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14 **IN THE UNITED STATES DISTRICT COURT**
15 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

16 **OAKLAND DIVISION**

17 CAROLYN JEWEL, *et al.*,

18 Plaintiffs,

19 v.

20 NATIONAL SECURITY AGENCY, *et al.*,

21 Defendants.

) Case No. 4:08-cv-4373-JSW

) **GOVERNMENT DEFENDANTS'**
) **NOTICE OF MOTION AND MOTION**
) **FOR SUMMARY JUDGMENT AS TO**
) **PLAINTIFFS' STATUTORY CLAIMS**

) [No hearing date]
) Courtroom 5, 2nd Floor

) Hon. Jeffrey S. White

NOTICE OF MOTION

PLEASE TAKE NOTICE that, at a date and time to be determined by the Court, before Judge Jeffrey S. White, defendants NATIONAL SECURITY AGENCY (“NSA”); PAUL M. NAKASONE, Director of the NSA, in his official capacity; the UNITED STATES OF AMERICA; DONALD J. TRUMP, President of the United States, in his official capacity; the DEPARTMENT OF JUSTICE; JEFFERSON B. SESSIONS, III, Attorney General of the United States, in his official capacity; and DANIEL COATS, Director of National Intelligence, in his official capacity (hereinafter the “Government Defendants”)¹ will move for summary judgment as to all of Plaintiffs’ remaining statutory claims against the Government Defendants pursuant to Rule 56 of the Federal Rules of Civil Procedure.

The grounds for this motion are that there is no genuine issue of material fact that Plaintiffs cannot meet their burden of establishing their standing. Due to the required exclusion of evidence subject to the Government Defendants’ assertions of the state secrets privilege and of the statutory privileges established by 50 U.S.C. § 3024(i)(1) and 50 U.S.C. § 3605(a), Plaintiffs lack admissible evidence with which to establish their standing to maintain their statutory claims, and the Court therefore lacks subject-matter jurisdiction to consider them. Additionally, dismissal is required because the case cannot be litigated on the merits without creating an unjustifiable risk of divulging state secrets.

The relevant facts, authority, and arguments supporting the Government Defendants’ motion are set forth below in the accompanying Memorandum of Points Authorities in Support of the Government Defendants’ Motion for Summary Judgment as to Plaintiffs’ Statutory Claims. For the reasons stated therein, the Government Defendants’ motion should be granted, judgment awarded to the Government Defendants on Plaintiffs’ statutory claims as a matter of law, and final judgment entered for the Government Defendants as to all counts.

¹ Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, defendants Nakasone, Trump, Sessions, and Coats have been automatically substituted herein as defendants sued in their official capacities in lieu of, respectively, Admiral Michael S. Rogers, former Director of the NSA, Barack H. Obama, former President of the United States, Dana J. Boente, former Acting Attorney General of the United States, and Michael S. Dempsey, former Acting Director of National Intelligence.

1 Dated: September 7, 2018

2 Respectfully submitted,

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) **MEMORANDUM OF POINTS AND**
) **AUTHORITIES IN SUPPORT OF THE**
) **GOVERNMENT DEFENDANTS'**
) **MOTION FOR SUMMARY JUDGMENT**
) **AS TO PLAINTIFFS' STATUTORY**
) **CLAIMS**

) [No hearing date]
) Courtroom 5, 2nd Floor

) Hon. Jeffrey S. White
)

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1 With the classified evidence removed entirely from the case, there remains no competent
2 evidence with which Plaintiffs can demonstrate their standing. That being so, Plaintiffs cannot
3 establish the existence of an essential element of their case, that is, the Court's Article III
4 jurisdiction to hear their case in the first instance. Judgment must therefore be awarded to the
5 Government as a matter of law. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992); *Celotex*
6 *Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986); *Jeppesen*, 614 F.3d at 1083. Moreover, even if it
7 were theoretically possible for Plaintiffs to establish their standing, dismissal still would be
8 required. The Court has already found that Plaintiffs' Fourth Amendment challenge to Upstream
9 collection could not proceed without unacceptable risk of disclosing classified information
10 concerning that program, to the grave detriment of national security. *Jewel v. NSA*, 2015 WL
11 545925, at *4-5 (N.D. Cal. Feb. 10, 2015). Just so with Plaintiffs' remaining claims.

