive the privilege. *Jeppesen Dataplan*, 614 F.3d at 1080; *Reynolds*, 345 U.S. at 7, 73 S. Ct. 528. The government cannot invoke the privilege lightly, especially where it seeks not merely to preclude the production of certain evidence, but to obtain dismissal of the action entirely. *Jeppesen Dataplan*, 614 F.3d at 1080. There are several mechanisms to ensure that the *Reynolds* privilege is invoked no more than is necessary. *Id.* First, “[t]here must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer.” *Reynolds*, 345 U.S. at 7-8, 73 S. Ct. 528. “This certification is fundamental to the government’s claim of privilege,” as the decision to invoke the privilege must “be a serious, considered judgment, not simply an administrative formality.” *Jeppesen Dataplan*, 614 F.3d at 1080 (quoting *United States v. W.R. Grace*, 526 F.3d 499, 507-508 (9th Cir. 2008) (en banc)). The formal claim must “reflect the certifying official’s *personal* judgment,” and be presented in “sufficient detail” to permit the court “to make an independent determination of the validity of the claim of privilege and the scope of the evidence subject to the privilege.” *Id.* at 1080.

Second, even before invoking the privilege in court, the government must adhere to its own State Secrets Policy, promulgated by the Obama administration in a memorandum by the Attorney General in September 2009, effective October 1, 2009. (Holder Decl. ¶ 12 & Exh. 1 [State Secrets Policy]); *see also Jeppesen Data-plan*, 614 F.3d at 1077. The Policy outlines the legal standard for invoking the privilege: the government will assert and defend an assertion of the state secrets privilege in litigation “when a government department or agency seeking to assert the privilege makes a sufficient showing that assertion of the privilege is necessary to protect information the unauthorized disclosure of which reasonably could be expected to cause significant harm to the national defense or foreign relations (“national security”) of the United States.” (Holder Decl., Exh. 1 ¶ 1(A).) The privilege must also be “narrowly tailored,” such that the “privilege should be invoked only to the extent necessary to protect against the risk of significant harm to national security.” (*Id.* ¶ 1(B).) The Policy further sets limitations for invoking the privilege, including not defending an invocation of the privilege to “conceal violations of the law, inefficiency, or administrative error”; to “prevent embarrassment to a person, organization, or agency of the United States government”; or to “prevent or delay the release of information the release of which would not reasonably be expected to cause significant harm to national security.” (*Id.* ¶ 1(C).) The Policy further outlines the initial procedure for invoking the privilege, which includes sufficient evidentiary support and recommendation from the Assistant Attorney General; evaluation, consultation, and recommendation by a state secrets review committee; and approval by the Attorney General. (*Id.* ¶¶ 2-4.)

The Government has properly invoked the state secrets privilege. The Government has submitted a public declaration from Eric Holder in his capacity as the Attorney General and head of the Department of Justice. The Attorney General has made a formal assertion of the state secrets privilege after personal consideration of the public and classified materials at the request of the director of the FBI: “After careful and actual personal consideration of the matter, I have concluded that disclosure of the three categories of information described below and in more detail in the classified Giuliano Declaration could reasonably be expected to cause significant harm to the national security, and I therefore formally assert the state secrets privilege over this information.” (Holder Decl. ¶ 3.) The Attorney General also avers that the requirements for an assertion and defense of the state secrets privilege have been satisfied in accordance with the State Secrets Policy. (*Id.* ¶ 12.)¹⁰

¹⁰ The Court cannot and does not comment on whether the Government has properly adhered to its State Secrets Policy, as this is internal to the Executive branch, and the Policy does not create a substantive or procedural right enforceable at law or in equity against the Government. (*See* Holder Decl., Exh. 1 ¶ 7.) However, the Court does observe that the Government has narrowly tailored its assertion of the privilege by moving on other grounds before invoking the privilege and has done so with restraint. (*See* Gov’t Br., at 3-7.) While the Court has considered Defendants’ initial grounds for dismissal before analyzing the state secrets privilege, the Court believes they are limited and do not entirely warrant dismissal of Plaintiffs’ claims. In contrast, the Court finds that all of Plaintiffs’ claims, aside from their FISA claim, should be dismissed under the *Reynolds* privilege. For this reason and for the sake of judicial economy, the Court limits its discussion to the state secrets doctrine

B. Independent Evaluation of the Privilege Claim

After a court determines that the privilege has been properly invoked, it then “‘must make an independent determination whether the information is privileged.’” *Jeppesen Dataplan*, 614 F.3d at 1080, 1081 (quoting *Al-Haramain*, 507 F.3d at 1202). “The court must sustain a claim of privilege when it is satisfied, ‘from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose . . . matters which, in the interest of national security, should not be divulged.’” *Id.* at 1081 (quoting *Reynolds*, 345 U.S. at 10, 73 S. Ct. 528). “The Executive bears the burden of satisfying a reviewing court that the *Reynolds* reasonable-danger standard is met.” *El-Masri*, 479 F.3d at 305. The government cannot satisfy this burden by the mere conclusory assertion that the standard has been met. *El-Masri*, 479 F.3d at 312. “Simply saying ‘military secret,’ ‘national security’ or ‘terrorist threat’ or invoking an ethereal fear that disclosure will threaten our nation is insufficient to support the privilege.” *Al-Haramain*, 507 F.3d at 1203. Rather, the government must provide “[s]ufficient detail” to enable the court to conduct a meaningful examination. *Id.* In some instances, a formal privilege claim asserted in a declaration may suffice, while in others, the court may conduct an *in camera* examination of the allegedly privileged information. *El-Masri*, 479 F.3d at 305. “The degree to which such a reviewing court should probe depends in part on the importance of the assertedly privileged information to the position of the party seeking it.” *Id.*; see also *Reynolds*, 345 U.S. at 11, 73 S. Ct. 528

in this Order and the FISA claim in the Court’s concurrently-issued Order.

“In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate.” At the same time, the Court must make this determination “without forcing a disclosure of the very thing the privilege is designed to protect.” *Reynolds*, 345 U.S. at 8, 73 S. Ct. 528. “If this standard is met, the evidence is absolutely privileged, irrespective of the plaintiffs’ countervailing need for it.” *Jeppesen Dataplan*, 614 F.3d at 1081.

Here, the Government asserts the privilege over three categories of information related to Operation Flex as described in their public and classified filings: (i) subject identification, (ii) reasons for counterterrorism, and (iii) sources and methods. First, the FBI seeks to protect “[i]nformation that could tend to confirm or deny whether a particular individual was or was not the subject of an FBI counterterrorism investigation, including in Operation Flex.” (Holder Decl. ¶ 4; Pub. Giuliano Decl. ¶ 15.) Second, the FBI seeks to protect “[i]nformation that could tend to reveal the initial reasons (*i.e.*, predicate) for an FBI counterterrorism investigation of a particular person (including in Operation Flex), any information obtained during the course of such an investigation, and the status and results of the investigation. This category includes any information obtained from the U.S. Intelligence Community related to the reasons for an investigation.” (Holder Decl. ¶ 4; Pub. Giuliano Decl. ¶ 15.) Third, the FBI seeks to protect “[i]nformation that could tend to reveal whether particular sources and methods were used in a counterterrorism investigation of a particular subject, including in Operation Flex,” and “previously undisclosed information related to whether court-ordered searches or

surveillance, confidential human sources, and other investigative sources and methods were used in a counterterrorism investigation of a particular person, the reasons such methods were used, the status of the use of such sources and methods, and any results derived from such methods.” (Holder Decl. ¶ 4; Pub. Giuliano Decl. ¶ 15.)

