09-15266

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs and Appellees,

vs.

BARACK H. OBAMA, President of the United States, et al.,

Defendants and Appellants.

MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION AND OPPOSITION TO EMERGENCY MOTION FOR STAY PENDING APPEAL

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CORPORATE DISCLOSURE STATEMENT

The undersigned counsel for appellees states that appellee Al-Haramain Islamic Foundation, Inc. is an Oregon corporation, with no parent or subsidiary, and that no publicly-held company owns 10 percent or more of Al-Haramain's stock.

February 23, 2009 By: /s/ Jon B. Eisenberg
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INTRODUCTION

Defendants purport to appeal an interlocutory order determining that plaintiffs may proceed under the Foreign Intelligence Surveillance Act (FISA) – specifically, 50 U.S.C. section 1806(f) – to demonstrate their Article III standing to prosecute their private cause of action under 50 U.S.C. section 1810 for warrantless electronic surveillance in violation of FISA. Defendants also seek an emergency stay of those proceedings below. Plaintiffs hereby oppose defendants' request for an emergency stay, and plaintiffs move to dismiss the appeal for lack of appellate jurisdiction.

None of defendants' theories of appellate jurisdiction can sustain this appeal. The interlocutory order is not appealable under the collateral order doctrine; it is not appealable as an injunction; and defendants have not filed anything resembling a petition for writ of mandamus.

The request for an emergency stay is predicated on defendants' unwarranted fear that the district judge will do grave harm to the Nation's security by publicly disclosing sensitive classified information in the course of adjudicating plaintiffs' standing. Section 1806(f), however, gives the judge authority to employ appropriate security measures as this case moves forward, and he has amply assured that he will use those measures effectively to protect national security.

Ultimately, defendants propose that the district court can *never* adjudicate plaintiffs' standing because to do so would confirm a secret fact – the fact of

plaintiffs' unlawful surveillance (or not) – which is protected from disclosure by the state secrets privilege. That proposition collapses, however, if FISA *preempts* the state secrets privilege. The district court has ruled that FISA *does* preempt the state secrets privilege – an issue this Court remanded to the district court in 2007. For this case to proceed expeditiously to an adjudication of standing upon the district court's FISA preemption ruling is consistent with this Court's remand order.

BACKGROUND

On November 16, 2007, the Court remanded this case to Judge Vaughn R. Walker "to consider whether FISA preempts the state secrets privilege and for any proceedings collateral to that determination." *Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190, 1206 (9th Cir. 2007). On July 2, 2008, Judge Walker ruled that FISA preempts the state secrets privilege and dismissed plaintiffs' complaint with leave to amend – specifically, to plead non-classified facts sufficient to establish "aggrieved person" status under section 1806(f). *In re National Security Agency Telecommunications Records Litigation*, 564 F.Supp.2d 1109, 1111, 1135 (N.D. Cal. 2008). Plaintiffs subsequently filed a First Amended Complaint which amply pleads the requisite non-classified information. *See* Doc. #35 at 4-14.

On January 5, 2009, Judge Walker ruled that "[w]ithout a doubt, plaintiffs have alleged enough to plead 'aggrieved person' status so as to proceed to the next step in proceedings under FISA's sections 1806(f) and 1810." Doc. #57 at 18. Judge Walker

prescribed several measures to be taken in order to facilitate going forward with an adjudication of plaintiffs' Article III standing. *See* Doc. #57 at 24-25.

On January 16, 2009, defendants filed a notice of appeal from the order of January 5, 2009. Doc. #59. Three days later, defendants moved for certification of an interlocutory appeal from that order pursuant to 28 U.S.C. section 1292(b). Doc. #60. On February 13, 2009, Judge Walker denied such certification and directed the government "not later than February 27, 2009 to inform the court how it intends to comply with the January 5 order." Doc. #71 at 3.

Defendants have filed with this Court an "Emergency Motion For Stay Pending Appeal" (hereafter "Emerg. Mo."), seeking a stay of "any district court proceedings that will lead to disclosure of classified information." Emerg. Mo. at 20. Defendants assert three theories of jurisdiction to review the January 5, 2009 order: the "final collateral order" doctrine, appealability as an injunction under 28 U.S.C. section 1292(a)(1), and this Court's mandamus jurisdiction. *See* Emerg. Mo. at 20, n. 3.