12 Disregarding established principles, Plaintiffs argue that this Court is not only authorized,
13 but "required" to rely on the classified evidence to decide their standing. That conclusion flies in
14 the face of decades of precedent, and the Supreme Court's recent warning against the inherent
15 risk to national security of adjudicating parties' standing to challenge claimed Government
16 surveillance based on *ex parte, in camera* review of classified evidence. *Clapper v. Amnesty*
17 *Int'l, USA*, 568 U.S. 398, 412 n.4 (2013). Plaintiffs base their mistaken view on a misreading of
18 50 U.S.C. § 1806(f), which by its own terms has no application here. Section 1806(f) authorizes
19 *ex parte, in camera* review of classified information pertaining to electronic surveillance only to
20 determine the legality of surveillance from which evidence to be used against a target or subject
21 was acquired, and not, as Plaintiffs seek here, to determine whether they are targets or subjects of
22 surveillance with standing to contest the Government's intelligence-gathering activities.
23 Moreover, even if § 1806(f) did apply here, it would not displace the state secrets privilege,
24 where Congress has not expressed a clear and unequivocal intent to do so.

25 As with Plaintiffs' earlier challenge to Upstream collection, both for "fail[ure] to proffer
26 sufficient admissible evidence" of standing, *Jewel*, 2015 WL 545925, at *4, and because
27 proceeding with the litigation would place national security at unacceptable risk, *see id.* at *5,
28 Plaintiffs' remaining claims must be dismissed, and final judgment awarded to the Government.

BACKGROUND

The Challenged NSA Intelligence-Gathering Programs

1
2
3 Plaintiffs' Complaint (ECF No. 1) implicates three inter-related NSA intelligence-
4 gathering activities authorized by President Bush in the wake of the September 11, 2001, terrorist
5 attacks: (1) targeted collection of one-end foreign communications reasonably believed to
6 involve agents of al-Qaida or other terrorist organizations; (2) bulk collection of non-content
7 information (metadata) about telephone calls made to, from, or within the United States (such as
8 dates, times, durations, and originating and receiving numbers); and (3) bulk collection of
9 metadata about Internet-based communications (such as the dates, times, and "to" and "from"
10 lines of e-mail). *See* Classified NSA Decl. (public version), ECF No. 389-1, ¶¶ 40, 73. By early
11 2007 all three of these Presidentially authorized activities had transitioned to authorization (and
12 supervision) by the Foreign Intelligence Surveillance Court ("FISC"), pursuant to the Foreign
13 Intelligence Surveillance Act ("FISA"). *See id.* ¶ 73. Although now discontinued, these
14 programs, known collectively as the President's Surveillance Program ("PSP"), remain at issue
15 in Plaintiffs' complaint. *See, e.g.,* Compl., ECF No. 1, ¶¶ 5, 7, 39, 76, 92, 110, 120, 129, 138.

16 Plaintiffs also maintain (although the Government disputes) that their complaint
17 challenges three NSA intelligence activities conducted pursuant to FISC orders, issued under
18 various provisions of FISA, following termination of the PSP: (1) "Upstream" collection of
19 Internet-based communications, targeted at non-U.S. persons located abroad; (2) now-
20 discontinued bulk collection of telephony metadata; and (3) now-discontinued bulk collection of
21 Internet metadata. *See* Classified NSA Decl. (public version) ¶ 55.

22 The Government has officially acknowledged the existence of and certain information
23 regarding the nature of all six programs described above, but the identities of persons whose
24 communications were subject to those intelligence gathering activities, details concerning the
25 programs' sources, methods, scope, and operation, and (with a single exception not applicable
26 here, *see infra* at 13) the identities of the telecommunications service providers that assisted the
27 NSA in carrying out these programs, all remain properly classified, *see* Classified NSA Decl.

1 (public version) ¶¶ 74, 323, and for the reasons detailed in the Classified NSA Declaration,
2 cannot be disclosed without risk of exceptionally grave damage to national security.