Beyond the Government’s descriptions of these categories of information in its public declarations, the Court heavily relies upon the classified declarations and supplemental memorandum to determine whether disclosure of the information described above could reasonably be expected to cause significant harm to national security. In making this determination, the Court assumes the “special burden to assure itself that an appropriate balance is struck between protecting national security matters and preserving an open court system.” *Jeppesen Dataplan*, 614 F.3d at 1081 (quoting *Al-Haramain*, 507 F.3d at 1203); *see also El-Masri*, 479 F.3d at 304 (“This inquiry is a difficult one, for it pits the judiciary’s search for truth against the Executive’s duty to maintain the nation’s security.”). On the one hand, the Court “acknowledge[s] the need to defer to the Executive on matters of foreign policy and national security and surely cannot legitimately find [itself] second guessing the Executive in this arena.” *Jeppesen Dataplan*, 614 F.3d at 1081-82; *see also El-Masri*, 479 F.3d at 305 (“In assessing the risk that such a disclosure [of state secrets] might pose to national security, a court is obliged to accord the ‘utmost deference’ to the responsibilities of the executive branch.”) (quoting *United States v. Nixon*, 418 U.S. 683, 710, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974)). On the other hand, “the state secrets

doctrine does not represent a surrender of judicial control over access to the courts.” *Jeppesen Dataplan*, 614 F.3d at 1082 (quoting *El-Masri*, 479 F.3d at 312); see also *Reynolds*, 345 U.S. at 9-10, 73 S. Ct. 528 (“Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.”) Rather, the Court has the obligation “to ensure that the state secrets privilege is asserted no more frequently and sweepingly than necessary,” by critically examining the instances of its invocation, *Ellsberg v. Mitchell*, 709 F.2d 51, 58 (D.C. Cir. 1983), with “a very careful, indeed a skeptical, eye, and not to accept at face value the government’s claim or justification of privilege,” *Al-Haramain*, 507 F.3d at 1203. See also *Jeppesen Dataplan*, 614 F.3d at 1082. But the Court cannot delve so deeply that it discloses the very information the privilege is meant to protect. *Reynolds*, 345 U.S. at 8, 73 S. Ct. 528 (“Too much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege is meant to protect, while a complete abandonment of judicial control would lead to intolerable abuses.”)

The Court has thoroughly and skeptically examined the Government’s public and classified submissions. In particular, the Court has critically scrutinized the Attorney General’s classified declarations and the classified memorandum—which are comprehensive and detailed—since they were submitted for the Court’s *ex parte*, *in camera* review in August and November 2011. The Court is convinced that the subject matter of this action, Operation Flex, involves intelligence that, if disclosed, would significantly compromise national security. The Court is further convinced that litigation of this action would certainly require or, at the very least, greatly risk disclosure of secret information, such that

dismissal at this stage of the proceeding is required. This is because, as described more fully below, the Government will inevitably need the privileged information to defend against Plaintiffs' core allegation that Defendants conducted an indiscriminate "dragnet" investigation and gathered information on Plaintiffs and Muslims in Southern California based on their religion. (*See infra* Part IV.C.)

In their Opposition, Plaintiffs argue that the Government's first category of information is not privileged because everyone who had contact with Monteilh already knows that they were targeted for investigation. (Pls. Opp'n to Gov't, at 31-32.) However, aside from the general information about Operation Flex and the identity of Monteilh as an informant, the Government has not confirmed or denied the identities of the fewer than 25 individuals who were under investigation. Plaintiffs further argue that because the Government has not explicitly invoked the *Totten* bar, it has effectively conceded that the very subject matter of this action is *not* a state secret. (*Id.* at 23.) But while some of the general facts of Operation Flex are public knowledge, the facts required to *litigate* the action—*e.g.*, to defend against Plaintiffs' claims of indiscriminate targeting of Muslims—requires disclosure of information that is classified and privileged. *El Masri*, 479 F.3d at 308 (“[F]or purposes of the state secrets analysis, the ‘central facts’ and ‘very subject matter’ of an action are those facts that are essential to prosecuting the action or defending against it.”) Plaintiffs' position to the contrary implies an overly rigid understanding of the difference between the *Totten* bar and *Reynolds* privilege that is inconsistent with the Ninth Circuit's application

of the state secrets doctrine. As the *Jeppesen* court indicated, the state secrets analysis under the *Totten* bar converges with its progeny when, as here, the Government requests dismissal at the pleading stage because defense against plaintiff's claims requires privileged evidence or further litigation of the case would present an unacceptable risk of disclosing state secrets. *Jeppesen Dataplan*, 614 F.3d at 1083. (See *infra* Part IV.C.)

While the Court cannot describe the specific contents of the classified materials—as this would thwart the very purpose of the privilege claim—the Court can make the following observations. In the context of a counterterrorism investigation, subject identification may include information about persons residing in the United States or abroad, such as Afghanistan, Lebanon, the Palestinian Territories, Yemen, and other regions in the Middle East, whom law enforcement has and has not decided to investigate depending on their nexus to terrorist organizations, such as al Qaeda, the Taliban, Hezbollah, and Hamas. Subjects and their associates may also be investigated because they are suspected of or involved in the recruitment, training, indoctrination, or radicalization of individuals for terrorist activities or fundraising for terrorist organizations. More directly, individuals subjected to counterterrorism investigations may be involved in plotting terrorist attacks. In the nearly eleven years that have passed since September 11, 2001, Islamic extremists have continued to plot and attempt to carry out numerous terrorist attacks both on U.S. soil and abroad against U.S. targets and allies. Such attacks are not abstract events born out of fear, but are real and insidious. The Daily Beast reported that as of September 8, 2011, “there have been at least 45 jihadist terrorist-attack plots against Americans

since 9/11—each of them thwarted by a combination of intelligence work, policing and citizen participation.” John Avlon, *Forty-Five Foiled Terror Plots Since 9/11*, Daily Beast (Sept. 8, 2011), <http://www.thedailybeast.com/articles/2011/09/08/9-11-anniversary-45-terror-plots-foiled-in-last-10-years.html>. The article notes that “these are just the plotted attacks that we know about through public documentation” and that “the real number of credible plots is no doubt much higher.” *Id.* Examples of recent, known terrorist attempts include the September 2009 scheme by Najibullah Zazi, who was arrested for plotting to attack the New York City subway system, as well as the December 2009 failed attempt by Umar Farouk Abdulmutallab to bomb Northwest Flight 253 to Chicago and the May 2010 failed attempt of Faisal Shazad to detonate a car bomb in Times Square. (See Pub. Giuliano Decl. ¶¶ 8-9.) Subjects and their associates may be further investigated because they have ties to homegrown violent extremists who do not necessarily receive guidance from terrorist groups overseas but may be inspired by the global jihadist movement to commit violent acts inside the United States. Such was the case for a group of armed men who were arrested before they could execute their plot to kill people inside a military recruiting center in Santa Monica, California, on September 11, 2005, and then later open fire on families outside of temple during Yom Kippur in West Los Angeles. (See *id.* ¶ 10.)

Disclosure of subjects under investigation would undoubtedly jeopardize national security. This is because persons under investigation would be alerted to the FBI’s interest in them and cause them to flee, destroy evidence, or alter their conduct so as to avoid de-

tection, which would seriously impede law enforcement's and intelligence officers' ability to determine their location or gain further intelligence on their activities. (Holder Decl. ¶ 6; Pub. Giuliano Decl. ¶ 23.) Disclosure of those *not* under investigation by the FBI is, likewise, dangerous because individuals who desire to commit terrorist acts may then be motivated to do so upon discovering that they are not being monitored. Information about who is being investigated while the status of others are unconfirmed may be manipulated by individuals and terrorist groups to discover whether they or any of their members are being investigated. (Holder Decl. ¶ 7; Pub. Giuliano Decl. ¶ 24.)

The second and third categories of information necessarily overlap with the first. The reasons and results of counterterrorism investigations may include the identities of human sources, such as confidential informants or undercover agents and officers (other than Monteilh); existent or suspected links between individuals and terrorist organizations; the results of surveillance efforts; and information shared among law enforcement and other government agencies. This category of evidence will also likely involve information about the status of the investigation—whether a particular investigation is open or closed—or the substantive details of the investigations themselves. With regard to the third category, this is likely to include information similar to the first and second categories, such as what, if any, confidential human sources besides Monteilh were used; whether court-authorized searches or surveillance occurred, such as wire taps and monitoring of electronic communication; whether the investigations involved undercover activity or physical surveillance; and whether

interviews with suspects and their associates were conducted. The disclosure of the reasons and results of counterterrorism investigations would unquestionably compromise national security because it would reveal to those involved in plotting terrorist activities what the FBI knows and does not know about their plans and thereby enable them to evade detection. (Holder Decl. ¶ 9; Pub. Giuliano Decl. ¶ 29.) The disclosure of the methods and sources would endanger national security because it could reveal the identities of particular subjects and the steps taken by the FBI in counterterrorism matters, thereby effectively disclosing a road map to adversaries on how the FBI detects and prevents terrorist activities. (Holder Decl. ¶ 10; Pub. Giuliano Decl. ¶ 31.)

