CA Nos. 11-15468, 11-15535

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Appellees/Cross-Appellants,

v.

BARACK OBAMA, *et al.*,

Appellants/Cross-Appellees.

On Appeal from the United States District Court
for the Northern District of California
(No. 07-0109-VRW, Honorable Vaughn Walker)

BRIEF OF JAMES J. CAREY, Rear Admiral, U.S. Navy (Ret.), NORMAN T. SAUNDERS, Rear Admiral, U.S. Coast Guard (Ret.), THOMAS L. HEMINGWAY, Brigadier General, U.S. Air Force (Ret.), WASHINGTON LEGAL FOUNDATION, ALLIED EDUCATIONAL FOUNDATION, AND THE NATIONAL DEFENSE COMMITTEE AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS, URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the Washington Legal Foundation, the Allied Educational Foundation, and the National Defense Committee state that they are corporations organized under § 501(c)(3) of the Internal Revenue Code. None of the three has a parent corporation, and no publicly held company has a 10% or greater ownership interest.

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INTERESTS OF *AMICI CURIAE*

The *amici curiae* are three retired officers in the U.S. armed forces and several organizations with an interest in national security issues.[1]

Rear Admiral James J. Carey, U.S. Navy (Ret.), served 33 years in the U.S. Navy and Naval Reserve, including service in Vietnam. He is a former Chairman of the U.S. Federal Maritime Commission and current Chairman of the National Defense Committee (NDC), which is also joining in this brief. The NDC is a grass roots pro-military organization supporting a larger and stronger military and the election of more veterans to the U.S. Congress.

Rear Admiral Norman T. Saunders, U.S. Coast Guard (Ret.), served on active duty for 35 years, including service in the Vietnam War. At the time of his retirement he was the Commander of the 7th Coast Guard District in Miami. He

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[1] Pursuant to Fed.R,App.P. 29, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief. All parties have consented to the filing of this brief.

previously served as Commander of the Coast Guard Military Personnel Command.

Brigadier General Thomas L. Hemingway, U.S. Air Force (Ret.), served at the time of his retirement in May 2007 as the Legal Advisor to the Convening Authority in the Department of Defense Office of Military Commissions. He was commissioned as a second lieutenant in 1962 and entered active service in 1965 after obtaining a law degree. He has served as a staff judge advocate at the group, wing, numbered air force, major command, and unified command level. He was also an associate professor of law at the U.S. Air Force Academy and a senior judge on the Air Force Court of Military Review.

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to promoting America's national security. To that end, WLF has appeared in this and numerous other federal courts to ensure that the U.S. government is not deprived of the tools necessary to protect this country from those who would seek to destroy it and/or harm its citizens. *See, e.g., Boumediene v. Bush,* 553 U.S. 723 (2008); *Hamdi v. Rumsfeld,* 542 U.S. 507 (2004). In particular, WLF has participated in numerous cases raising issues under the "state secrets" doctrine. *See, e.g., Mohamed v. Jeppesen Dataplan, Inc.,* 614 F.3d 1070

(9th Cir. 2010) (*en banc*), *cert. denied*, 179 L. Ed. 2d 1235 (2011).

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared in this Court on a number of occasions in cases raising national security issues.

Amici are concerned that permitting courts to litigate Appellees' claims poses an unacceptable risk to national security. Indeed, in its previous consideration of this case, the Court excluded the Sealed Document from the case after concluding that "disclosure of information concerning . . . the means, sources and methods of intelligence gathering in the context of this case would undermine the government's intelligence gathering and compromise national security." *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1204 (9th Cir. 2007). *Amici* do not believe that the federal government should be forced to choose between releasing information whose disclosure compromises national security or withholding the information and thereby subjecting itself to what amounts to a multi-million dollar default judgment – nor do they believe that Congress ever intended to require such a Hobson's Choice.

Amici agree with Appellants (hereinafter, "the United States" or the

"Government") that the district court erred in determining that sovereign immunity has been waived. *Amici* write separately to address three issues: (1) the district court lacked jurisdiction to issue a judgment on the merits of this case because Appellees never demonstrated that they possess standing; (2) the state secrets doctrine applies to this case (and requires dismissal) because Congress did not intend FISA to preempt the state secrets doctrine and, in any event, lacks the power to preempt the doctrine completely because the doctrine derives in significant part from the President's powers under Article II of the Constitution; and (3) contrary to the district court's conclusion, those who believe they have been the targets of illegal electronic surveillance are not authorized under 50 U.S.C. § 1806(f) to demand that the United States share with their attorneys evidence regarding any such surveillance.