3 **Plaintiffs' Claims**

4 Plaintiffs' complaint initially asserted 12 causes of action against the Government, three
5 constitutional and nine statutory claims (Counts I, III, V–VII, IX, X, XII, XIII, XV–XVII),
6 variously seeking declaratory and injunctive relief and damages. Since then, however, the Court
7 has dismissed a number of Plaintiffs' statutory claims, *see Jewel v. NSA*, 965 F. Supp. 2d 1090,
8 1097, 1108-12 (N.D. Cal. 2013), and granted the Government summary judgment on Plaintiffs'
9 Fourth Amendment challenge to Upstream collection. *See Jewel*, 2015 WL 545925, at *4, *5
10 (holding that Plaintiffs had not adduced sufficient admissible evidence of their standing, and that
11 their claim could not be adjudicated “without risking exceptionally grave damage to national
12 security”). Plaintiffs sought to appeal that ruling as a partial final judgment under Federal Rule
13 of Civil Procedure 54(b), but the Ninth Circuit held that it was not properly appealable, and
14 remanded the case to this Court for a final resolution of all of Plaintiffs' claims. *See Jewel v.*
15 *NSA*, 810 F.3d 622, 631 (9th Cir. 2015). After the case returned to this Court, and the May 2017
16 case-management conference neared, Plaintiffs withdrew their remaining constitutional claims
17 against the Government, in apparent recognition that the cessation of the remaining challenged
18 programs had rendered their constitutional claims for declaratory and injunctive relief moot. *See*
19 *Jt. Case Mgmt. Conf. St.*, ECF No. 352, at 2, 20.

20 As a result, what remain of Plaintiffs' claims against the Government are three statutory
21 damages claims: (i) Count IX, alleging unlawful interception, use, and disclosure of the contents
22 of Plaintiffs' communications in violation of the Wiretap Act, 18 U.S.C. § 2511(1)(a)–(c);
23 (ii) Count XII, alleging unlawful disclosure of the contents of Plaintiffs' communications in
24 violation of the Stored Communications Act (“SCA”), 18 U.S.C. § 2703(a); and (iii) Count XV,
25 alleging unlawful acquisition of records or other information (*i.e.*, metadata), pertaining to
26 Plaintiffs' communications, also in violation of the SCA, 18 U.S.C. § 2703(c). *See Jt. Case*
27 *Mgmt. Conf. St.* at 3–6. Each remaining count purports to challenge each applicable NSA
28 content- or metadata-collection activity, respectively, as follows:

PSP Content Collection	PSP Bulk Internet metadata	PSP Bulk telephony metadata	FISA Upstream Collection	FISA bulk telephony metadata	FISA bulk Internet metadata
Wiretap Act Count IX (content)	N/A	N/A	Wiretap Act Count IX (content)	N/A	N/A
SCA 2703(a) Count XII (content)	N/A	N/A	SCA 2703(a) Count XII (content)	N/A	N/A
N/A	SCA 2703(c) Count XV (metadata)	SCA 2703(c) Count XV (metadata)	N/A	SCA 2703(c) Count XV (metadata)	SCA 2703(c) Count XV (metadata)

Discovery Proceedings

Following the Ninth Circuit’s dismissal of Plaintiffs’ attempted Rule 54(b) appeal from the Court’s Upstream ruling, the Court established a procedural framework for addressing Plaintiffs’ remaining claims against the Government that has now readied the case for dispositive briefing on the threshold issue of Plaintiffs’ standing.

On remand from the Ninth Circuit the Court lifted its initial stay of discovery, Order Granting Motion to Lift Stay of Discovery, ECF No. 340, whereupon Plaintiffs served over 300 discovery requests on the Government directed to their standing and the merits of their still-remaining claims. The Government objected to Plaintiffs’ requests on a number of grounds, principally that they sought classified operational details of NSA intelligence-gathering activities protected by the state secrets privilege and the Government’s statutory privileges, 50 U.S.C. §§ 3024(i)(1) and 3605(a). *See* Jt. Ltr. Brief re: Discovery Dispute, ECF No. 341, at 6–9.

To resolve the parties’ impasse and “insure the timely progress of this litigation,” the Court held a further case-management conference in May 2017. Order Granting Jt. Request for Case Mgmt. Conf., ECF No. 347, at 5; *see also* Civil Minute Order, ECF No. 356. There the Court set a schedule for “[s]tagged [d]iscovery” under which Plaintiffs were permitted to serve revised discovery requests limited to the issue of their standing to pursue their remaining statutory damages claims. *See* Civil Minute Order at 1. The Court directed the Government to file its unclassified objections and responses to Plaintiffs’ revised discovery requests on the public record, and to submit classified documents and information responsive to Plaintiffs’

1 requests *ex parte* and *in camera*. *See id.* In addition, to ensure its access to all classified
2 information pertaining to the standing issue, the Court also tasked the Government Defendants to
3 “marshal all evidence” they believe has bearing on the standing issue, even if Plaintiffs had not
4 requested it. *Id.*; *see also* Reporter’s Tr., Further Case Mgmt. Conf. (May 19, 2017) (“Tr. of
5 Case Mgmt. Conf.”) at 72:22-73:8. The Court explained that it would review the classified
6 materials *ex parte* and *in camera* to rule on the Government’s objection that disclosing these
7 materials would place national security at risk. *Id.* at 48:7-21, 73:8-24. Thereafter it would set a
8 schedule for briefing on dispositive motions. *Id.* at 74:12-17; Civil Minute Order.