ARGUMENT

I. THE DISTRICT COURT'S ORDER IS NOT APPEALABLE UNDER THE "FINAL COLLATERAL ORDER" DOCTRINE.

The "final collateral order" doctrine permits a direct appeal from an interlocutory order if (1) the order "conclusively determine[s]" a disputed question, (2) the question is "completely separate from the merits of the action" and is not

"enmeshed in the factual and legal issues comprising the plaintiff's cause of action," and (3) the order is "effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468-69 (1978) (emphasis and internal quotation marks omitted). The January 5, 2009 order is not appealable under this doctrine unless all three requirements are met.

A. The Ruling Denying Defendants' Motion to Dismiss This Action For Lack of Standing is Not a Final Collateral Order.

The district court's order has two elements. The first element is a ruling denying defendants' third motion to dismiss this action for purported lack of standing. The law is well settled that this ruling is not appealable under the collateral order doctrine because "the issue of standing is not effectively unreviewable on appeal from a final judgment and, thus, fails the last prong of the collateral order doctrine." *Summit Medical Associates, P.C. v. Pryor*, 180 F.3d 1326, 1334 (11th Cir. 1999).

B. The Ruling Allowing Plaintiffs to Proceed Under 50 U.S.C. § 1806(f) is Not a Final Collateral Order.

The second element of the district court's order is the ruling allowing plaintiffs to proceed under section 1806(f). This ruling is not appealable under the collateral order doctrine because it fails both the first and second prongs of the doctrine.

1. The Ruling is Not "Final" Because it Does Not Conclusively Determine How the District Court Will Proceed Regarding Possible Disclosure of Classified Information.

The ruling allowing plaintiffs to proceed under section 1806(f) fails the first prong of the collateral order doctrine because it is not *final*, in that it does not "conclusively determine" how the case will proceed. *See Coopers & Lybrand,* 437 U.S. at 468. Specifically, the ruling leaves unsettled, for the time being, the questions of how and to what extent plaintiffs' counsel will be granted access to classified information. The order states that (1) "[t]he court's next steps will be to prioritize two interests: protecting classified evidence from disclosure and enabling plaintiffs to prosecute their action," (2) "the court will review the Sealed Document ex parte and in camera," and (3) due process might "possibly" require plaintiffs' counsel to have access "to at least some of defendants' classified filings." Doc. #57 at 23.

Thus, nothing is yet conclusive with regard to how the district court will proceed. The section 1806(f) proceedings below are still in midstream, which is not an appropriate time for appellate review under the collateral order doctrine.

2. The Ruling is Not "Collateral" Because it is Enmeshed in the Merits Issue.

The district court's section 1806(f) ruling fails the second prong of the collateral order doctrine because the ruling is an integral step leading to adjudication of the ultimate question in proceedings under section 1806(f) – whether the plaintiffs'

surveillance was lawful – and as such is not "completely separate from the merits of the action." *Coopers & Lybrand,* 437 U.S. at 468. To the contrary, the district court's ruling is "enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Id.* at 469. In section 1806(f) proceedings, the district court may "determine whether the surveillance of the aggrieved person was lawfully authorized and conducted." 50 U.S.C. § 1806(f). That issue is hardly collateral to the merits issue in this case, but *is* the merits issue.

II. THE DISTRICT COURT'S ORDER IS NOT APPEALABLE AS AN INJUNCTION UNDER 28 U.S.C. § 1292(a)(1).

Under 28 U.S.C. section 1292(a)(1), direct appeal lies from interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." Although the January 5, 2009 order does not purport to grant an injunction, an order not labeled an "injunction" may be appealable under section 1292(a)(1) if it has the "practical effect" of granting an injunction. An order has such practical effect if "it is (1) 'directed to a party,' (2) 'enforceable by contempt,' and (3) 'designed to accord or protect "some or all of the substantive relief sought by a complaint" in more than a preliminary fashion.'" *United States v. Cal-Almond, Inc.*, 102 F.3d 999, 1002 (9th Cir. 1996). In contrast, an order is not appealable as an injunction if it merely "regulates the conduct of the litigation." *Gon v. First State Ins. Co.*, 871 F.2d 863, 865 (9th Cir. 1989).

A. To the Limited Extent That the Order is Directed to Defendants, the Appeal is Mooted by Defendants' Compliance With the Order.

