No. 19-16066

In the United States Court of Appeals for the Ninth Circuit

CAROLYN JEWEL, et al.,
Plaintiffs–Appellants,

v.

NATIONAL SECURITY AGENCY, et al.,
Defendants–Appellees.

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, AND AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA IN SUPPORT OF PLAINTIFFS–APPELLANTS AND REVERSAL

On Appeal from the United States District Court
for the Northern District of California
Case No. 08-cv-04373-JSW

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CORPORATE DISCLOSURE STATEMENT

Amici curiae American Civil Liberties Union ("ACLU"), ACLU of Northern California, and ACLU of Southern California state that they do not have parent corporations. No publicly held corporation owns 10% or more of any stake or stock in amici curiae.

Dated: September 13, 2019

/s/ Ashley Gorski
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STATEMENT OF INTEREST[1]

The ACLU is a nationwide, nonprofit, nonpartisan organization with more than 1.5 million members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of Northern California and the ACLU of Southern California are state affiliates of the national ACLU. The ACLU, ACLU of Northern California, and ACLU of Southern California have appeared before the federal courts in numerous cases implicating civil liberties and the state secrets privilege, including as counsel in *Fazaga v. FBI*, 916 F.3d 1202 (9th Cir. 2019), *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010) (en banc), *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007), *Wikimedia Foundation v. NSA*, 335 F. Supp. 3d 772 (D. Md. 2018), and as amicus curiae in *Ibrahim v. U.S. Department of Homeland Security*, 912 F.3d 1147 (9th Cir. 2019).

[1] This brief is filed pursuant to Fed. R. App. P. 29(a) with the consent of all parties. Counsel for amici curiae certify that no party's counsel authored this brief in whole or in part, and no person other than amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

INTRODUCTION

Congress enacted the Foreign Intelligence Surveillance Act ("FISA") to deter unlawful executive branch intelligence activities and afford meaningful redress to individuals subject to illegal surveillance. In furtherance of those goals, Congress mandated the use of specific discovery procedures in cases involving foreign intelligence surveillance. *See* 50 U.S.C. § 1806(f). In other contexts where the executive branch asserts that disclosure of materials would result in harm to national security, the government may rely on the common law "state secrets" privilege to exclude certain evidence from a case—and sometimes even to obtain outright dismissal. But Section 1806(f) of FISA reflects Congress's intent to chart a different course in cases challenging government surveillance, by mandating ex parte and in camera judicial review of sensitive information. Through Section 1806(f), Congress struck a careful and deliberate balance to facilitate accountability for unlawful surveillance: it limited plaintiffs' ability to access sensitive evidence, but at the same time ensured that potentially meritorious claims would be heard and resolved by the courts.

As this Court held in *Fazaga v. FBI*, 916 F.3d 1202, 1230–34 (9th Cir. 2019), where Section 1806(f) applies, its mandatory procedures displace the executive branch's state secrets privilege. For the reasons discussed below, Congress's authority to displace common law rules through legislation, as well as

separation-of-powers principles, requires precisely this result.

In this case, the lower court reviewed sensitive discovery materials in camera, as Section 1806(f) mandates. But following that review, the district court inexplicably and improperly reversed course: it resurrected the state secrets privilege as a basis for dismissal and shut the courthouse door on Plaintiffs' surveillance claims. That decision violates this Court's precedent. It also intrudes on Congress's power to ensure judicial oversight of surreptitious electronic surveillance and provide redress for executive branch overreach.

ARGUMENT

I. FISA's in camera review provision displaces the state secrets privilege.

A. This Court held in *Fazaga* that Section 1806(f) displaces the state secrets privilege.

In *Fazaga v. FBI*, 916 F.3d at 1230–34, this Court recognized that Section 1806(f)'s discovery procedures completely displace the state secrets privilege. The plaintiffs in *Fazaga* alleged that the FBI had conducted a covert, illegal surveillance program that gathered information about Muslims in Southern California based solely on their religion. *Id.* at 1210. The district court had dismissed several of the plaintiffs' statutory and constitutional claims on the basis of the state secrets privilege, finding that the challenge to the FBI's surveillance operation involved intelligence that, if disclosed, would significantly compromise national security. *Id.* at 1215–16.