Aside from these explanations, the Court cannot and need not give any further details with regard to the contents of the classified materials. See *Kasza*, 133 F.3d at 1169 (concluding that *in camera* review of classified declarations “was an appropriate means to resolve the applicability and scope of the state secrets privilege,” and “[n]o further disclosure or explanation is required”). The Court, however, is thoroughly convinced that the Government has described, in sufficient detail, the nature of the privileged information and reasons why its disclosure would compromise national security in its classified filings. Plaintiffs no doubt are frustrated that the Court is precluded from giving any more specifics. But “[a]n inherent feature of the state secrets privilege . . . is that the party against whom it is asserted will often not be privy to the information that the Executive seeks to protect.” *El-Masri*, 479 F.3d at 312. While the Government must persuade the Court

with “[s]ufficient detail” that their assertion of the privilege is warranted, *Al-Haramain*, 507 F.3d at 1203, it has no obligation to divulge any details of the privileged matter to Plaintiffs. (See Pls. Opp’n to Gov’t, at 31 n.17 (criticizing the Government’s public declarations for not describing the alleged privileged information with sufficient specificity). Nevertheless, Plaintiffs’ unfamiliarity with the classified materials’ explanation for the privilege does not imply that “no such explanation was required,” or that the Court’s “ruling was simply an unthinking ratification of a conclusory demand by the executive branch.” *El-Masri*, 479 F.3d at 312.

C. Consequences of the Privilege Claim

If the court sustains a claim of privilege, then “the ultimate question to be resolved is how the matter should proceed in light of the successful privilege claim.” *Jeppesen Dataplan*, 614 F.3d at 1080, 1082 (quoting *Al-Haramain*, 507 F.3d at 1202). Ordinarily, a successful claim of the privilege may simply entail excluding or walling off the secret evidence. *Id.* at 1082. But in some instances, as here, application of the privilege may require dismissal of the case. *Id.* at 1083. Dismissal is appropriate in cases where “the court may be able to determine with certainty from the nature of the allegations and the other government’s declarations in support of its claim of secrecy that litigation must be limited or cut off in order to protect state secrets, even before any discovery or evidentiary requests have been made.” *Id.* at 1081. There are three circumstances when the *Reynolds* privilege warrants terminating a case entirely, rather than removing the evidence at issue: (1) “if the plaintiff cannot prove the *prima facie* elements of her claim with nonprivileged evidence,” (2) “if the

privilege deprives the defendant of information that would otherwise give the defendant a valid defense to the claim, then the court may grant summary judgment to the defendant,” and (3) “even if the claims and defenses might theoretically be established without relying on privileged evidence, it may be impossible to proceed with the litigation because—privileged evidence being inseparable from nonprivileged information that will be necessary to the claims or defenses—litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets.” *Id.* (citations and quotes omitted). The second and third circumstances are applicable here.

1. Privileged Information Needed for Defense

Dismissal of all of Plaintiffs’ claims, aside from their FISA claim, is required because the privileged information gives Defendants a valid defense. *Jeppesen Dataplan*, 614 F.3d at 1083. This analysis of the *Reynolds* privilege necessarily coincides with the *Totten* bar, which permits dismissal of an action at the outset if the very subject matter of the action is a state secret. *Reynolds*, 345 U.S. at 11 n.26, 73 S. Ct. 528. The key test is not whether the general subject matter of Operation Flex is a state secret, but whether this case can be “*litigated* without threatening the disclosure of such state secrets.” *El-Masri*, 479 F.3d at 308. “Subject matter” of an action means “those facts that are essential to prosecuting the action or *defending* against it.” *Id.* (emphasis added); *see also id.* at 309-11 (affirming dismissal of action under the *Reynolds* privilege because defendants needed privileged information related to CIA intelligence operations to defend itself against plaintiff’s claims); *Kasza*, 133 F.3d at 1166 (stating that

dismissal is proper “if the privilege deprives the *defendant* of information that would otherwise give the defendant a valid defense to the claim” (citation and quotes omitted)).

Here, Plaintiffs’ claims are predicated on their core allegation that Defendants engaged in an indiscriminate investigation, surveillance, and collection of information of Plaintiffs and the putative class because they are Muslim. (FAC ¶¶ 1-3, 86, 167.) Based on this allegation, Plaintiffs assert that Defendants’ scheme discriminated against Plaintiffs because of their religion in violation of the Establishment Clause (claims 1, 2); substantially burdened the exercise of their religion without a legitimate government interest in violation of the Free Exercise Clause (claims 3, 4) and the RFRA (claim 5); and violates the Equal Protection Clause (claims 6, 7). Plaintiffs also assert that Defendants’ alleged scheme violates the Privacy Act, the Fourth Amendment prohibition against unreasonable searches, and FISA (claims 8, 9, 10). Finally, Plaintiffs assert that the United States is liable to Plaintiffs for the Agent Defendants’ invasion of their privacy, violation of Cal. Civ. Code § 52.1, and for intentional infliction of emotional distress under California law pursuant to the FTCA (claim 11).

Plaintiffs contend that they do not need privileged information to prove their discrimination claims against Defendants. (Pls. Opp’n to Gov’t, at 37.) The Court does not speculate on what Plaintiffs already have in their possession and whether that is enough to prove their claims at this stage of the proceeding. But even assuming that Plaintiffs do not require privileged information to establish their claims, the Court is persuaded that privileged information provides essential evidence

for Defendants’ full and effective *defense* against Plaintiffs’ claims—namely, showing that Defendants’ purported “dragnet” investigations were not indiscriminate schemes to target Muslims, but were properly predicated and focused. Doing so would require Defendants to summon privileged evidence related to Operation Flex, including the subjects who may or may not have been under investigation, the reasons and results of those investigations, and their methods and sources. Additionally, even if Plaintiffs can successfully show that Defendants’ actions substantially burdened their exercise of religion with nonprivileged information, defense against Plaintiffs’ First Amendment claims entails analysis of whether the Government had a “compelling state interest” and its actions were “narrowly tailored” to achieve that interest. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993); *see also Navajo Nation v. United States Forest Serv.*, 535 F.3d 1058, 1068 (9th Cir. 2008) (“[S]hould the plaintiff establish a substantial burden on his exercise of religion [for a RFRA claim], the burden of persuasion shifts to the government to prove that the challenged government action is in furtherance of a ‘compelling governmental interest’ and is implemented by ‘the least restrictive means.’”). These are fact-intensive questions that necessitate a detailed inquiry into the nature, scope, and reasons for the investigations under Operation Flex. Moreover, with regard to Plaintiffs’ FTCA claim, the United States may have a valid defense under the discretionary function exception, *Sabow v. United States*, 93 F.3d 1445, 1451 (9th Cir. 1996), which requires the Court to determine “whether the challenged acts . . . are of the nature and quality that Congress intended to shield from tort

liability.” *United States v. Varig Airlines*, 467 U.S. 797, 813, 104 S. Ct. 2755, 81 L. Ed. 2d 660 (1984); *see also Dichter-Mad Family Partners, LLP v. United States*, 707 F. Supp. 2d 1016, 1018-19 (C.D. Cal. 2010). To establish that this defense applies to the Government’s counterterrorism investigations that purportedly violated Plaintiffs’ constitutional rights, the Government must marshal facts that fall within the three privileged categories of information related to Operation Flex.¹¹

2. Inseparable from Privileged Information

Dismissal of Plaintiffs’ claims is also required because, even if the claim or defense may be theoretically established without relying on privileged information, the Court is convinced that the privileged and nonprivileged information are inextricably intertwined, such