9 Pursuant to the Court’s instructions, Plaintiffs served 160 discovery requests on the
10 Government seeking evidence to support their standing to challenge the six above-described
11 NSA intelligence-gathering programs conducted over the past 17 years. On February 16, 2018,
12 the Government filed its unclassified objections and responses, *see* ECF No. 388, and lodged
13 with the Court its classified responses, “marshal[ing] all evidence” on the issue of standing. The
14 classified materials included responses to Plaintiffs’ interrogatories and requests for admission,
15 as set forth in the Classified NSA Declaration, together with documents responsive to Plaintiffs’
16 requests for production. *See id.* at 2. Contemporaneously, the Government asserted the state
17 secrets privilege, and its related statutory privileges, over the classified discovery materials. *See*
18 Public Decl. of the Principal Deputy Director of National Intelligence (“PDDNI Decl.”), ECF
19 No. 388-2; Classified NSA Decl. (public version), ECF No. 389-1. As explained by the PDDNI
20 and Admiral Rogers, the Government’s *ex parte*, *in camera* submissions concerning the sources
21 and methods of the classified NSA intelligence-gathering activities challenged by Plaintiffs are
22 extraordinarily sensitive and detailed, and their disclosure would cause exceptionally grave
23 damage to national security. PDDNI Decl. ¶¶ 7, 8, 10, 19, 36; Classified NSA Decl. (public
24 version) ¶¶ 2, 11, 22, 324, 334, 385.

25 The Court has now completed its review of the classified evidence submitted by the
26 Government Defendants, and ordered that “the parties file dispositive motions to resolve the
27 threshold legal issues raised by the remaining statutory claims” against the Government. Order
28 Requiring Dispositive Motions Briefing, ECF No. 410, at 1.

ARGUMENT

I. LEGAL STANDARD FOR SUMMARY JUDGMENT

“Summary judgment is appropriate when the record demonstrates ‘that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.’” *Jewel*, 2015 WL 545925, at *2 (quoting Fed. R. Civ. P. 56(c)). “[T]here can be no genuine issue as to any material fact” where a party “fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which [it] [bears] . . . the burden of proof.” *Celotex Corp.*, 477 U.S. at 322. Because a demonstration of standing is an “indispensable part of [Plaintiffs’] case,” they must support their standing “in the same way as any other matter on which [they] bear[] the burden of proof, *i.e.*, with the manner and degree of evidence required at [each] successive stage[] of the litigation.” *Defenders of Wildlife*, 504 U.S. at 561. Thus, if Plaintiffs cannot set forth, by affidavit or other admissible evidence, “specific facts” sufficient to show a genuine issue for trial on standing, then “Rule 56(c) mandates the entry of summary judgment” against them. *Celotex*, 477 U.S. at 322 (quoting Fed. R. Civ. P. 56(e)); *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 385 (9th Cir. 2010) (a ruling on summary judgment must be based only on admissible evidence).

II. THE GOVERNMENT DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT, BECAUSE PLAINTIFFS HAVE NOT ESTABLISHED THEIR STANDING.

A. Plaintiffs Bear the Burden of Establishing Their Article III Standing.

“The judicial power of the United States . . . is not an unconditioned authority to determine the [validity] of legislative or executive acts,” but is limited by Article III of the Constitution “to the resolution of ‘cases’ and controversies.” *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982); *see also Wittman v. Personhuballah*, 136 S. Ct. 1732, 1736 (2016). “[N]o principle is more fundamental to the judiciary’s proper role” under the Constitution’s separation of powers, *Amnesty Int’l USA*, 568 U.S. at 408, inasmuch as the case-or-controversy requirement prevents the Federal Judiciary from “intrud[ing] upon the powers given to the [elected] branches” of the Federal Government, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

1 “[A]n essential and unchanging part of the case-or-controversy requirement” is that
2 litigants have “standing to invoke the authority of a federal court,” *DaimlerChrysler Corp. v.*
3 *Cuno*, 547 U.S. 332, 342 (2006), assuring that would-be litigants have a sufficient “personal
4 stake in the outcome of [a] controversy as to . . . justify [the] exercise of the court’s remedial
5 powers on [their] behalf.” *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017).
6 Standing is, therefore, a “threshold jurisdictional question,” *Steel Co. v. Citizens for a Better*
7 *Env’t*, 523 U.S. 83, 102 (1998), “determining the power of the court to entertain the suit.” *Warth*
8 *v. Seldin*, 422 U.S. 490, 498 (1975).