On appeal, this Court reversed the district court's state secrets holding. It expressly held that the procedures mandated by Section 1806(f) displace the common law state secrets privilege. *Id.* at 1230, 1234 ("[I]n 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[.]").

Not only is *Fazaga* the law of this Circuit, but its holding is firmly supported by Congress's overriding purpose in enacting FISA, Congress's authority to displace common law evidentiary rules through legislation, and separation-of-powers principles, discussed below.

B. In enacting FISA's in camera review provision, Congress intended to regulate discovery of FISA-related information.

Congress enacted FISA in 1978 to govern surveillance conducted for foreign intelligence purposes. It did so after a congressional committee, led by Senator Frank Church, conducted an in-depth investigation into executive branch surveillance abuses. The investigation revealed that, over the course of decades, intelligence agencies had engaged in widespread warrantless surveillance of United States citizens. *See* Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities, Book II, S. Rep. No. 94-755 (1976) ("Church Committee Report"). In response to these abuses, the Church Committee called for "fundamental reform" of surveillance policies and practices, including the creation

of civil remedies for unlawful surveillance. *Id.* at 289, 337. The committee envisioned the application of "discovery procedures, including inspections of material in chambers . . . 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.

In response to the Church Committee's findings and recommendations for reform, Congress enacted FISA to create a comprehensive statutory scheme to prevent future misuse of electronic surveillance by the executive branch. *See, e.g.*, Church Committee Report at 289 ("[I]ntelligence activities have undermined the constitutional rights of citizens and . . . they have done so primarily because checks and balances designed by the framers of the Constitution to assure accountability have not been applied."); S. Rep. No. 95-604, pt. 1, at 7 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3904, 3908 ("This legislation is in large measure a response to the revelations that warrantless electronic surveillance in the name of national security has been seriously abused.").

One of the key components of the statute was the provision of civil remedies, together with procedures to ensure effective judicial review. In Section 1810 of FISA, Congress implemented the Church Committee's recommendations by authorizing individuals to bring civil claims for unlawful surveillance. 50

U.S.C. § 1810. And in Section 1806(f), it explicitly spelled out discovery procedures for both criminal and civil cases involving FISA surveillance. *See* 50 U.S.C. § 1806(f); H.R. Rep. No. 95-1720, at 31–32 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4048, 4060–61 ("an in camera and ex parte proceeding is appropriate . . . in both criminal and civil cases").[2] Because Section 1806(f) reflects Congress's decision about how to afford meaningful redress to individuals while accommodating executive branch claims of secrecy, Congress made its procedures mandatory, and it forbade parties from resorting to other discovery rules concerning FISA-related information. *See* S. Rep. No. 95-604, pt. 1, at 57 ("The Committee wishes to make very clear that the procedures set out in [Section 1806(f)] apply whatever the underlying rule or statute referred to in [a party's] motion. This is necessary to prevent the carefully drawn procedures in [Section 1806(f)] from being bypassed[.]").

C. Consistent with Congress's clear intent, Section 1806(f) displaces the state secrets privilege in cases involving foreign intelligence surveillance.

A congressional statute abrogates a federal common law rule, such as the state secrets privilege, if it "'speak[s] directly' to the question addressed by the common law." *United States v. Texas*, 507 U.S. 529, 534 (1993) (quoting *Mobil*

[2] The House of Representatives originally proposed two separate procedures, one for criminal cases and one for civil cases. *See* H.R. Rep. No. 95-1720, at 31–32. In Section 1806(f), Congress ultimately adopted a single in camera review procedure for courts to apply in both criminal and civil cases.

Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978)); *see also* Fed. R. Evid. 501. This displacement doctrine recognizes that Congress's legislative pronouncements supersede the federal courts' common law. *See Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 857 (9th Cir. 2012); *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 315 (1981) (observing that our nation's "commitment to the separation of powers is too fundamental to continue to rely on federal common law by judicial[] decree[] . . . when Congress has addressed the problem" (quotation marks omitted)). Through both the text of Section 1806(f) and FISA's legislative history, Congress spoke directly to the question of how to regulate discovery of FISA-related information, thereby displacing the common law state secrets privilege.[3]

The text of Section 1806(f) is deliberately broad in scope and mandatory in application. Its procedures apply whenever "*any* motion or request is made . . . pursuant to *any* . . . statute or rule of the United States" to "discover" materials relating to electronic surveillance. 50 U.S.C. § 1806(f) (emphases added). The statute applies to efforts to discover all "materials relating to electronic surveillance," "notwithstanding any other law." *Id.*; *see also* 18 U.S.C.

[3] *See, e.g.*, *Fazaga*, 916 F.3d at 1227 (observing that "the modern state secrets doctrine" was "[c]reated by federal common law"); *Gen. Dynamics Corp. v. United States*, 563 U.S. 478, 491 (2011) (stating that the state secrets opinion issued therein is "a common-law opinion, which, after the fashion of the common law, is subject to further refinement").

§ 2712(b)(4) ("Notwithstanding any other provision of law, [Section 1806(f)] shall be the exclusive means" by which materials concerning FISA surveillance may be reviewed.).

These statutory procedures directly map onto, and replace, the procedures for the executive branch's withholding of evidence under the state secrets privilege. *See Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1080–83 (9th Cir. 2010) (en banc) (describing application of the state secrets privilege). As an initial matter, the procedures set out in Section 1806(f) "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." *Fazaga*, 916 F.3d at 1232. Section 1806(f) then dictates precisely how courts should respond to an assertion that disclosure would result in harm to national security. Rather than allow the executive branch to exclude the evidence from the case, *cf. Jeppesen*, 614 F.3d at 1082–83, the court "shall, notwithstanding any other law, . . . 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." 50 U.S.C. § 1806(f). Because Section 1806(f) speaks directly to the circumstances in which the state secrets privilege might otherwise apply, and because it explicitly controls

"notwithstanding any other law," it displaces the privilege.

FISA's legislative history confirms Congress's intent to establish exclusive and mandatory procedures concerning "electronic surveillance," 50 U.S.C. § 1801(f)—and to supplant the common law. Congress's express purpose in enacting FISA was "to curb the practice by which the Executive 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; *see also* 18 U.S.C. § 2511(2)(f) (the "procedures in . . . [FISA and related statutes] shall be the exclusive means by which electronic surveillance, as defined in [FISA] . . . may be conducted"). FISA "put[] to rest the notion that Congress recognizes an inherent Presidential power to conduct such surveillances in the United States outside of the procedures contained in [FISA and Title III]." S. Rep. No. 95-604, pt. 1, at 64; *see also* H.R. Rep. No. 95-1720, at 35 (invoking *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)). And Congress reaffirmed that exclusivity when it enacted the FISA Amendments Act of 2008. *See* 50 U.S.C. § 1812. As the Department of Justice has acknowledged, Congress's "overriding purpose" in enacting FISA was to "bring[] the use of electronic surveillance under congressional control." U.S. Dep't of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President*, at 20 (Jan. 19, 2006).

In doing so, Congress also observed that the common law regulating electronic surveillance was "uneven and inconclusive. . . . [T]he 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." H.R. Rep. No. 95-1283, pt. 1, at 21 (1978). In response, it sought to replace common law that had failed to "adequately balance[] the rights of privacy and national security," *id.*, with provisions that "strike[] a fair and just balance between protection of national security and protection of personal liberties," S. Rep. No. 95-604, pt. 1, at 7—including Section 1806(f).

Thus, as this Court held in *Fazaga*, FISA's text and legislative history make plain Congress's intent to displace the state secrets privilege in cases involving foreign intelligence surveillance.

D. The executive branch's reliance on the state secrets privilege to override FISA unconstitutionally encroaches on Congress's authority.