¹¹ Plaintiffs further argue that the Government misunderstands the nature of their religious discrimination claim, which they assert does not require proof that religion is the “sole” reason for their having been targeted for surveillance, but rather that religion was “a” reason that they were targeted. Plaintiffs argue that their essential claim is that religion should be treated like race for the purposes of anti-discrimination law in that its use should always be justified by strict scrutiny. (Pls. Opp’n to Gov’t, at 21.) As a preliminary matter, Plaintiffs’ characterization of their own allegation contradicts the express language in their FAC. (*See* FAC ¶ 86 (alleging that the FBI Agents’ instructions to Monteilh ensured that “Plaintiffs and numerous other people were surveilled *solely* due to their religion”) (emphasis added).) Regardless of the semantics used, however, for the purpose of the state secrets analysis, there is little difference between alleging that Plaintiffs were targeted because of their religion or solely based on their religion. Defense against the claim that Defendants targeted Plaintiffs because of their religion requires the Government to draw on privileged information to show that the investigations were proper and narrowly targeted for a legitimate purpose.

that litigating the instant case to judgment on the merits would present an unacceptable risk of disclosing state secrets. *Jeppesen Dataplan*, 614 F.3d at 1083. “[W]henver possible, sensitive information must be disentangled from nonsensitive information to allow for the release of the latter.” *Kasza*, 133 F.3d at 1166 (quoting *Ellsberg*, 709 F.2d at 57). But “when, as a practical matter, secret and nonsecret information cannot be separated,” the Court may “restrict the parties’ access not only to evidence which itself risks the disclosure of a state secret, but also those pieces of evidence or areas of questioning which press so closely upon highly sensitive material that they create a high risk of inadvertent or indirect disclosures.” *Jeppesen Dataplan*, 614 F.3d at 1082 (citation and quotes omitted); *see also Kasza*, 133 F.3d at 1166 (“[I]f seemingly innocuous information is part of a classified mosaic, the state secrets privilege may be invoked to bar its disclosure and the court cannot order the government to disentangle this information from other classified information.”); *id.* at 1169-70 (affirming dismissal under the state secrets privilege of action involving allegations that the United States Air Force had unlawfully handled hazardous waste in classified operating locations because litigation of plaintiff’s claims required and risked, under the “classified mosaic” theory, disclosure of privileged information).

Here, as in *Jeppesen Dataplan* and *Kasza*, the subject matter of this case, Operation Flex, involves both privileged and nonprivileged information, which cannot be separated as a practical matter. Indeed, Operation Flex comprises only a small part of the classified mosaic in the FBI’s larger counterterrorism investigations, which predate and go beyond Monteilh’s source work. The effort to separate privileged from nonprivileged

information—even with the protective procedures available to the Court—presents an unjustifiable risk of disclosing state secrets. As the Ninth Circuit observed, “[a]dversarial litigation, including pretrial discovery of documents and witnesses and the presentation of documents and testimony at trial, is inherently complex and unpredictable.” *Jeppesen Dataplan*, 614 F.3d at 1089. “Although district courts are well equipped to wall off isolated secrets from disclosure, the challenge is exponentially greater in exceptional cases like this one, where the relevant secrets are difficult or impossible to isolate and even efforts to define a boundary between privileged and unprivileged evidence would risk disclosure by implication.” *Id.* In such rare circumstances, as here, the risk of disclosure that further litigation would engender cannot be averted through protective orders or restrictions on testimony. *Id.* This is true even as to Plaintiffs’ Fourth Amendment claim because it is impossible to excise the facts directly related to this claim from the factual context of Operation Flex as a whole, and that context forms an important background for a finder of fact to consider in her analysis. While this case is only at the pleading stage and Plaintiffs have not yet propounded any discovery requests, (Arulanantham Decl. ¶ 2), Defendants need not wait before discovery or evidentiary disputes are at issue to assert the privilege for dismissal. *Jeppesen Dataplan*, 614 F.3d at 1081 (“Courts are not required to play with fire and chance further disclosure—inadvertent, mistaken, or even intentional—that would defeat the very purpose for which the privilege exists.”) (quoting *Sterling v. Tenet*, 416 F.3d 338, 344 (4th Cir. 2005)). Accordingly, because further litigation of this action would create “an unjustifiable risk of revealing state secrets” related to

the FBI's counterterrorism investigations, dismissal of Plaintiffs' claims is warranted. *Id.* at 614 F.3d at 1088.

V. CONCLUSION

The state secrets privilege strives to achieve a difficult compromise between the principles of national security and constitutional freedoms. The state secrets privilege can only be invoked and applied with restraint, in narrow circumstances, and infused with judicial skepticism. Yet, when properly invoked, it is absolute—the interest of protecting state secrets cannot give way to any other need or interest. Navigating through the narrow straits of the state secrets privilege has not been an easy or enviable task for the Court. In the context of the Executive's counterterrorism efforts engendered by 9/11, the Court has been confronted with the difficult task of balancing its obligation to defer to the Executive in matters of national security with its duty to promote open judicial inquiry. Too much deference would short-circuit constitutional liberties while too much judicial inquiry would risk disclosure of information that would jeopardize national security. In struggling with this conflict, the Court is reminded of the classic dilemma of Odysseus, who faced the challenge of navigating his ship through a dangerous passage, flanked by a voracious six-headed monster, on the one side, and a deadly whirlpool, on the other. Odysseus opted to pass by the monster and risk a few of his individual sailors, rather than hazard the loss of his entire ship to the sucking whirlpool. Similarly, the proper application of the state secrets privilege may unfortunately mean the sacrifice of individual liberties for the sake of national security. *El-Masri*, 479 F.3d at 313 (“[A] plaintiff suffers this reversal not through any fault of his own, but because his

personal interest in pursuing his civil claim is subordinated to the collective interest in national security.”); *Sterling*, 416 F.3d at 348 (“[T]here can be no doubt that, in limited circumstances . . . the fundamental principle of access to court must bow to the fact that a nation without sound intelligence is a nation at risk.”); *Fitzgerald v. Penthouse Int’l, Ltd.*, 776 F.2d 1236, 1238 n.3 (4th Cir. 1985) (“When the state secrets privilege is validly asserted, the result is unfairness to individual litigants—through the loss of important evidence or dismissal of a case—in order to protect a greater public value.”)

The Court recognizes the weight of its conclusion that Plaintiffs must be denied a judicial forum for their claims. The Court does not reach its decision today lightly, but does so only reluctantly, after months of careful review of the parties’ submissions and arguments, particularly the Government’s *in camera* materials upon which the Court heavily relies. Plaintiffs raise the specter of *Korematsu v. United States*, 323 U.S. 214, 65 S. Ct. 193, 89 L. Ed. 194 (1944), and protest that dismissing their claims based upon the state secrets privilege would permit a “remarkable assertion of power” by the Executive, and that any practice, no matter how abusive, may be immunized from legal challenge by being labeled as “counterterrorism” and “state secrets.” (Pls. Opp’n to Gov’t, at 20, 41-42.) But such a claim assumes that courts simply rubber stamp the Executive’s assertion of the state secrets privilege. That is not the case here. The Court has engaged in rigorous judicial scrutiny of the Government’s assertion of privilege and thoroughly reviewed the public and classified filings with a skeptical eye. The Court firmly believes that after careful examination of all the parties’ submissions, the present action falls squarely within the narrow class

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of cases that require dismissal of claims at the outset of the proceeding on state secret grounds. Accordingly, all of Plaintiffs' causes of action against Defendants, aside from their FISA claim, are DISMISSED.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

Case No. 8:11-cv-00301-CJC (VBKx)

YASSIR FAZAGA, ALI UDDIN MALIK, YASSER
ABDELRAHIM, PLAINTIFFS

v.

FEDERAL BUREAU OF INVESTIGATION, ET AL.,
DEFENDANTS

Aug. 14, 2012

**ORDER GRANTING IN PART DEFENDANTS'
MOTIONS TO DISMISS PLAINTIFFS' FISA CLAIM**

CORMAC J. CARNEY, District Judge.