STATEMENT OF THE CASE

Appellees allege that they were the targets of illegal electronic surveillance conducted by the United States. Brushing aside assertions by the United States that any adjudication of those allegations created a serious risk of damage to national security, the district court directed the Government to respond to Appellees' "prima facie" showing that they were subjected to electronic surveillance and, when the Government declined to produce relevant documents to the court and/or

counsel for Appellees, it entered judgment for Appellees in the amount of $2.6 million, including liquidated damages, attorney fees, and costs. The court determined that the United States could be held liable under Section 110 of the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. § 1810, based on findings that Executive Branch officials had subjected Appellees to electronic surveillance in violation of Section 109 of FISA, 50 U.S.C. § 1809.

This suit was filed in 2006 by Al-Haramain Islamic Foundation, a Muslim charity that the Government has determined to be a Specially Designated Global Terrorist (SDGT) due to its ties to al-Qaeda. Also named as plaintiffs were Appellees Wendell Belew and Asim Ghafoor, U.S. attorneys who represented Al-Haramain in connection with the Government's efforts to designate Al-Haramain a SDGT. All three plaintiffs alleged that in 2004 they had been subjected to electronic surveillance pursuant to the Terrorist Surveillance Program (TSP), a Government program (whose existence came to light in 2005) that intercepted international communications into and out of the U.S. of persons alleged to have ties to al-Qaeda and other terrorist networks.

The case came before this Court in 2007, on interlocutory appeal by the Government from the district court's denial of a motion to dismiss. *Al-Haramain Islamic Found., Inc. v. Bush*, 505 F.3d 1190 (9th Cir. 1007) ("*Al-Haramain I*").

The Court held, *inter alia*, that: (1) the United States sustained its burden of showing that the "state secrets" doctrine precluded introduction of any evidence relating to a document known as the "Sealed Document," including evidence consisting of witnesses' memories of what was written in the Sealed Document; (2) Appellees could not demonstrate standing in the absence of such evidence; and (3) the case should be remanded to allow the district court to consider Appellees' claim that the state secrets doctrine is inapplicable to this case because FISA preempts that doctrine in cases relating to electronic surveillance. *Id.* at 1204-06.

In a July 2008 order, the district court determined that FISA does, indeed, preempt the state secrets doctrine in electronic surveillance cases, in the sense that the procedures established by Section 106(f) of FISA, 50 U.S.C. § 1806(f), govern how courts should handle Government claims that the disclosure of information relating to electronic surveillance would harm national security. 564 F. Supp. 2d 1109, 1117-24 ("*Al-Haramain II*"). The court granted Appellees leave to amend their complaint in order to set forth allegations demonstrating that they were "aggrieved person[s]" within the meaning of Section 101(k) of FISA, 50 U.S.C. § 1801(k).[2] *Id*. at 1137.

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[2] An "aggrieved person" under FISA is "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).

In a January 5, 2009 order, the district court denied a Government motion to dismiss the case on the grounds, *inter alia*, that Appellees lacked Article III standing and that they had not demonstrated that they were "aggrieved person[s]." 595 F. Supp. 2d 1077 ("*Al-Haramain III*"). The Court acknowledged that allegations that one is a § 1801(k) "aggrieved person" are insufficient by themselves to establish the requisite injury-in-fact for purposes of Article III standing; one must also allege that one has been aggrieved within the meaning of § 1810 (*i.e.*, that the electronic surveillance was conducted illegally, or that information obtained through the surveillance was disclosed or used in an unauthorized manner). *Id.* at 1088; *see also Al-Haramain II*, 564 F. Supp. 2d at 1124 ("If plaintiffs can show that they are "aggrieved" *as section 1810 contemplates*, then plaintiffs have demonstrated injury for purposes of establishing Article III standing.") (emphasis added). But the court held that the plaintiffs' allegations that they had been electronically surveilled in violation of § 1810 were sufficient to meet the undemanding Fed.R.Civ.P. 8 pleading standards:

> Contrary to defendants' assertions, *proof* of plaintiffs' claims is not necessary at this stage. The court has determined that the allegations "are sufficiently definite, specific, detailed, and nonconjectural, to enable the court to conclude that a substantial claim is presented."

Al-Haramain III, 595 F. Supp. 2d at 1085 (quoting *United States v. Alter*, 482 F.2d

1016, 1025 (9th Cir. 1973)).