An order is directed to a party for purposes of appealability under section 1292(a)(1) if the order compels the party to take action. *See Alsea Valley Alliance v. Department of Commerce*, 358 F3d 1181, 1186 (9th Cir. 2004). The January 5, 2009 order requires defendants to take some action, but only the following: (1) to arrange for the Department of Justice Litigation Security Section to make the Sealed Document available for the court's in camera review, (2) to arrange for plaintiffs' attorneys to apply for Top Secret/Sensitive Compartmented Information(SCI) security clearance and to expedite their processing, and (3) to determine whether any of the classified filings in this case may be declassified and to file a report on the outcome of that determination. Doc. #57 at 24-25.

Defendants have complied with or are in the process of complying with all those directives. Defendants have advised the district court that the Sealed Document is available for the court's inspection. Defendants have processed applications by plaintiffs' counsel for security clearance, and two of plaintiffs' attorneys have been granted security clearance. Defendants have advised the district court that they will file their report on declassification on or before February 27, 2009. Thus, to the limited extent that the district court's order is directed to defendants, this appeal is mooted by their compliance with the court's directives. *See, e.g., Christian Knights*

of the Ku Klux Klan v. District of Columbia, 972 F.2d 365, 369 (D.C. Cir. 1992) (injunction appeal is mooted by compliance). Such mootness deprives this Court of whatever jurisdiction it might have had under section 1292(a)(1). *See North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (mootness is jurisdictional).

Nothing in the district court's order other than the directives with which defendants are complying requires defendants to take any other action. Notably, the order does not require defendants to disclose classified information to plaintiffs' counsel. Nor will the district court require such disclosure by defendants at any future time. If the district court later decides to give plaintiffs' counsel access to the Sealed Document and/or to disclose to plaintiffs' counsel any of the information in defendants' classified filings, such disclosure will be *by the district court*, not by defendants under court order; thus, the ruling will not be appealable as an injunction under section 1292(a)(1), because it will not require any action by defendants.

B. The Order is Not Designed to Accord or Protect Any of the Substantive Relief Sought.

The district court's order is not appealable as an injunction for the additional reason that it is not "'designed to accord or protect "some or all of the substantive relief sought by a complaint."'" *Cal-Almond*, 102 F.3d at 1002. Rather, it merely "regulates the conduct of the litigation," *Gon*, 871 F.2d at 865, by prescribing procedures to facilitate plaintiffs' showing of standing.

"To qualify as an 'injunction' under § 1292(a)(1), a district court order must grant at least part of the ultimate, coercive relief sought by the moving party." *Henrietta D. v. Giuliani*, 246 F.3d 176, 182 (2d Cir. 2001). The order here does no such thing. Plaintiffs' First Amended Complaint seeks (in addition to damages) coercive relief in the form of an order that defendants (1) "disclose . . . all unlawful surveillance of plaintiffs' communications," (2) "turn over" material relating to plaintiffs that was acquired by or the fruit of such surveillance, and (3) "purge" from defendants' files all information that was acquired by or the fruit of such surveillance. Doc. #35 at 16. The district court's order does not grant any of this coercive relief. It does not order defendants to "disclose" or "turn over" anything to plaintiffs or to "purge" anything from defendants' files.

The order simply allows this case to proceed under section 1806(f), without conclusively determining *how* the case will proceed. "It is well settled that an order of the district court that merely continues a case and does not reach the merits of parties' opposing claims is merely a step in the processing of a case and does not fall within the range of interlocutory orders appealable under 28 U.S.C. § 1292(a)(1)." *Frutiger v. Hamilton Central School District*, 928 F.2d 68, 72 (2d Cir. 1991).

III. DEFENDANTS HAVE NOT INVOKED THIS COURT'S MANDAMUS JURISDICTION.

The only other ground defendants assert as a basis for appellate jurisdiction is

this Court's mandamus jurisdiction. Defendants have not, however, filed a petition for writ of mandamus or anything that might be appropriately treated as a mandamus petition. Thus, exercise of mandamus jurisdiction at this time would be premature.

IV. THE DISTRICT COURT'S JULY 2, 2008 RULING ON FISA PREEMPTION CANNOT BE REVIEWED ON APPEAL FROM THE ORDER OF JANUARY 5, 2009.

The primary purpose of defendants' purported appeal from the district court's January 5, 2009 decision to proceed under section 1806(f) is to challenge the district court's previous ruling on July 2, 2008 that FISA preempts the state secrets privilege. *See* Emerg. Mo. at 15-17. But even if this Court were to conclude that it has jurisdiction at this time to review the order of January 5, 2009, the Court would lack pendent jurisdiction to review the FISA preemption ruling of July 2, 2008.