I. INTRODUCTION & BACKGROUND

On February 22, 2011, Plaintiffs, three Muslim residents in Southern California, filed a putative class action suit against the Federal Bureau of Investigation (“FBI”), the United States of America, and seven FBI officers and agents (collectively, “Defendants”) for claims arising from a group of counterterrorism investigations, known as “Operation Flex,” conducted in Plaintiffs’ com-

munity with the help of a civilian informant, Craig Monteilh, from 2006 to 2007.¹ Plaintiffs allege that, as part of Operation Flex, the FBI employed Monteilh to gather information in various Islamic community centers in Orange County by presenting himself as a Muslim convert. Plaintiffs allege that Monteilh was paid by the FBI to collect information on Muslims under an assumed identity and “infiltrate[] several mainstream mosques in Southern California.” (First Amended Complaint (“FAC”) ¶ 1.) They further allege that the FBI conducted a “dragnet investigation” using Monteilh to “indiscriminately collect personal information on hundreds and perhaps thousands of innocent Muslim Americans in Southern California” over a fourteen-month period. (*Id.* ¶ 2.) Through these actions, Plaintiffs assert that the FBI gathered hundreds of hours of video and thousands of hours of audio recordings from “the inside of mosques, homes, businesses, and associations of hundreds of Muslims,” including at times where Monteilh was not present with the recording device. (*Id.*) Plaintiffs also assert that Defendants collected hundreds of phone numbers and thousands of email addresses. (*Id.*) Based on these factual allegations, Plaintiffs as-

¹ Plaintiffs are Yassir Fazaga, Ali Uddin Malik, and Yasser AbdelRahim. The FBI officers are Robert Mueller, Director of the FBI, and Steven M. Martinez, Assistant Director in Charge of the FBI Los Angeles Division, sued in their official capacities. FBI agents are J. Stephen Tidwell, Barbara Walls, Pat Rose, Kevin Armstrong, and Paul Allen, sued in their individual capacities. The Court will hereinafter refer to the FBI, the United States, Director Mueller, and Assistant Director Martinez as the “Government.” The Court will hereinafter refer to Agents Tidwell, Walls, Rose, Armstrong, and Allen as the “Agent Defendants.”

sert claims for violations of the First Amendment’s Establishment and Free Exercise Clauses, the Religious Freedom Restoration Act, the Fifth Amendment’s Equal Protection Clause, the Privacy Act, the Fourth Amendment, the Foreign Intelligence Surveillance Act (“FISA”), 50 U.S.C. § 1810, and the Federal Tort Claims Act.

The FBI denies any wrongdoing, asserting that it did not engage in unconstitutional and unlawful practices. Instead, the FBI asserts that it undertook reasonably-measured investigatory actions in response to credible evidence of potential terrorist activity. Defendants now move to dismiss Plaintiffs’ claims. This Order addresses Defendants’ motions as to Plaintiffs’ FISA claim only.² As to that claim, Defendants’ motions are GRANTED with respect to the Government, but DENIED as to the Agent Defendants.

II. ANALYSIS

A. FISA

Plaintiffs bring their FISA claim pursuant to Section 1810 of Title 50 of the United States Code. Section 1810 provides:

An aggrieved person, other than a foreign power or an agent of a foreign power, as defined in section 1801(a) or (b)(1)(A) of this title, respectively, who has been subjected to an electronic surveillance or about whom information obtained by electronic surveil-

² Defendants’ motions to dismiss Plaintiffs’ other claims based on the state secrets privilege are addressed in the Court’s separate, concurrently—issued Order. The factual background and procedural history of this case are discussed in greater detail in that Order.

lance of such person has been disclosed or used in violation of section 1809 of this title shall have a cause of action against any person who committed such violation and shall be entitled to recover—

- (a) actual damages, but not less than liquidated damages of \$1,000 or \$100 per day for each day of violation, whichever is greater;
- (b) punitive damages; and
- (c) reasonable attorney's fees and other investigation and litigation costs reasonably incurred.

50 U.S.C. § 1810. An aggrieved person means “a person who is the target of an electronic surveillance or any other person whose communications or activities were subject to electronic surveillance.” *Id.* § 1801(k). A person is defined as “any individual, including any officer or employee of the Federal Government, or any group, entity, association, corporation, or foreign power.” *Id.* § 1801(m). FISA defines electronic surveillance as:

- (1) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire or radio communication sent by or intended to be received by a particular, known United States person who is in the United States, if the contents are acquired by intentionally targeting that United States person, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes;
- (2) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if

such acquisition occurs in the United States, but does not include the acquisition of those communications of computer trespassers that would be permissible under section 2511(2)(i) of Title 18;

(3) the intentional acquisition by an electronic, mechanical, or other surveillance device of the contents of any radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, and if both the sender and all intended recipients are located within the United States; or

(4) the installation or use of an electronic, mechanical, or other surveillance device in the United States for monitoring to acquire information, other than from a wire or radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes.

Id. § 1801(f). Section 1809 criminalizes two types of conduct:

A person is guilty of an offense if he intentionally—

(1) engages in electronic surveillance under color of law except as authorized by this chapter, chapter 119, 121, or 206 of Title 18 or any express statutory authorization that is an additional exclusive means for conducting electronic surveillance under section 1812 of this title; or

(2) discloses or uses information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through electronic surveillance not authorized by this

chapter, chapter 119, 121, or 206 of Title 18, or any express statutory authorization that is an additional exclusive means for conducting electronic surveillance under section 1812 of this title.

Id. § 1809(a). A person may assert, as a defense to prosecution under this section, that he “was a law enforcement or investigative officer engaged in the course of his official duties and the electronic surveillance was authorized by and conducted pursuant to a search warrant or court order of a court of competent jurisdiction.” *Id.* § 1809(b).

B. Sovereign Immunity

The Government moves to dismiss Plaintiffs’ FISA claim pursuant to Federal Rule of Civil Procedure Rule 12(b)(1) on the ground that the claim is barred by sovereign immunity. “The United States, including its agencies and employees, can be sued only to the extent that it has expressly waived its sovereign immunity.” *Kaiser v. Blue Cross of Cal.*, 347 F.3d 1107, 1117 (9th Cir. 2003) (citing *United States v. Testan*, 424 U.S. 392, 399, 96 S. Ct. 948, 47 L. Ed. 2d 114 (1976)). “[A]ny lawsuit against an agency of the United States or against an officer of the United States in his or her official capacity is considered an action against the United States.” *Balser v. Dep’t of Justice, Office of the U.S. Tr.*, 327 F.3d 903, 907 (9th Cir. 2003) (citing *Sierra Club v. Whitman*, 268 F.3d 898, 901 (9th Cir. 2001)). “[S]uits against officials of the United States . . . in their official capacity are barred if there has been no waiver” of sovereign immunity. *Sierra Club*, 268 F.3d at 901. Absent a waiver of sovereign immunity, courts have no subject matter jurisdiction over cases against the government. *United States v. Mitchell*, 463 U.S. 206, 212, 103 S. Ct.

2961, 77 L. Ed. 2d 580 (1983). “A waiver of the Federal Government’s sovereign immunity must be unequivocally expressed in statutory text . . . and will not be implied.” *Lane v. Pena*, 518 U.S. 187, 192, 116 S. Ct. 2092, 135 L. Ed. 2d 486 (1996). Waiver of sovereign immunity is to be strictly construed in favor of the sovereign. *Id.*; *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34, 112 S. Ct. 1011, 117 L. Ed. 2d 181 (1992).

On August 7, 2012, the Ninth Circuit held that Congress “deliberately did not waive [sovereign] immunity with respect to § 1810” and thus a plaintiff may not bring a suit for damages against the government under that provision. *Al-Haramain Islamic Found., Inc. v. Obama*, 690 F.3d 1089, 1099-1100 (9th Cir. 2012). The Ninth Circuit reversed the district court’s decision that Congress implicitly waived sovereign immunity for Section 1810. *Id.* at 1093-1100. The Ninth Circuit held that the district court’s finding was erroneous for three reasons.

First, the Ninth Circuit concluded that the district court erred in finding an implicit waiver because the Supreme Court has held that sovereign immunity cannot be waived by implication. *Id.* at 1093-94 (quoting *United States v. Mitchell*, 445 U.S. 535, 538, 100 S. Ct. 1349, 63 L. Ed. 2d 607 (1980)). The waiver must be “unequivocally expressed.” *Id.* (quoting *Mitchell*, 445 U.S. at 538, 100 S. Ct. 1349).