The court further determined that, in order to proceed with "discovery" proceedings under § 1806(f), a plaintiff need only establish a "prima facie case" that he has been subjected to electronic surveillance by the United States. *Id.* at 1084.[3] After determining that the plaintiffs met that standard, the court set forth a § 1806(f) discovery plan that entailed, among other things, submission of the Sealed Document to the court *in camera*, a determination by the court regarding "whether the Sealed Document establishes that plaintiffs were subject to electronic surveillance not authorized by FISA," and direct participation by plaintiffs' counsel in the court's final determination of whether § 1806(f) evidence was sufficient to establish plaintiffs' § 1810 claim. *Id.* at 1089-90.

The Government continued to disagree with the district court's interpretation of § 1806(f) and sought to avoid complying with the January 5 order while it sought interlocutory review by this Court. In response, the district court issued an order to show cause why, as a sanction for the Government's noncompliance, it

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[3] The court defined a "prima facie case" as "evidence, direct and/or circumstantial, sufficient to raise a reasonable inference on a preponderance of the evidence that they were subjected to electronic surveillance." *Id.* at 1084. While that definition is somewhat unclear, one aspect of the definition is quite clear: it did not require plaintiffs to demonstrate that they had been subjected to *illegal* surveillance.

should not deem liability established under § 1810 and proceed to determine the amount of damages to be awarded. On March 31, 2010, the district court granted the plaintiffs' motion for summary judgment on their FISA claims. 700 F. Supp. 2d 1182 ("*Al-Haramain IV*"). The court conceded that the defendants had presented no evidence that electronic surveillance had been undertaken in violation of § 1809 (*e.g.*, evidence that no FISA warrant had been obtained). But the court "f[ou]nd merit" in the plaintiffs' assertion that the burden should be placed on the Government to demonstrate that a FISA warrant had been obtained because "knowledge of the existence or nonexistence of a FISA warrant was within defendants' exclusive knowledge." *Id.* at 1197. The court concluded that the Government "must be deemed estopped" from arguing that a warrant might have existed because it had "foregone multiple opportunities to show that a warrant existed," and because it possessed "exclusive knowledge" of that issue. *Id.* The court ultimately concluded that plaintiffs were entitled to summary judg-ment as to liability because the Government failed to rebut plaintiffs' "prima facie case" that they were subjected to electronic surveillance. *Id.* at 1197-1202.

In a December 21, 2010 order, the district court awarded statutory damages, attorney fees, and costs (totaling $2.6 million) based on its previous finding that the plaintiffs' rights under § 1810 had been violated. 2010 U.S. Dist. LEXIS

136156 ("*Al-Haramain V*"). The court awarded statutory damages to Appellees Belew and Ghafoor but determined that Al-Haramain was statutorily ineligible for an award of damages because it is a "foreign power" that has engaged in "international terrorism or activities in preparation therefor." *Id.* at *20-*24. The court denied the plaintiffs' request for equitable relief, *id.* at *24-*28, and for punitive damages. *Id*. at *28-*41.

SUMMARY OF ARGUMENT

The district court's judgment should be reversed as a matter of law on multiple grounds, and the case should be dismissed. *Amici* focus on three grounds for reversal.

I. Appellees lack Article III standing because they did not (and cannot) establish that they suffered injury-in-fact. Appellees cannot, of course, demonstrate injury simply by submitting evidence suggesting that they were subjected to electronic surveillance. Rather, they must demonstrate the electronic surveillance was wrongful; that is, it violated a right bestowed on them by FISA. There are numerous factual scenarios under which interceptions of Appellees' communications would not cause them injury because it would not invade their statutory rights. Many Government interceptions of communications are not subject to FISA regulation; for example, FISA generally does not apply to

interception of wire communications unless at least one party to the communication is a person "within the United States" *and* the interception occurs within the United States. 50 U.S.C. § 1801(f)(2). Moreover, such electronic surveillance invades one's statutory rights only if it is undertaken under color of law and is not "authorized by statute" (*e.g.*, not undertaken pursuant to a FISA warrant). 50 U.S.C. § 1809. Appellees failed to demonstrate that they met the injury-in-fact component of standing because they failed to provide evidence that the alleged electronic surveillance violated FISA. They could do no more than speculate that perhaps the Government did not obtain a required FISA warrant before engaging in electronic surveillance.