On an appeal under the collateral order doctrine or section 1292(a)(1), the appellate court cannot exercise pendent jurisdiction over previous interlocutory rulings unless "the rulings are inextricably intertwined with, or necessary to ensure meaningful review of, decisions that are properly before the court on interlocutory appeal." *Burlington Northern & Santa Fe Railway Company v. Vaughn*, 509 F.3d 1085, 1093 (9th Cir. 2007). "These requirements are narrowly construed, setting 'a very high bar' for the exercise of pendent appellate jurisdiction." *Id.* at 1093. "'Two issues are not "inextricably intertwined" if we must apply different legal standards to each issue.'" *Meredith v. Oregon*, 321 F.3d 807, 814 (9th Cir. 2003). Pendent

jurisdiction is not "necessary to ensure meaningful review of" the appealed ruling unless the pendent decision has "much more than a tangential relationship" to the appealed ruling. *Poulos v. Caesar's World, Inc.*, 379 F.3d 654, 669 (9th Cir. 2004). "Rare is the ruling that is 'inextricably intertwined' or 'necessary to ensure meaningful review of' decisions that are properly before us on interlocutory appeal." *Id.* (permissive appeal from denial of class certification).

The district court's previous FISA preemption decision is not that "rare"ruling. The substantive issue addressed in the July 2, 2008 ruling on FISA preemption and the procedural issues addressed in the January 5, 2009 ruling on how to proceed under section 1806(f) implicate wholly different legal standards and thus are not inextricably intertwined. FISA preemption bears only a tangential relationship to the determination of how to proceed under section 1806(f), because the law of preemption has no relevance to that determination. The time has not yet arrived for this Court's review of Judge Walker's FISA preemption ruling.

V. EVEN IF THIS COURT HAS JURISDICTION, NO EMERGENCY STAY IS NECESSARY.

A. A Stay is Not Necessary Because the District Court Has Given Ample Assurance That it Will Use the Security Procedures Prescribed by 50 U.S.C. § 1806(f) to Protect National Security as This Case Moves Forward.

Even if this Court were to conclude that it has jurisdiction, the Court should deny an emergency stay because there is no danger that Judge Walker will do harm

to the Nation's security by publicly disclosing sensitive classified information as the case moves forward under section 1806(f). To the contrary, Judge Walker's order of January 5, 2009 gives ample assurance that he will take all measures necessary to protect national security, using the "appropriate security procedures and protective orders" authorized by section 1806(f). The order states:

> The court has carefully considered the logistical problems and process concerns that attend considering classified evidence and issuing rulings based thereon. Measures necessary to limit the disclosure of classified or other secret evidence must in some manner restrict the participation of parties who do not control the secret evidence and of the press and the public at large. The court's next steps will prioritize two interests: protecting classified evidence from disclosure and enabling plaintiffs to prosecute their action. Unfortunately, the important interests of the press and the public in this case cannot be given equal priority without compromising other interests.

Doc. #57 at 22-23. Judge Walker's subsequent order of February 13, 2009 reiterates that "the court is fully aware of its obligations with regard to classified information." Doc. #71 at 2. Thus, there is no prospect of an imminent and irreparable public disclosure of sensitive information – not if Judge Walker uses, as he has assured he will, the security measures authorized by Congress in section 1806(f).

Plaintiffs are mindful of this Court's previous determination that the basis for defendants' assertion of the state secrets privilege "is exceptionally well documented" and that "disclosure of information concerning the Sealed Document and the means, sources and methods of intelligence gathering in the context of this case would undermine the government's intelligence capabilities and compromise national

security." *Al-Haramain*, 507 F.3d at 1203-04. But the Court made that determination within the context of the *state secrets privilege*, under which, "if 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*." *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998) (emphasis added.) If the state secrets privilege were to apply to this case, this Court has indicated that the district court would not be permitted to disentangle portions of the Sealed Document that are safe to disclose and allow plaintiffs to use those portions to demonstrate standing, but would have to exclude the Sealed Document entirely. In contrast, under section 1806(f), such disentanglement *is* permitted, through the use of "appropriate security procedures and protective orders." 50 U.S.C. § 1806(f).