Second, the Ninth Circuit found that a conclusion that Congress intended to implicitly waive sovereign immunity was unwarranted given that Congress had expressly waived sovereign immunity, and permitted civil actions for damages against the United States, for other sections of FISA. *Id.* at 1094-98 (citing 18 U.S.C. § 2712).

Section 2712 of Title 18 of the United States Code, enacted as part of the Patriot Act, permits actions against the United States to recover money damages for violations of Sections 1806(a), 1825(a), and 1845(a) of FISA. A person may, therefore, bring a suit against the government if the government (1) uses or discloses information obtained from electronic surveillance conducted pursuant to the FISA subchapter on electronic surveillance without consent and without following FISA's minimization procedures or without a lawful purpose, 50 U.S.C. § 1806(a); (2) uses or discloses information from a physical search conducted pursuant to the FISA subchapter on physical searches without consent and without following the minimization procedures or without a lawful purpose, *id.* § 1825(a); or (3) uses or discloses information obtained from a pen register or trap and trace device installed pursuant to the FISA subchapter on such devices without following the requirements of Section 1845, *id.* § 1845(a). Congress clearly knew how to waive sovereign immunity for certain violations of FISA. It decided, in its wisdom, not to do so for violations of Section 1810.

Third, the Ninth Circuit explained that “the relationship between [Section] 1809 and [Section] 1810” further demonstrates that Congress did not intend to permit an action against the government for violations of Section 1810. Specifically, the Ninth Circuit explained that because of this relationship, to impose official capacity liability under Section 1810, it “must also suppose that a criminal prosecution may be maintained against an office, rather than an individual, under [Section] 1809.” *Id.* at 1098. The Ninth Circuit found that imposing such “unprecedented” official capacity liability for criminal violations, in essence “imposing criminal penalties

against an office for the actions of the officeholder,” would be “patently absurd.” *Id.* at 1099 (citing *United States v. Singleton*, 165 F.3d 1297, 1299-1300 (10th Cir. 1999)).”

The Ninth Circuit’s decision in *Al-Haramain* is dispositive here. Sovereign immunity is not waived for violations of Section 1810. Consequently, Plaintiffs’ Section 1810 claim against the Government is DISMISSED WITH PREJUDICE.

C. Qualified Immunity

The Agent Defendants move under Federal Rule of Civil Procedure 12(b)(6) for dismissal of Plaintiffs’ FISA claim arguing that they are entitled to qualified immunity. A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint. The issue on a motion to dismiss for failure to state a claim is not whether the claimant will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims asserted. *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997). When evaluating a Rule 12(b)(6) motion, the district court must accept all material allegations in the complaint as true and construe them in the light most favorable to the non-moving party. *Moyo v. Gomez*, 32 F.3d 1382, 1384 (9th Cir. 1994). Rule 12(b)(6) is read in conjunction with Rule 8(a), which requires only a short and plain statement of the claim showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2). Dismissal of a complaint for failure to state a claim is not proper where a plaintiff has alleged “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). In keeping with this liberal pleading standard,

the district court should grant the plaintiff leave to amend if the complaint can possibly be cured by additional factual allegations. *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995).

“Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was ‘clearly established’ at the time of the challenged conduct.” *Ashcroft v. al-Kidd*, — U.S. —, 131 S. Ct. 2074, 2080, 179 L. Ed. 2d 1149 (2011) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)). The district court may address the two prongs in any order. *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009).

The doctrine of qualified immunity was established to protect government officials “from liability for civil damages insofar as their conduct does not violate any clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow*, 457 U.S. at 818, 102 S. Ct. 2727. A right is clearly established if “it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.” *Saucier v. Katz*, 533 U.S. 194, 202, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001), *overruled on other grounds by Pearson*, 555 U.S. at 236-37, 129 S. Ct. 808. Law may be clearly established “notwithstanding the absence of direct precedent. . . . Otherwise, officers would escape responsibility for the most egregious forms of conduct simply because there was no case on all fours prohibiting that particular manifestation of unconstitutional [or unlawful] conduct.” *Deorle v. Rutherford*, 272 F.3d 1272, 1285-86 (9th Cir. 2001). “Rather,

what is required is that government officials have ‘fair and clear warning’ that their conduct is unlawful.” *Devereaux v. Abbey*, 263 F.3d 1070, 1075 (9th Cir. 2001) (quoting *United States v. Lanier*, 520 U.S. 259, 271, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997)).

The Agent Defendants are not entitled to dismissal of Plaintiffs’ FISA claim based on qualified immunity. Plaintiffs have pleaded sufficient facts to demonstrate that, taken in the light most favorable to them, they are “aggrieved persons” and that the Agent Defendants violated a clearly established statutory right created by FISA. FISA constitutes clearly established law governing electronic surveillance, including that of the kind engaged in by the Agent Defendants. Sections 1809 and 1810 clearly prohibit “the installation or use of an electronic, mechanical, or other surveillance device in the United States for monitoring to acquire information, other than from a wire or radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes,” 50 U.S.C. § 1801(f), “under color of law except as authorized by [FISA], chapter 119, 121, or 206 of Title 18 or any express statutory authorization that is an additional exclusive means for conducting electronic surveillance under section 1812 [of FISA].” 50 U.S.C. § 1809(a)(1).

The Agent Defendants argue that they are entitled to qualified immunity because it was not clearly established that Plaintiffs were “aggrieved persons.” Specifically, the Agent Defendants argue that Plaintiffs did not have a clearly established reasonable expectation of privacy with respect to the situations in which they were electronically surveilled. The Court disagrees. FISA’s

“aggrieved person” status is coextensive with standing under the Fourth Amendment for claims involving electronic surveillance. *See ACLU v. Nat’l Sec. Agency*, 493 F.3d 644, 658 n.16 (6th Cir. 2007) (citing H.R. Rep. No. 95-1283, at 66 (1978)). Thus, the law regarding the reasonable expectation of privacy in the Fourth Amendment context governs here and is clearly established. A person has a reasonable expectation of privacy where he “has shown that ‘he seeks to preserve [something] as private’” and his “subjective expectation of privacy is ‘one that society is prepared to recognize as ‘reasonable.’” *Smith v. Maryland*, 442 U.S. 735, 740, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979) (citing *Katz v. United States*, 389 U.S. 347, 351, 361, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)). Notably, “[p]rivacy does not require solitude,” *United States v. Taketa*, 923 F.2d 665, 673 (9th Cir. 1991), and even open areas may be private places so long as they are not “so open to [others] or the public that no expectation of privacy is reasonable,” *O’Connor v. Ortega*, 480 U.S. 709, 718, 107 S. Ct. 1492, 94 L. Ed. 2d 714 (1987).

As noted by Plaintiffs in their opposition:

The complaint sets forth detailed allegations that Defendants planted electronic listening devices in one Plaintiff’s home and another’s office, that their informant left recording devices to capture intimate religious discussion at the mosque, that the informant routinely took video in mosques and in private homes, and that the informant acted pursuant to broad instructions to gather as much information on Muslims as possible.