The district court sought to overcome that evidentiary deficiency by finding that the Government was estopped from denying that it had engaged in surveillance without a FISA warrant – because it had foregone opportunities to show that a warrant existed, and because the existence or nonexistence of a warrant was within the Government's exclusive knowledge. 700 F. Supp. 2d at 1197. The Government asserts that the district court erred in thus relieving Appellees of their obligation to demonstrate all elements of their statutory claim. More importantly, the district court erred in determining that Appellees have Article III standing despite their failure to carry their burden of demonstrating that they suffered

injury-in-fact. The party invoking jurisdiction *at all times* bears the burden of establishing the elements of standing, including injury-in-fact. Numerous decisions from this Court and the Supreme Court reject the notion that the defendant's conduct or inaction can constitute a waiver of the standing requirements and thereby relieve the plaintiff of his burden of establishing that those requirements have been met. Indeed, because standing is a jurisdictional requirement (*i.e.*, a federal court lacks subject matter jurisdiction to hear a case unless the plaintiff can establish Article III standing), granting a federal district court authority to excuse a plaintiff's failure to demonstrate standing would in effect grant the court authority to expand its own jurisdiction beyond the limitations imposed by Article III of the Constitution.

II. The district court erred in determining that Congress, when it adopted FISA in 1978, intended to preempt the state secrets doctrine in cases involving electronic surveillance. This Court has determined that the relevant inquiry in deciding if a federal statute preempts the state secrets doctrine is whether the statute "speaks directly to the question" otherwise answered by the doctrine. *Kasza v. Browner*, 133 F.3d 1159, 1167 (9th Cir. 1998). The district court's suggestion that 50 U.S.C. § 1806(f) "speaks directly" to questions answered by the state secrets doctrine is without merit. Section 1806(f) addresses procedures for

determining whether electronic surveillance of an individual was "lawfully authorized and conducted." It never mentions the state secrets doctrine and includes no consideration of the central focus of that doctrine: whether national security considerations require that certain matters be excluded entirely from a judicial proceeding because allowing the matters to be litigated would pose an unacceptable risk to national security.

This Court has already determined that the prerequisites for application of the state secrets doctrine have been met and that "disclosure of information concerning . . . the means, sources and methods of intelligence gathering in the context of this case would undermine the government's intelligence gathering and compromise national security." *Al-Haramain I*, 507 F.3d at 1204. Thus, a determination that FISA preempts the state secrets doctrine requires an assumption that Congress intended to permit litigation to go forward under § 1806(f) even when, as here, doing so risks serious damage to national security. It is implausible that Congress intended a statute that does not even mention the state secrets doctrine to have such dramatic effects on the doctrine. A much more plausible interpretation is that Congress intended FISA to work in harmony with the state secrets doctrine, such that the Government is as free to invoke a state secrets claim in an electronic surveillance case governed by FISA as it is to raise such a claim in

litigation arising in other contexts.

Moreover, even if Congress did intend that FISA would impose limits on the Executive Branch's invocation of the state secrets doctrine, any such limits must be addressed with a recognition that the doctrine has firm constitutional underpinnings. Just as the Speech or Debate Clause protects against the compelled disclosure of congressional documents whose disclosure would interfere with the due functioning of the legislative process, so too do various provision of Article II of the Constitution entitle the Executive Branch to resist compelled disclosure of information whose disclosure would undermine effective discharge of a President's powers. The Court's findings in *Al-Haramain I* – that adjudication of Appellees' FISA claims would risk serious damage to national security – provide a strong basis for concluding that the President is acting within his constitutionally protected sphere in resisting adjudication of those claims.

III. FISA does not authorize those asserting claims under 50 U.S.C. § 1810 to utilize § 1806(f) as a means of forcing the United States to reveal whether they have been subjected to electronic surveillance. Only the United States is authorized to initiate proceedings under § 1806(f); the statute authorizes a district court to act only "if the Attorney General files an affidavit under oath that disclosure [of electronic surveillance] or an adversary hearing would harm the

national security of the United States." If the Attorney General initiate proceedings in that manner, then § 1806(f) authorizes a district court to review relevant materials "ex parte and in camera . . . to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted." The usual motivation for such an application by the Attorney General is to obtain a determination that evidence in the possession of the United States may be used in a criminal proceeding because the electronic surveillance from which it was derived was lawful. But in the absence of such an application by the Attorney General, § 1806(f) grants a district court no authority, at the request of an "aggrieved person," to require the United States to produce evidence regarding alleged electronic surveillance.

In arriving at its contrary interpretation of § 1806(f), the district court reasoned as follows. Although §1810 grants a right of action to "aggrieved person[s]" who have been subjected to illegal electronic surveillance, the court feared that such individuals would have no way of obtaining the evidence necessary to prove their claims unless they had some means of requiring the Government to disclose whether they had been subjected to electronic surveillance and whether such surveillance was conducted in violation of § 1809. The court therefore concluded that § 1806(f) must grant discovery rights to "aggrieved

person[s]" because otherwise § 1810 plaintiffs would have no means of obtaining evidence necessary to support their claim and the § 1810 cause of action would be rendered a dead letter. *Al-Haramain III*, 595 F. Supp. 2d at 1083. But the premise of the district court's argument is incorrect: § 1810 plaintiffs in some cases will be able to obtain necessary discovery even without resort to § 1806(f). The availability of evidence will depend on whether the Government successfully asserts the state secrets doctrine in response to the lawsuit. If the Government decides not to assert the doctrine, or if the district court determines that the Government has failed to demonstrate that the doctrine should be applied, then the § 1810 plaintiffs will be able to invoke normal discovery channels to obtain the evidence necessary to prove their claim.