Judge Walker has made clear that he will use those security measures as necessary to protect the Nation's security. For example, he can allow plaintiffs' counsel to use a redacted version of the Sealed Document to establish standing, whereby any sensitive portions of the document that are not safe to disclose will be shielded from public view, and he can issue protective orders that bind plaintiffs' counsel to confidentiality. There is no danger that plaintiffs' counsel will disclose anything Judge Walker directs them not to disclose; their security clearance means

the FBI has determined that they are persons "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, . . . and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Order No. 12968, § 3.1(b) (1995). Indeed, throughout three years of litigating this case, plaintiffs and their counsel have scrupulously taken care not to disclose the contents of the Sealed Document. Thus, in the forthcoming proceedings under section 1806(f), there is no danger of any public disclosure – by Judge Walker or plaintiffs' counsel – of the sensitive information that caused this Court to rule as it did in 2007.

Judge Walker has done nothing more than what was contemplated in this Court's 2007 decision to remand for a determination on FISA preemption "and for any proceedings collateral to that determination." *Al-Haramain*, 507 F.3d at 1206. Implicit in that decision is the assumption that section 1806(f) *can* be employed effectively to protect national security in this case – otherwise, the remand would have been pointless. Judge Walker has demonstrated that he *will* use section 1806(f) effectively to protect national security here. The proceedings under section 1806(f) with which Judge Walker will now go forward are the "collateral proceedings" this Court envisioned in 2007.

In the 2007 proceedings before this Court, defendants insisted it was essential

to national security that they "neither confirm nor deny whether plaintiffs had been surveilled under the TSP or any other intelligence-gathering program." Brief For Appellants at 6. Even now, defendants continue to insist that "[e]ven a bare conclusion of whether or not plaintiffs were subject to surveillance . . . would cause exceptionally grave harm to the national security." Emerg. Mo. at 13. Yet, on October 22, 2007, in a public speech that now appears on the FBI's official Internet website, FBI Deputy Director John Pistole *acknowledged* that the FBI used surveillance in the 2004 investigation of Al-Haramain. *See* Doc. #35 at 11. If a high FBI official can publicly acknowledge such surveillance without harming national security, then surely Judge Walker can adjudicate the mere fact of surveillance without harming national security.

B. There is Little Likelihood of Success on the Merits of This Purported Appeal.

Defendants have failed to sustain their burden of demonstrating a likelihood of success on the merits sufficient to justify an emergency stay. In this regard, defendants make two substantive arguments: they would be likely to succeed in challenging Judge Walker's authority to give plaintiffs' counsel access to the classified documents on file with the district court, and they would be likely to succeed in challenging Judge Walker's determination that FISA preempts the state secrets privilege. Defendants are wrong on both points.

1. The District Court is Authorized to Give Plaintiffs' Counsel Access to Classified Filings Under the Court's Control.

Now that plaintiffs' counsel have been given security clearance, they may be given access to the classified filings if it is determined that they have a "need to know" any information contained in those filings. *See* Exec. Order No. 13,292, § 4.1(a)(3) (2003). Judge Walker has the authority to make that "need to know" determination. Defendants are not likely to succeed in showing otherwise.

Executive Order No. 13,292 defines "need to know" as "a determination *made by an authorized holder of classified information* that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized government function." Exec. Order No. 13,292, § 6.1(z) (2003) (emphasis added). This provision means *the district court* may make the "need to know" determination here, because the court is an "authorized holder" of the classified filings in this case. According to Department of Defense regulations, "Members of . . the Federal judiciary . . . do not require personnel security clearances. They may be granted access to DoD classified information to the extent necessary to adjudicate cases being heard before these individual courts." DoD 5200.2-R, § C3.4.4.5 (1987). Congress has declared that executive orders and regulations pertaining to security clearances "shall not apply to . . . Federal judges appointed by the President." 50 U.S.C. § 437. Thus, the applicable regulatory and statutory law makes the district

court an "authorized holder" of the classified filings here, as the court needs no security clearance and plainly needs access to the filings in order to adjudicate this case. The Executive Branch's own regulations give the court, as an "authorized holder," the power to make the "need to know" determination.