There is another, fundamental reason that FISA controls in this case and the state secrets privilege does not: the separation of powers between Congress and the executive branch. Once Section 1806(f)'s procedures have been triggered, the Constitution forbids the executive branch from relying on the state secrets privilege to shield materials from judicial review. That is because, within the constitutional

framework of separated powers, the executive cannot "take[] measures incompatible with the expressed or implied will of Congress," unless the executive's asserted power is both "'exclusive' and 'conclusive' on the issue." *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2084 (2015) (citation omitted); *see also Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 233 (1986); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring) (noting that the executive's power under Article II is at its "lowest ebb" when the executive acts in direct contravention of a congressional mandate). As discussed below, with respect to the matters addressed by FISA—foreign intelligence surveillance, the handling of sensitive and classified information, and evidentiary rules for U.S. courts—the executive's asserted power is neither "exclusive" nor "conclusive." Congress has the authority to legislate in all three areas, as it has done in FISA and in numerous other statutes. Accordingly, separation-of-powers principles prohibit the executive branch from contravening Congress's expressed intent in Section 1806(f).

First, Congress has the authority to regulate foreign intelligence surveillance, particularly where, as here, that surveillance implicates U.S. persons. Indeed, Congress has regulated the conduct of foreign intelligence surveillance on U.S. soil for 40 years through FISA. The executive branch has never refused to comply with FISA or its discovery procedures based on a claim that Congress impermissibly

mandated the disclosure of sensitive information to Article III courts—and the government cannot credibly make that argument now. After all, the government routinely discloses such information to the Foreign Intelligence Surveillance Court to justify its surveillance, and to other Article III courts when evidence acquired as the result of FISA surveillance is challenged in criminal trials or immigration proceedings. *See, e.g.*, [*Redacted*], 2011 WL 10945618 (FISC Oct. 3, 2011); *United States v. Cavanaugh*, 807 F.2d 787, 789 (9th Cir. 1987); *United States v. Hamide*, 914 F.2d 1147, 1149 (9th Cir. 1990).

Second, Congress has a long-established and constitutional role to play in the handling of sensitive and classified information, and it regulates classified information in several contexts. For example, Title 50 of the U.S. Code regulates national security information and requires the executive branch to disclose such information—including illegal intelligence activity—to congressional committees. *See* 50 U.S.C. §§ 3091, 3125, 3345, 3365; *see also* 42 U.S.C. §§ 2162–69 (nuclear data). Congress has also directed the President to establish certain procedures governing access to classified material, 50 U.S.C. §§ 3161–64; *see also id.* §§ 831–35 (personnel security procedures for the NSA), and it has mandated that the President provide due process to employees whose access to that material is denied or terminated, *id.* § 3161(a)(5). And Congress enacted the Classified Information Procedures Act to regulate the disclosure and use of classified information in

criminal proceedings. *See* 18 U.S.C. app. 3 §§ 1–16. "Congressional regulation of the use of classified information by the executive branch through FISA and other statutes is therefore well-established." *In re NSA Telecomms. Records Litig.*, 564 F. Supp. 2d 1109, 1122 (N.D. Cal. 2008).

Finally, it is clearly within Congress's authority to create evidentiary rules for United States courts. That authority, rooted in Congress's Article I powers, "is undoubted and has been frequently noted and sustained." *Vance v. Terrazas*, 444 U.S. 252, 265–66 (1980) (citing cases); *see also United States v. Banafshe*, 616 F.2d 1143, 1146 (9th Cir. 1980) (recognizing "Congress' authority to enact rules of evidence"). For example, following the Supreme Court's drafting of the Federal Rules of Evidence, the Rules were subject to congressional review and became effective only upon approval by an act of Congress. *See* Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (1974). Amendments by the Supreme Court affecting evidentiary privileges similarly require congressional approval. 28 U.S.C. § 2074(b). And, in FISA and elsewhere, Congress has continued to create and amend evidentiary rules directly. *See, e.g.*, Violent Crimes Control and Law Enforcement Act, Pub. L. No. 103-322, 108 Stat. 1796 (1994) (amending Federal Rule of Evidence 412 and adding Rules 413–15, which address evidence in sex-offense cases).

Because Congress has the authority to regulate foreign intelligence

surveillance and to create the evidentiary rules governing legal challenges to that surveillance, the executive cannot constitutionally override the mechanism that Congress has established for the protection of individual rights in Section 1806(f). As the President's power is neither "exclusive" nor "conclusive" on these issues, *Zivotofsky*, 135 S. Ct. at 2084, the executive branch cannot thwart the operation of Section 1806(f) by invoking the state secrets privilege.