ARGUMENT

I. APPELLEES LACK ARTICLE III STANDING BECAUSE THEY CANNOT ESTABLISH THAT THEY SUFFERED INJURY-IN-FACT

Article III, § 2 of the Constitution extends the "judicial Power" of the United States only to "Cases" and Controversies." Standing to sue is part of the common understanding of what it takes to make a justiciable case. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). Appellees lack Article III standing because they did not (and cannot) establish that they suffered injury-in-fact.

The Supreme Court has explained Article III standing requirements as follows:

> The irreducible constitutional minimum of standing contains three requirements. . . . First, and foremost, there must be alleged (and ultimately proven) an "injury in fact" – a harm suffered by the plaintiff that is "concrete" and "actual and imminent, not 'conjectural' or 'hypothetical.'" . . . Second, there must be causation – a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. . . . And third, there must be redressability – a likelihood that the requested relief will redress the alleged injury.

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 102-103 (1998) (citations omitted). Appellees contend that they suffered injury-in-fact because, they allege, they were subjected to electronic surveillance under color of law in a manner not authorized by FISA.[4] The district court deemed those allegations to be plausible and thus denied the United States' motion to dismiss the complaint based on lack of standing. *Al-Haramain III*, 595 F. Supp. 2d at 1085.

But once the lawsuit reached the summary judgment stage, Appellees evidentiary burden in establishing injury-in-fact became considerably greater:

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[4] In the absence of FISA, Appellees would not have a plausible injury claim. Electronic surveillance does not cause any physical or financial injury, and its targets generally are unaware that they have been surveilled. But in adopting FISA, Congress granted privacy rights to individuals, and it is violation of those rights that can constitute the requisite injury-in-fact for standing purposes. "The injury required by Article III can exist solely by virtue of statutes creating legal rights, the invasion of which create standing." *Fulfillment Servs., Inc. v. UPS*, 528 F.3d 614, 618-19 (9th Cir. 2008) (citation omitted).

> At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim. . . . In response to a summary judgment motion, however, the plaintiff can no longer rest on such "mere allegations," but must "set forth" by affidavit or other evidence "specific facts," Fed. Rule Civ. Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be supported adequately by the evidence adduced at trial.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (citations omitted).

As the party invoking federal jurisdiction in this case, Appellees bore the burden of establishing the elements of their standing, including injury-in-fact. *Lopez v. Candaele*, 630 F.3d 775, 784-85 (9th Cir. 2010). Thus, in order to establish injury based on invasion of their FISA statutory rights, Appellees were required to demonstrate by a preponderance of the evidence that: (1) they were "aggrieved persons" within the meaning of § 1801(k) (*i.e.*, their communications were subjected to "electronic surveillance" within the meaning of § 1801(f)); (2) the electronic surveillance to which they were subjected constituted a "prohibited activity" within the meaning of § 1809(a).[5]

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[5] Not all interceptions of wire communications meet the definition of "electronic surveillance." For example, that definition generally does not apply to interception of wire communications unless either the sender or recipient is a person "within the United States" *and* the interception occurs within the United States. 50 U.S.C. § 1801(f)(2). Thus, to demonstrate injury-in-fact Appellees were required to show that at least one party to the intercepted communication was located in the U.S. and that the interception occurred here. Similarly, FISA

The district court granted summary judgment to Appellees on liability after determining that they submitted sufficient evidence to establish a "prima facie case" that the United States subjected them to "electronic surveillance." *Al-Haramain IV*, 700 F. Supp. 2d at 1197-1202. *Amici* agree with the Government that the evidence submitted by Appellees fell woefully short of demonstrating "electronic surveillance"; indeed, the Government notes that virtually all of the evidence upon which the district court relied was publicly available when this Court issued its 2007 decision that determined that Appellees could not demonstrate standing. U.S. Br. 21.

But even if the district court were correct that Appellees met the "electronic surveillance" portion of their injury-in-fact evidentiary burden, they indisputably introduced *no* evidence demonstrating that the surveillance violated § 1809 (*e.g.*, no evidence that the United States did not obtain a FISA warrant before initiating surveillance).