(Pls. Combined Opp’n, at 64; *see also* FAC ¶¶ 95, 209, 127, 137, 192, 193, 202, 211.) The FAC alleges that this

surveillance often took place outside the presence of the informant and was all conducted without a warrant. (FAC ¶¶ 86-137.) A reasonable officer knows that there is a reasonable expectation of privacy in one's home, office, and in certain discrete areas of a mosque as described in the FAC, (*id.*). See *Kyllo v. United States*, 533 U.S. 27, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001) (finding a reasonable expectation of privacy exists in one's home); *O'Connor v. Ortega*, 480 U.S. 709, 107 S. Ct. 1492 (finding that a reasonable expectation of privacy can exist in a person's work place and office); *Mockaitis v. Harcleroad*, 104 F.3d 1522 (9th Cir. 1997) (finding a reasonable expectation of privacy arising out of religious customs of confidentiality such as confession), *overruled on other grounds by United States v. Antoine*, 318 F.3d 919 (9th Cir. 2003).³

Agent Rose argues that she is entitled to qualified immunity because Plaintiffs have failed to plausibly allege that she violated FISA based on *Ashcroft v. Iqbal*. Again, the Court disagrees. In *Iqbal*, the Supreme Court held that a supervisor may not be held liable for a constitutional violation on the basis of *respondeat superior* or vicarious liability, but instead, a plaintiff must

³ Agent Defendants also argue that they are entitled to qualified immunity because it was not clearly established that they could be liable under Section 1810 in their individual capacity, based upon the Northern District's ruling that Section 1810 imposed only official capacity liability that was reversed by *Al-Haramain*. The Court disagrees. Regardless of the nature of the remedy permitted by Section 1810, both that section and Section 1809 clearly establish that the conduct allegedly engaged in by the individual defendants was unlawful. The qualified immunity analysis focuses on the legality of the conduct, not the remedy available to a plaintiff or the procedure for seeking that remedy.

allege sufficient facts to plausibly allege liability based upon the supervisor's individual conduct. *Ashcroft v. Iqbal*, 556 U.S. 662, 675-76, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). Contrary to Agent Rose's assertion, Plaintiffs do allege intentional and wrongful conduct on her part. The FAC alleges:

Upon information and belief, Defendant Pat Rose was, at all times relevant to this action, employed by the FBI and acting in the scope of her employment as a Special Agent. Upon information and belief, Agent Rose was assigned to the FBI's Santa Ana branch office, where she supervised the FBI's Orange County national security investigations and was one of the direct supervisors of Agents Allen and Armstrong. Upon information and belief, Defendant Rose was regularly apprised of the information Agents Armstrong and Allen collected through Monteilh; directed the action of the FBI agents on various occasions based on that information; and actively monitored, directed, and authorized the actions of Agents Armstrong and Allen and other agents at all times relevant in this action, for the purpose of surveilling Plaintiffs and other putative class members because they were Muslim. Agent Rose also sought additional authorization to expand the scope of the surveillance program described [in the FAC], in an effort to create a Muslim gym that the FBI would use to gather yet more information about the class.

(FAC ¶ 22.) The FAC further alleges that all of the Agent Defendants, including Agent Rose, "maintained extremely close oversight and supervision of Monteilh" and "because they made extensive use of the results of his surveillance, they knew in great detail the nature

and scope of the operation, including the methods of surveillance Monteilh used and the criteria used to decide his targets, and continually authorized their ongoing use.” (*Id.* ¶ 138.) These allegations amount to intentional, individual conduct on the part of Agent Rose that, taken in the light most favorable to Plaintiffs, demonstrates a violation of Section 1810 that satisfies the pleading requirements of *Iqbal*.

Finally, Agents Tidwell and Walls assert that Plaintiffs’ FISA claim should be dismissed because it fails to allege that they engaged in the alleged surveillance activity with the intent to violate the law. Dismissal on this basis is unsupported by the plain language of FISA or judicial precedent interpreting Section 1809. Section 1809 imposes liability for those who “intentionally engage in electronic surveillance under color of law except as authorized.” 50 U.S.C. § 1809. The statute requires that Agents Tidwell and Walls intended to conduct unauthorized electronic surveillance. The FAC makes clear that the Agents did intentionally engage in such surveillance without authorization. More is not required.⁴

III. CONCLUSION

For the foregoing reasons, with respect to Plaintiffs’ FISA Section 1810 claim, the Government’s motion to dismiss is GRANTED and the Agent Defendants’ motions to dismiss are DENIED.

⁴ The Court, however, declines at this time to rule on the issue of whether Plaintiffs’ FISA claim should be dismissed under the state secrets privilege, as that issue was not before the Court.

APPENDIX D

1. 50 U.S.C. 1801 provides:

Definitions

As used in this subchapter:

(a) “Foreign power” means—

(1) a foreign government or any component thereof, whether or not recognized by the United States;

(2) a faction of a foreign nation or nations, not substantially composed of United States persons;

(3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments;

(4) a group engaged in international terrorism or activities in preparation therefor;

(5) a foreign-based political organization, not substantially composed of United States persons;

(6) an entity that is directed and controlled by a foreign government or governments; or

(7) an entity not substantially composed of United States persons that is engaged in the international proliferation of weapons of mass destruction.

(b) “Agent of a foreign power” means—

(1) any person other than a United States person, who—

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(A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4), irrespective of whether the person is inside the United States;

(B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances indicate that such person may engage in such activities, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities;

(C) engages in international terrorism or activities in preparation therefore;

(D) engages in the international proliferation of weapons of mass destruction, or activities in preparation therefor; or

(E) engages in the international proliferation of weapons of mass destruction, or activities in preparation therefor, for or on behalf of a foreign power, or knowingly aids or abets any person in the conduct of such proliferation or activities in preparation therefor, or knowingly conspires with any person to engage in such proliferation or activities in preparation therefor; or

(2) any person who—

(A) knowingly engages in clandestine intelligence gathering activities for or on behalf

of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States;

(B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States;

(C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, for or on behalf of a foreign power;

(D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or

(E) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C) or knowingly conspires with any person to engage in activities described in subparagraph (A), (B), or (C).

(c) “International terrorism” means activities that—

(1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would

be a criminal violation if committed within the jurisdiction of the United States or any State;

(2) appear to be intended—

(A) to intimidate or coerce a civilian population;

(B) to influence the policy of a government by intimidation or coercion; or

(C) to affect the conduct of a government by assassination or kidnapping; and

(3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

(d) “Sabotage” means activities that involve a violation of chapter 105 of title 18, or that would involve such a violation if committed against the United States.

(e) “Foreign intelligence information” means—

(1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against—

(A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

(B) sabotage, international terrorism, or the international proliferation of weapons of mass destruction by a foreign power or an agent of a foreign power; or

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(C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or

(2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to—

(A) the national defense or the security of the United States; or

(B) the conduct of the foreign affairs of the United States.

(f) “Electronic surveillance” means—

(1) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire or radio communication sent by or intended to be received by a particular, known United States person who is in the United States, if the contents are acquired by intentionally targeting that United States person, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes;

(2) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs in the United States, but does not include the acquisition of those communications of computer trespassers that would be permissible under section 2511(2)(i) of title 18;

(3) the intentional acquisition by an electronic, mechanical, or other surveillance device of the

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contents of any radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, and if both the sender and all intended recipients are located within the United States; or

(4) the installation or use of an electronic, mechanical, or other surveillance device in the United States for monitoring to acquire information, other than from a wire or radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes.

(g) “Attorney General” means the Attorney General of the United States (or Acting Attorney General), the Deputy Attorney General, or, upon the designation of the Attorney General, the Assistant Attorney General designated as the Assistant Attorney General for National Security under section 507A of title 28.

(h) “Minimization procedures”, with respect to electronic surveillance, means—

(1) specific procedures, which shall be adopted by the Attorney General, that are reasonably designed in light of the purpose and technique of the particular surveillance, to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information;

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(2) procedures that require that nonpublicly available information, which is not foreign intelligence information, as defined in subsection (e)(1), shall not be disseminated in a manner that identifies any United States person, without such person's consent, unless such person's identity is necessary to understand foreign intelligence information or assess its importance;

(3) notwithstanding paragraphs (1) and (2), procedures that allow for the retention and dissemination of information that is evidence of a crime which has been, is being, or is about to be committed and that is to be retained or disseminated for law enforcement purposes; and

(4) notwithstanding paragraphs (1), (2), and (3), with respect to any electronic surveillance approved pursuant to section 1802(a) of this title, procedures that require that no contents of any communication to which a United States person is a party shall be disclosed, disseminated, or used for any purpose or retained for longer than 72 hours unless a court order under section 1805 of this title is obtained or unless the Attorney General determines that the information indicates a threat of death or serious bodily harm to any person.

(i) "United States person" means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the

United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3).

(j) “United States”, when used in a geographic sense, means all areas under the territorial sovereignty of the United States and the Trust Territory of the Pacific Islands.

(k) “Aggrieved person” means a person who is the target of an electronic surveillance or any other person whose communications or activities were subject to electronic surveillance.

(l) “Wire communication” means any communication while it is being carried by a wire, cable, or other like connection furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications.

(m) “Person” means any individual, including any officer or employee of the Federal Government, or any group, entity, association, corporation, or foreign power.

(n) “Contents”, when used with respect to a communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication.