II. Because FISA displaces the state secrets privilege in this case, the privilege provided no basis for dismissal.

A. The district court erred in resurrecting the state secrets privilege after applying FISA's procedures and reviewing the evidence in camera.

Although this Court has squarely held that Section 1806(f) precludes the application of the state secrets privilege, the district court here dismissed Plaintiffs' surveillance claims on state secrets grounds. Not only did the district court's decision contravene the law of this circuit, as set out in *Fazaga*, but it also defied Congress's decision to displace the common law state secrets privilege in FISA. Once Congress has displaced a common law privilege, a court is not free to revive it.

At an earlier stage of the litigation, the district court properly applied Section 1806(f)'s procedures to review evidence relevant to Plaintiffs' standing. In 2013, the district court rejected the government's asserted state secrets defense, holding that Congress had displaced the privilege in FISA. Am. Order at 12–15, *Jewel v.*

NSA, No. 08-cv-04373 (N.D. Cal. July 23, 2013), ECF No. 153. In doing so, the district court necessarily concluded that Plaintiffs had adequately alleged they were "aggrieved persons" under FISA—a precondition to application of the statute's in camera review procedures. *See id.*; *Fazaga*, 916 F.3d at 1238–39. The district court later directed the government to respond to Plaintiffs' discovery requests pursuant to Section 1806(f). *See* Order Granting Mot. To Lift Stay of Disc. at 3–4, *Jewel*, No. 08-cv-04373 (N.D. Cal. Feb. 19, 2016), ECF No. 340. It then "allowed the full development of the record and . . . reviewed the universe of documents and declarations . . . publicly and under the procedures of Section 1806(f)." Order Granting Defs.' Mot. for Summ. J. & Denying Pls.' Cross-Mot. at 25, *Jewel*, No. 08-cv-04373 (N.D. Cal. Apr. 5, 2019), ECF No. 462 ("S.J. Order").

Once the district court correctly concluded that Section 1806(f)'s procedures applied, and proceeded to review the evidence in camera as FISA requires, the state secrets privilege should have had no role in the case. Yet, after completing its review of surveillance materials pursuant to FISA, the district court resurrected the privilege as a basis for granting summary judgment for the government. *See* S.J. Order at 18–25. Amici are aware of no other case in which a court recognized that Congress displaced an evidentiary privilege or other common law rule, but nonetheless went ahead and applied that displaced rule within the same litigation. *Cf. Native Vill. of Kivalina*, 696 F.3d at 857 (where "federal common law . . . has

been extinguished by Congressional displacement, it would be incongruous to allow it to be revived").

The district court appears to have believed—even after reviewing evidence pursuant to FISA—that the government could revive the privilege and force dismissal simply by insisting that Plaintiffs' status as "aggrieved persons" under FISA was itself a state secret. S.J. Order at 23–24. That analysis was wrong for at least three reasons.

First, although the district court cited *Fazaga* in resurrecting the state secrets privilege, *see* S.J. Order at 23–24, *Fazaga* plainly forecloses the district court's ruling. Nowhere does *Fazaga* suggest that, following discovery and the application of Section 1806(f)'s procedures, a district court must *reassess* whether a plaintiff is an "aggrieved person" and whether the case should be dismissed on state secrets grounds. To the contrary, *Fazaga* states repeatedly and consistently that where Section 1806(f) applies, its procedures are mandatory and exclusive, and displace the state secrets privilege entirely. *See* 916 F.3d at 1226–27, 1230–34, 1237. Consistent with this holding, the Court in *Fazaga* remanded the case specifically for the district court to "review any materials relating to the surveillance as may be necessary" "using § 1806(f)'s ex parte and in camera procedures." *Id.* at 1251 (quotation marks omitted). There is simply no coherent rationale that would permit a district court to review evidence in camera based on the determination that

Congress displaced the state secrets privilege, but would not permit the court to rule on that evidence following in camera review.