The district court sought to overcome that evidentiary deficiency by finding

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prohibits only some "electronic surveillance." For example, it is not prohibited if not undertaken under color of law or if undertaken pursuant to a FISA warrant. Thus, Appellees were also required to show that the Government did not obtain a FISA warrant before subjecting them to electronic surveillance. The elements of standing are "an indispensable part of the plaintiff's case" and thus Appellees were required to prove "each element" by a preponderance of the evidence. *Lujan*, 504 U.S. at 561.

that the Government was estopped from denying that it had engaged in surveillance without a FISA warrant – because it had foregone opportunities to show that a warrant existed, and because the existence or nonexistence of a warrant was within the Government's exclusive knowledge. 700 F. Supp. 2d at 1197. But as the preceding discussion of standing case law amply demonstrates, the district court erred in determining that Appellees possessed Article III standing despite their failure to carry their burden of demonstrating "each element" necessary to establish injury-in-fact. *Lujan*, 504 U.S. at 561.

It makes no difference whether a defendant has acted wrongfully by failing to supply the court with information that might have helped the plaintiff to establish his standing, or by failing to defend. *See, e.g., Transatlantic Marine Claims Agency, Inc. v. Ace Shipping Corp.*, 109 F.3d 105 (2d Cir. 1997) (defendant's failure to defend, which led to entry of a default judgment, cannot be the basis for deeming subject matter jurisdiction to have been established). The Supreme Court has held repeatedly that "[t]he question of standing is not subject to waiver." *United States v. Hayes*, 515 U.S. 737, 742 (1995); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990). The reason for the no-waiver rule is readily apparent: Article III standing is a strict limit on a federal court's jurisdiction, and it has no power to rule on the merits of a case if the plaintiff cannot demonstrate his

standing. *Ex parte McCardle*, 7 Wall. (74 U.S.) 506, 514 (1869) ("Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."). If a federal district court had the power to declare that objections to subject matter jurisdiction could be waived and that standing could be deemed to exist despite the absence of evidence that the plaintiffs suffered injury-in-fact, then the court would possess authority to expand jurisdiction beyond the limitations imposed by Article III. Granting courts such powers is inconsistent with separation-of-power principles. As the Supreme Court has observed:

> Much more than legal niceties are at stake here. The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibrium of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects.

Steel Company, 523 U.S. at 101.

Ruling in a lawsuit filed by another group of citizens who believed that they might have been subjected to illegal electronic surveillance under the TSP, the Sixth Circuit held that the plaintiffs lacked standing to raise FISA claims in the absence of evidence that they had suffered injury-in-fact. *ACLU v. NSA*, 493 F.3d 644, 682 (6th Cir. 2007); *id*. at 688 (Gibbons, J., concurring in the judgment).

Amici urge the Court likewise to dismiss this case for lack of standing, and thus avoid creating a conflict among the federal appeals courts.

II. THE STATE SECRETS DOCTRINE IS NOT PREEMPTED AND REQUIRES DISMISSAL OF THIS SUIT

The state secrets doctrine permits the Government to bar the disclosure of information in a judicial proceeding if "there is a reasonable danger" that disclosure will "expose military matters which in the interest of national security, should not be divulged." *United States v. Reynolds*, 345 U.S. 1, 10 (1953). This Court made just such a "reasonable danger" determination when the case first came up on appeal in 2007. It invoked the state secrets doctrine on the grounds that "disclosure of information concerning . . . the means, sources and methods of intelligence gathering in the context of this case would undermine the government's intelligence gathering and compromise national security." *Al-Haramain I*, 507 F.3d at 1204.

Despite these findings that intelligence gathering would be "undermined" and that national security would be "compromised," the district court determined that Congress intended, when it adopted FISA, to preempt the state secrets doctrine in the area of electronic surveillance and to permit cases of this sort to go forward. *Al-Haramain II*, 564 F. Supp. 2d at 1117-24. That ruling is erroneous. There is

virtually no evidence that Congress intended FISA to displace the state secrets doctrine, and significant evidence that Congress lacked the constitutional authority to do so.

Amici note initially that neither FISA's statutory text nor its legislative history so much as mentions the state secrets doctrine. That silence would be highly surprising if Congress really had intended to displace the doctrine, particularly in light of its centuries-long pedigree. *See, e.g., Totten v. United States*, 92 U.S. 105 (1876). Indeed, as the district court later stated in explaining his rejection of Appellees' claim for punitive damages: "The legislature will not be presumed to overturn long-established legal principles unless such intention plainly appears in the statute." *Al-Haramain V*, 2010 U.S. Dist. LEXIS 136156, at *32. This Court has determined that the relevant inquiry in deciding if a federal statute preempts the state secrets doctrine is whether the statute "speaks directly to the question" otherwise answered by the doctrine. *Kasza v. Browner*, 133 F.3d 1159, 1167 (9th Cir. 1998). In the absence of any evidence that Congress "sp[oke] directly" to the preemption issue when it adopted FISA, there is no basis for concluding that Congress intended to impliedly preempt the doctrine.