(o) “State” means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Trust Territory of the Pacific Islands, and any territory or possession of the United States.

- (p) “Weapon of mass destruction” means—
- (1) any explosive, incendiary, or poison gas device that is designed, intended, or has the capability to cause a mass casualty incident;
 - (2) any weapon that is designed, intended, or has the capability to cause death or serious bodily injury to a significant number of persons through the release, dissemination, or impact of toxic or poisonous chemicals or their precursors;
 - (3) any weapon involving a biological agent, toxin, or vector (as such terms are defined in section 178 of title 18) that is designed, intended, or has the capability to cause death, illness, or serious bodily injury to a significant number of persons; or
 - (4) any weapon that is designed, intended, or has the capability to release radiation or radioactivity causing death, illness, or serious bodily injury to a significant number of persons.

2. 50 U.S.C. 1806 provides:

Use of information

- (a) **Compliance with minimization procedures; privileged communications; lawful purposes**

Information acquired from an electronic surveillance conducted pursuant to this subchapter concerning any United States person may be used and disclosed by Federal officers and employees without the consent of the United States person only in accordance with the minimization procedures required by this subchapter. No

otherwise privileged communication obtained in accordance with, or in violation of, the provisions of this subchapter shall lose its privileged character. No information acquired from an electronic surveillance pursuant to this subchapter may be used or disclosed by Federal officers or employees except for lawful purposes.

(b) Statement for disclosure

No information acquired pursuant to this subchapter shall be disclosed for law enforcement purposes unless such disclosure is accompanied by a statement that such information, or any information derived therefrom, may only be used in a criminal proceeding with the advance authorization of the Attorney General.

(c) Notification by United States

Whenever the Government intends to enter into evidence or otherwise use or disclose in any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, against an aggrieved person, any information obtained or derived from an electronic surveillance of that aggrieved person pursuant to the authority of this subchapter, the Government shall, prior to the trial, hearing, or other proceeding or at a reasonable time prior to an effort to so disclose or so use that information or submit it in evidence, notify the aggrieved person and the court or other authority in which the information is to be disclosed or used that the Government intends to so disclose or so use such information.

(d) Notification by States or political subdivisions

Whenever any State or political subdivision thereof intends to enter into evidence or otherwise use or disclose in any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of a State or a political subdivision thereof, against an aggrieved person any information obtained or derived from an electronic surveillance of that aggrieved person pursuant to the authority of this subchapter, the State or political subdivision thereof shall notify the aggrieved person, the court or other authority in which the information is to be disclosed or used, and the Attorney General that the State or political subdivision thereof intends to so disclose or so use such information.

(e) Motion to suppress

Any person against whom evidence obtained or derived from an electronic surveillance to which he is an aggrieved person is to be, or has been, introduced or otherwise used or disclosed in any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the evidence obtained or derived from such electronic surveillance on the grounds that—

- (1) the information was unlawfully acquired; or
- (2) the surveillance was not made in conformity with an order of authorization or approval.

Such a motion shall be made before the trial, hearing, or other proceeding unless there was no opportunity to make such a motion or the person was not aware of the grounds of the motion.

(f) In camera and ex parte review by district court

Whenever a court or other authority is notified pursuant to subsection (c) or (d) of this section, or whenever a motion is made pursuant to subsection (e) of this section, or whenever any motion or request is made by an aggrieved person pursuant to any other statute or rule of the United States or any State before any court or other authority of the United States or any State to discover or obtain applications or orders or other materials relating to electronic surveillance or to discover, obtain, or suppress evidence or information obtained or derived from electronic surveillance under this chapter, the United States district court or, where the motion is made before another authority, the United States district court in the same district as the authority, shall, notwithstanding any other law, if the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States, review in camera and ex parte the application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted. In making this determination, the court may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other materials relating to the surveillance only where such disclosure is necessary to make an accurate determination of the legality of the surveillance.

(g) Suppression of evidence; denial of motion

If the United States district court pursuant to subsection (f) determines that the surveillance was not lawfully authorized or conducted, it shall, in accordance with

the requirements of law, suppress the evidence which was unlawfully obtained or derived from electronic surveillance of the aggrieved person or otherwise grant the motion of the aggrieved person. If the court determines that the surveillance was lawfully authorized and conducted, it shall deny the motion of the aggrieved person except to the extent that due process requires discovery or disclosure.

(h) Finality of orders

Orders granting motions or requests under subsection (g), decisions under this section that electronic surveillance was not lawfully authorized or conducted, and orders of the United States district court requiring review or granting disclosure of applications, orders, or other materials relating to a surveillance shall be final orders and binding upon all courts of the United States and the several States except a United States court of appeals and the Supreme Court.

(i) Destruction of unintentionally acquired information

In circumstances involving the unintentional acquisition by an electronic, mechanical, or other surveillance device of the contents of any communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, and if both the sender and all intended recipients are located within the United States, such contents shall be destroyed upon recognition, unless the Attorney General determines that the contents indicate a threat of death or serious bodily harm to any person.

(j) Notification of emergency employment of electronic surveillance; contents; postponement, suspension or elimination

If an emergency employment of electronic surveillance is authorized under subsection (e) or (f) of section 1805 of this title and a subsequent order approving the surveillance is not obtained, the judge shall cause to be served on any United States person named in the application and on such other United States persons subject to electronic surveillance as the judge may determine in his discretion it is in the interest of justice to serve, notice of—

- (1) the fact of the application;
- (2) the period of the surveillance; and
- (3) the fact that during the period information was or was not obtained.

On an ex parte showing of good cause to the judge the serving of the notice required by this subsection may be postponed or suspended for a period not to exceed ninety days. Thereafter, on a further ex parte showing of good cause, the court shall forego ordering the serving of the notice required under this subsection.

(k) Coordination with law enforcement on national security matters

(1) Federal officers who conduct electronic surveillance to acquire foreign intelligence information under this subchapter may consult with Federal law enforcement officers or law enforcement personnel of a State or political subdivision of a State (including the chief executive officer of that State or political subdivision who has

the authority to appoint or direct the chief law enforcement officer of that State or political subdivision) to coordinate efforts to investigate or protect against—

(A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

(B) sabotage, international terrorism, or the international proliferation of weapons of mass destruction by a foreign power or an agent of a foreign power; or

(C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power.

(2) Coordination authorized under paragraph (1) shall not preclude the certification required by section 1804(a)(7)(B)¹ of this title or the entry of an order under section 1805 of this title.

3. 50 U.S.C. 1809 provides:

Criminal sanctions

(a) Prohibited activities

A person is guilty of an offense if he intentionally—

(1) engages in electronic surveillance under color of law except as authorized by this chapter, chapter 119, 121, or 206 of title 18, or any express statutory authorization that is an additional exclusive means

¹ See References in Text note below.

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for conducting electronic surveillance under section 1812 of this title;

(2) discloses or uses information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through electronic surveillance not authorized by this chapter, chapter 119, 121, or 206 of title 18, or any express statutory authorization that is an additional exclusive means for conducting electronic surveillance under section 1812 of this title.

(b) Defense

It is a defense to a prosecution under subsection (a) that the defendant was a law enforcement or investigative officer engaged in the course of his official duties and the electronic surveillance was authorized by and conducted pursuant to a search warrant or court order of a court of competent jurisdiction.

(c) Penalties

An offense described in this section is punishable by a fine of not more than \$10,000 or imprisonment for not more than five years, or both.

(d) Federal jurisdiction

There is Federal jurisdiction over an offense under this section if the person committing the offense was an officer or employee of the United States at the time the offense was committed.

4. 50 U.S.C. 1810 provides:

Civil liability

An aggrieved person, other than a foreign power or an agent of a foreign power, as defined in section 1801(a) or (b)(1)(A) of this title, respectively, who has been subjected to an electronic surveillance or about whom information obtained by electronic surveillance of such person has been disclosed or used in violation of section 1809 of this title shall have a cause of action against any person who committed such violation and shall be entitled to recover—

- (a) actual damages, but not less than liquidated damages of \$1,000 or \$100 per day for each day of violation, whichever is greater;
- (b) punitive damages; and
- (c) reasonable attorney's fees and other investigation and litigation costs reasonably incurred.