The district court said that *Fazaga* supported its approach, but it cited only a single sentence that in fact provides no support at all. In a section of *Fazaga* addressing whether the plaintiffs there had "plausibly alleged" a cause of action under FISA, this Court observed that "[t]he complaint's allegations are sufficient if proven to establish that Plaintiffs are 'aggrieved persons.'" 916 F.3d at 1216, 1225. Here, the district court suggested that this sentence required Plaintiffs to *prove* they were aggrieved in order to hold the state secrets privilege at bay. *See* S.J. Order at 23–24. But the Court in *Fazaga* said no such thing. Rather, the *Fazaga* Court was addressing an entirely different question (as the surrounding discussion and the section header make plain): whether the plaintiffs had stated a claim under Section 1810. The Court was simply explaining that the plaintiffs had adequately alleged one of the elements necessary to establish such a claim.[4] By the same token, nothing in the section of the opinion addressing "the state secrets privilege and FISA preemption" holds that, after applying FISA's procedures, district courts should then revisit the state secrets privilege by requiring Plaintiffs to independently prove they are "aggrieved persons" under Section 1806(f). The

[4] The Court's preceding sentence explained that "Plaintiffs allege in extensive detail in the complaint that they were subjected to many and varied instances of audio and video surveillance." *See Fazaga*, 916 F.3d at 1216. It went on to hold that the plaintiffs adequately alleged a "FISA claim." *Id.* at 1216, 1251.

Fazaga Court gave careful instructions to the district court on remand—and those instructions plainly direct district courts to rule on surveillance claims using the procedures that Congress provided. 916 F.3d at 1251–52.[5]

Second, the district court's reasoning was at odds with the text and purpose of FISA, which was designed to permit civil claims to proceed while channeling discovery through Congress's chosen procedures. *See* 50 U.S.C. § 1806(f). For obvious practical reasons—especially given the surreptitious nature of FISA surveillance—the statute does not require plaintiffs to prove they are aggrieved *before* they can pursue discovery and in camera review under Section 1806(f). In civil litigation, discovery necessarily occurs before plaintiffs are required to prove their case. *See, e.g.*, *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011) (explaining that a defendant is subject to discovery where a complaint's factual allegations, taken as true, plausibly suggest entitlement to relief). It would be entirely illogical to require FISA plaintiffs to *prove* that they have been subject to electronic surveillance before Section 1806(f)'s discovery procedures applied, *see Fazaga*, 916 F.3d at 1216, and the text of the statute contains no such requirement.

Third and finally, the district court's reasoning would hand unilateral control

[5] The *Fazaga* Court noted that the government could reassert the state secrets privilege *if* the FISA surveillance completely dropped out of the case—that is, if the evidence ultimately showed that the surveillance did not occur, following the district court's in camera review pursuant to Section 1806(f). *See* 916 F.3d at 1253 & n.52.

over surveillance claims back to the executive branch, contrary to Congress's will. As the lower court made clear, the government's position is that courts cannot even rule on the question of whether a plaintiff is "aggrieved" in the face of a state secrets claim. S.J. Order at 23–24. In other words, where details of government surveillance are not public—or even where such details *are* public, but the government has not officially acknowledged them—the government believes it alone can bestow "aggrieved person" status by confirming its surveillance.

But making the availability of FISA's procedures turn entirely on the executive branch's say-so would defy Congress's intent in enacting FISA. It would allow the executive branch to dictate who can pursue civil remedies against it and remove the teeth from the scheme that Congress enacted. *See In re NSA Telecomms. Records Litig.*, 595 F. Supp. 2d 1077, 1083 (N.D. Cal. 2009) (rejecting argument that "only affirmative confirmation by the government or equally probative evidence will meet the 'aggrieved person' test"). The government could evade review of well-founded claims simply by invoking the state secrets privilege over this threshold question in every case. Such a result "would undermine the overarching goal of FISA more broadly—'curb[ing] the practice by which the Executive Branch may conduct warrantless electronic surveillance on its own unilateral determination that national security justifies it.'" *Fazaga*, 916 F.3d at 1237 (quoting S. Rep. No. 95-604, pt. 1, at 8); *see also In re NSA Telecomms.*

Records Litig., 564 F. Supp. 2d at 1122–24 ("Congress intended for the executive branch to relinquish its near-total control over whether the fact of unlawful surveillance could be protected as a secret.").[6]

B. Congress carefully balanced the costs of disclosure with the need for accountability and judicial review in enacting FISA.