The district judge based his ruling that Congress, in adopting FISA, had impliedly preempted the state secrets doctrine on his conclusion that § 1806(f) "is

in effect a codification of the state secrets privilege." *Al-Haramain II*, 564 F. Supp. 2d at 1119. That conclusion does not bear examination; the procedures provided for in § 1806(f) are far different from the procedures mandated for addressing state secrets claims. The most striking difference is that they focus on two largely different issues. The principle focus in a state secrets case is whether the disclosure of information would damage national security; if so, the privilege applies. *Reynolds*, 345 U.S. at 10. In contrast, § 1806(f) focuses on whether electronic surveillance is being properly conducted; the district court's principal task is to determine "whether the surveillance of the aggrieved person was lawfully authorized and conducted." Whether national security concerns require that the material should be kept absolutely confidential is not the most relevant issue in a court's § 1806(f) deliberations; to the contrary, the statute indicates that, where possible, the aggrieved person ought to be permitted to participate in § 1806(f) proceedings. The opposite is true in state secrets proceedings: any viewing of classified documents is to be done *ex parte*, outside the plaintiff's presence, and whether the classified information is a product of illegal government conduct plays little or no role in determining whether the state secrets doctrine is to be applied.

Moreover, even if Congress did intend that FISA would impose limits on the Executive Branch's invocation of the state secrets doctrine, any such limits must be

addressed with a recognition that the doctrine has firm constitutional underpinnings. Indeed, in establishing the framework for the modern state secrets doctrine, the Supreme Court stated that the tradition of protecting Executive Branch secrets from disclosure was evidence of a "recognition of an inherent executive power which is protected in the constitutional system of separation of power." *Reynolds*, 345 U.S. at 6 n.9.

Article II of the Constitution assigns to the President important foreign policy and national security responsibilities, including the role of "Commander in Chief of the Army and Navy" and the power to "make Treaties." U.S. Const., Art. II, § 2. The Supreme Court has recognized that the President's "authority to classify and control access to information bearing on national security" flows "primarily" from his Article II powers. *Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988). The Court earlier spelled out the contours of that constitutional power to control the flow of information and documents: Executive privilege is "constitutionally based" to the extent that "it relates to the effective discharge of a President's powers." *United States v. Nixon*, 418 U.S. 683, 711 (1974).

Obviously, as *Nixon* made clear, there are strict limits on the Executive Branch's authority to invoke constitutional authority to withhold information from court proceedings. But given this Court's previous determination that allowing a

full airing of information relating to Appellee's claims would "compromise national security," this case is a prime candidate for upholding Executive privilege. There can be little doubt that preventing disclosures that would compromise national security "relates to the effective discharge of a President's power." *Id.* *See* Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249 (2007).

The district court gave lip service to "constitutional overtones" of the state secrets doctrine, but it ultimately determined that when the Executive Branch and Congress come into conflict with respect to state secrets, the views of Congress must always prevail. *Al-Haramain II*, 564 F. Supp. 2d at 1123-24. That one-sided approach to separation-of-powers issues does not accurately reflect existing case law. The Framers intended that, under a properly adjusted system of checks and balances, the powers of each of the three branches of government were subject to being checked by another branch; yet each was to possess sufficient independence that it could carry out its core functions without interference from the other two branches. Thus, the Speech or Debate Clause, U.S. Const., Art. I, § 6, cl. 1, protects against the compelled disclosure of congressional documents whose disclosure would interfere with the due functioning of the legislative process. *United States v. Rayburn House Office Building*, 497 F.3d 654, 660 (D.C. Cir.

2007). Similarly, Article II mandates that the Executive Branch's secrets be protected to the extent necessary to permit the President to effectively carry out his military and foreign affairs functions. *El-Masri v. United States*, 479 U.S. 296, 303 (4th Cir. 2007).

It is true, of course, that in the course of this lawsuit the United States has never been forced to disclose any classified information. But it has had to pay a considerable price to maintain its secrecy: a $2.6 million judgment, as well as the blot on its reputation created by a summary judgment determination that it violated the rights of an Islamic charity. The United States should not be required to exercise such a Hobson's Choice between releasing information whose disclosure compromises national security or withholding the information and thereby subjecting itself to what amounts to a multi-million dollar default judgment. In the absence of any evidence that Congress intended to put the Executive Branch to that choice by preempting the state secrets doctrine, the judgment of the district court should be reversed.