Because of the constitutional separation of powers, it could not be any other way. "Every court has supervisory power over its own records and files . . . ." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978). "So long as they remain under the aegis of the court, they are superintended by judges who have dominion over the court." *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 141 (2d Cir. 2004). The supervisory power of the courts over their files is "an incident of their constitutional function." *In re Sealed Affidavit(s) To Search Warrants Executed On February 14, 1979*, 600 F.2d 1256, 1257 (9th Cir. 1979). Control over the classified filings in this case is a Judicial Branch power which the Executive Branch cannot impair or intrude upon by operation of executive orders or agency regulations. *See United States v. Pollard*, 416 F.3d 48, 58-59 (D.C. Cir. 2005) (Rogers, J., concurring and dissenting) (district court had power to determine counsel's "need to know" classified information contained in documents that had been "filed with the district court," because otherwise the court "would be in the untenable position of lacking jurisdiction over motions that relate to documents that were filed with it and over which it has continuing control").

2. Section 1806(f) Preempts the State Secrets Privilege.

Defendants similarly have little likelihood of success on the issue of FISA preemption (which is not yet reviewable by this Court).

This Court has plainly described the state secrets privilege as "a common law evidentiary privilege." *Al-Haramain*, 507 F.3d at 1196. A federal statutory scheme like FISA can preempt federal common law like the state secrets privilege, even without explicit evidence of a clear and manifest purpose to do so, if "Congress has "*occupied the field* through the establishment of a *comprehensive regulatory program*." *Milwaukee v. Illinois*, 451 U.S. 304, 316-17 (1981) (emphasis added).

FISA preempts the state secrets privilege by occupying the entire field of foreign intelligence surveillance with a comprehensive regulatory program that includes a warrant requirement and secure procedures for adjudicating civil actions for FISA violations. As Senator Gaylord A. Nelson (one of FISA's co-sponsors) explained during floor debate, FISA "[a]long with the existing statute dealing with criminal wiretaps . . . *blankets the field*." 124 CONG. REC. 10,903-04 (1978) (emphasis added). As this Court put it in 2007, FISA "provides a *detailed regime* to determine whether surveillance 'was lawfully authorized and conducted.'" *Al-Haramain*, 507 F.3d at 1205 (emphasis added).

The specific preemption inquiry is whether FISA's comprehensive regulatory

program “““[speaks] *directly* to [the] question” otherwise answered by federal common law.’” *Kasza,* 133 F.3d at 1167 (emphasis in original). The question, simply put, is whether FISA speaks directly to protecting national security in FISA litigation. Two sub-issues are presented: (1) Does FISA speak directly to security procedures and rules of disclosure that are otherwise prescribed by the state secrets privilege? (2) Does FISA speak directly to the rule of outright dismissal that is otherwise prescribed by the state secrets privilege? Both answers are *yes*.

On the first sub-issue, section 1806(f) speaks directly to security procedures and rules of disclosure by prescribing rules for judicial determination and protection of national security concerns where, as here, a private cause of action is alleged under section 1810. This regime speaks directly to use and disclosure that would otherwise be governed by the state secrets privilege. It speaks directly to secure use of the Sealed Document in the present case to demonstrate plaintiffs’ standing. And its application “notwithstanding any other law,” 50 U.S.C. § 1806(f), means the state secrets privilege is preempted. FISA departs from the state secrets privilege by replacing its absolute rule of outright dismissal – in effect, deniability by silence – with statutory provisions for protecting national security while holding the Executive Branch accountable for intelligence abuses.

On the second sub-issue – whether FISA speaks directly to the rule of outright dismissal within the state secrets privilege – section 1810, by prescribing a private

right of action for FISA violations despite the otherwise secret nature of FISA proceedings, displaces the rule of outright dismissal, which is wholly inconsistent with the very notion of a private FISA action. If section 1810 did *not* displace the rule of outright dismissal, then Congress's prescription of a private FISA action would be meaningless, for the President would be able to evade any private FISA action merely by invoking the state secrets privilege. Yet that is defendants' position here – that section 1810 is a nullity because the President says so. That position is inimical to the rule of law that prevails in America.

CONCLUSION

For the foregoing reasons, this Court should deny an emergency stay and dismiss the appeal for lack of jurisdiction.

February 23, 2009

Respectfully submitted,

/s/ Jon B. Eisenberg

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STATEMENT OF RELATED CASE

This Court previously adjudicated an interlocutory appeal in this case in No. 06-36083, *Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190 (9th Cir. 2007).

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 27(d)(2), this Motion By Appellees To Dismiss Appeal For Lack Of Jurisdiction is proportionately spaced, has a typeface of 14 points or more, and consists of 20 pages.

February 23, 2009

By: /s/ Jon B. Eisenberg
Jon B. Eisenberg

CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2009, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants.

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