As this Court has recognized, FISA's in camera review provision is "extremely protective" of the government's interests, as it allows the government to withhold discovery from a party where the Attorney General attests to the harm that would flow from disclosure. *Fazaga*, 916 F.3d at 1226. And even this restrictive procedure is available only in limited circumstances—where a plaintiff is able to plead his or her "aggrieved person" status with the requisite detail and specificity. *See, e.g.*, *id.* at 1216.

[6] Indeed, FISA's text further confirms that the definition of "aggrieved person" is not limited to those for whom the government has officially confirmed its surveillance. *See* 50 U.S.C. § 1801(k). Congress understood how to require notice of government surveillance, *see* 50 U.S.C. § 1806(c) and (d), and if Congress had intended to require a person to receive government notice in order to be "aggrieved," it would have said so. Moreover, Sections 1806(c) and (d) contemplate that persons will be "aggrieved" *before* the government notifies them that they have been surveilled. "Aggrieved person" status is therefore a precondition to notice, not vice versa. Finally, the text of Section 1806(f) makes clear that its procedures apply in three circumstances: when the government has provided notice under Section 1806(c) or (d), when a litigant moves to suppress evidence (regardless of notice), "*or* whenever any motion or request is made by an aggrieved person" to discover material related to surveillance. 50 U.S.C. § 1806(f) (emphasis added). The use of the disjunctive "or" makes clear that Section 1806(f)'s in camera review procedures apply in civil cases even absent notice to an aggrieved person.

To the extent that any harm might result from the in camera review of surveillance evidence, or a judicial ruling that a person has standing to challenge FISA surveillance, it is the product of Congress's deliberate judgment. As this Court has acknowledged, in enacting FISA, Congress struck a "careful balance" between "assuring the national security and protecting against electronic surveillance abuse." *Fazaga*, 916 F.3d at 1233. 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." *Id.* Implicit in Congress's judgment is an acceptance of the limited disclosure that might result from the application of Section 1806(f).

In this case, of course, the government has already disclosed a vast amount of information about the challenged programs. It has described the surveillance in public testimony, public reports, public statements, and dozens of publicly released FISC opinions and orders, often in considerable technical detail. *See, e.g.*, Appellants' Opening Br. at 26–33, 37–38 (Sept. 10, 2019), ECF No. 19; Privacy & Civil Liberties Oversight Board, *Report on the Surveillance Program Operated Pursuant to Section 702* (2014), https://perma.cc/WD5R-5GKE (citing numerous official disclosures); Office of the Director of National Intelligence ("ODNI"), *DNI Clapper Declassifies and Releases Telephone Metadata Collection Documents* (July 31, 2013), https://bit.ly/2ksUcU9; *see generally* ODNI, *IC on the Record*,

https://bit.ly/2b8IZTE (official clearinghouse for publication of declassified documents, reports, fact sheets, press statements, and interviews concerning the programs at issue and other surveillance). This is not a case where a plaintiff is seeking to challenge an unacknowledged surveillance program. Nor would a judicial ruling in this case reveal any individual surveillance targets. Indeed, the very breadth of the programs the government has disclosed, which indisputably affect millions of Americans who use the Internet or the telephone to communicate, means that the government's actual targets will remain entirely unknown. *See, e.g.*, Appellants' Opening Br. at 25, 31, 74–75; [*Redacted*], 2011 WL 10945618, at *9. Especially where the government's public disclosures are legion, as they are here, the executive branch should not be able to use selective claims of secrecy to thwart judicial review.

FISA was the culmination of Congress's deliberate effort to protect both national security and personal liberties, and the district court should have adhered to that determination.

CONCLUSION

For the reasons above, this Court should reverse the district court's judgment.

Dated: September 13, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2019, I electronically filed the foregoing with the Clerk for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system. There are no unregistered participants.

Dated: September 13, 2019

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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