III. SECTION 1806(f) IS NOT DESIGNED AS A DISCOVERY VEHICLE FOR FISA PLAINTIFFS

The district court's conclusion that § 1806(f) is a codification of the state secrets doctrine appears to have been driven in significant part by its basic

misunderstanding of the provisions of that lengthy (and somewhat convoluted) statutory provision. In an effort to clear up that misunderstanding, *amici* briefly parse the various provisions of the statute.

We note initially that § 1806 is entitled "Use of Information," thereby providing a strong indication that § 1806(f) focuses primarily on determining when information obtained through electronic surveillance can be used in judicial proceedings, not (as the district court believed) as a means of discovering whether the government has engaged in electronic surveillance and whether such surveillance complied with § 1809.

In order to discern the role of a district court in § 1806(f) proceedings, one must drop down to the 102nd word of the opening sentence. It provides, ". . . the United States district court . . . shall . . . 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." But the authority of the district court to carry out that role is conditional; it may do so *only* "if the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States." In other words, unless the Attorney General files such an affidavit, a district court may not act.

The district court's conclusion that § 1806(f) authorizes a court to initiate proceedings at the behest of an aggrieved person finds no support in the text of the statute. The district court relied on an introductory clause of the statute: ". . . 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 key phrase in this unwieldy clause is "any other statute or rule." That phrase makes clear that this clause is *not* granting authorization to aggrieved persons to initiate proceedings under § 1806(f). Rather, *if* an aggrieved person makes a motion or request (pursuant to some other statute or rule) of the type described in the clause, then the Attorney General has the option of filing the designated affidavit; and *only if* the Attorney General files such an affidavit may the district court conduct a proceeding of the sort outlined in § 1806(f).

The surrounding statutory provisions make clear that § 1806(f) is primarily intended as an adjunct to criminal proceedings. The primary reason why the Attorney General would ask a district court to determine whether the surveillance

was "lawfully authorized and conducted" would be to obtain a determination whether the fruits of that surveillance can be introduced into evidence in a criminal trial. *See* § 1806(c), (d), (e), and (g). By turning to a district court and utilizing in camera and ex parte review procedures authorized by § 1806(f), the Attorney General presumably hopes that he can obtain a determination regarding the legality of the surveillance in a more confidential setting than the proceeding in which the motion to suppress (or similar motion or request) was initially filed.

In arriving at its contrary interpretation of § 1806(f), the district court reasoned as follows. Although §1810 grants a right of action to "aggrieved person[s]" who have been subjected to illegal electronic surveillance, the court feared that such individuals would have no way of obtaining the evidence necessary to prove their claims unless they had some means of requiring the Government to disclose whether they had been subjected to electronic surveillance and whether such surveillance was conducted in violation of § 1809. The court therefore concluded that § 1806(f) must grant discovery rights to "aggrieved person[s]" because otherwise § 1810 plaintiffs would have no means of obtaining evidence necessary to support their claim and the § 1810 cause of action would be rendered a dead letter. *Al-Haramain III*, 595 F. Supp. 2d at 1083. But the premise of the district court's argument is incorrect: § 1810 plaintiffs in some cases will be

able to obtain necessary discovery even without resort to § 1806(f). The availability of evidence will depend on whether the Government successfully asserts the state secrets doctrine in response to the lawsuit. If the Government decides not to assert the doctrine, or if the district court determines that the Government has failed to demonstrate that the doctrine should be applied, then the § 1810 plaintiffs will be able to invoke normal discovery channels to obtain the evidence necessary to prove their claim.

CONCLUSION

Amici curiae request that the Court reverse the judgment of the district court and direct the dismissal of this case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I am an attorney for *amici curiae* Washington Legal Foundation, *et al.*. Pursuant to Fed.R.App.P. 29(d) and 32(a)(7)(C) and Ninth Circuit Rule 32-1, I hereby certify that the foregoing brief of *amicus curiae* is in 14-point, proportionately spaced CG Times type. According to the word processing system used to prepare this brief (WordPerfect 12.0), the brief contains less than 7,000 words (the actual word count is 6,968, not including the corporate disclosure statement, table of contents, table of authorities, certificate of service, and this certificate of compliance).

/s/ Richard A. Samp
Richard A. Samp

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of July, 2011, I electronically filed the brief of *amicus curiae* Washington Legal Foundation with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Richard A. Samp
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