9 To establish standing to maintain their remaining claims, Plaintiffs must show they have
10 suffered an injury in fact that is (1) “concrete [and] particularized,” (2) “fairly traceable to the
11 challenged action[s]” of the defendants, and (3) “redressable by a favorable ruling.” *Amnesty*
12 *Int’l USA*, 568 U.S. at 409. Plaintiffs, “as the part[ies] invoking federal jurisdiction, bear[] the
13 burden of establishing these elements.” *Spokeo*, 136 S. Ct. at 1547. *See also Gill v. Whitford*,
14 138 S. Ct. 1916, 1923 (2018) (vacating a judgment for plaintiffs who had “alleged that they had
15 such a personal stake in [that] case, but never followed up with the requisite proof”); *Jewel*, 2015
16 WL 545925, at *3. Principally at issue in this case is whether Plaintiffs have suffered the
17 requisite “injury in fact.” *See Spokeo*, 136 S. Ct. at 1549 (confirming that “Article III standing
18 requires a concrete injury even in the context of a statutory violation”). Accordingly, Plaintiffs
19 must adduce admissible evidence that the contents of or metadata about their communications
20 were subject to the intelligence-collection activities they seek to challenge, *i.e.*, that they
21 “personally suffered a concrete and particularized injury in connection with the conduct about
22 which [they] complain[].” *Trump v. Hawaii*, 138 S. Ct. 2392, 2416 (2018). If Plaintiffs cannot
23 adduce such evidence, the Court lacks jurisdiction to hear their claims, and “cannot proceed at
24 all” except to ““announc[e] the fact and dismiss[]” the case. *Steel Co.*, 523 U.S. at 94.

25 For the reasons explained below, Plaintiffs cannot meet their burden to establish their
26 standing, and judgment must be entered against them, as to all of their remaining claims.

1 **B. Because the Government Has Properly Invoked the State Secrets Privilege,
2 Classified Information Bearing upon the Question of Plaintiffs' Standing
3 Must Be Removed Entirely from this Case.**

4 The classified evidence bearing on Plaintiffs' standing that the Government submitted to
5 the Court for its *in camera* review includes information that would tend to confirm whether or
6 not the named Plaintiffs have been subject to any of the challenged NSA surveillance activities;
7 details concerning the sources, methods, scope, and operation of these activities; and (with a
8 single exception of limited duration, *see infra*, at 13), the identities of U.S. telecommunications
9 service providers that have assisted the NSA in carrying out these programs. This evidence
10 remains properly classified and cannot be disclosed without risking exceptionally grave damage
11 to the national security, for all the reasons, explained at great length, in the Classified NSA
12 Declaration. *See* Classified NSA Decl., § VII. That declaration, together with the declaration of
13 the PDDNI, demonstrates that disclosure of this information would, *inter alia*, seriously
14 compromise—if not entirely undermine—vital, *ongoing*, intelligence operations (including
15 Upstream); deprive the NSA of valuable foreign intelligence; debilitate critical intelligence-
16 gathering sources, methods, tools, and facilities; and enhance the abilities of foreign adversaries
17 to evade NSA surveillance and to conduct their own surveillance operations against the United
18 States and its allies. *See id.*; PDDNI Decl. ¶¶ 22–35. On this basis, the Government has asserted
19 the state secrets privilege, and related statutory privileges, over this information.

20 The privilege for military and state secrets to protect information vital to the national
21 security “is well established,” and may be invoked by the Government where it is shown, “from
22 all the circumstances of the case, that there is a reasonable danger that compulsion of the
23 evidence will expose ... matters which, in the interest of national security, should not be
24 divulged.” *United States v. Reynolds*, 345 U.S. 1, 6-7, 10 (1953). The Court of Appeals has
25 explained that analyzing a Government assertion of the state secrets privilege involves three
26 steps: “First [a court] must ‘ascertain that the procedural requirements for invoking the state
27 secrets privilege have been satisfied.’ Second, [a court] must make an independent
28 determination whether the information is privileged . . . Finally, ‘the ultimate question to be
 resolved is how the matter should proceed in light of the successful privilege claim.’” *Jeppesen*,

1 614 F.3d at 1080 (quoting *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1202 (9th
2 Cir. 2007)). With respect to the first step, “there must be a formal claim of privilege, lodged by
3 the head of the department which has control over the matter, after actual personal consideration
4 by that officer.” *Id.* (quoting *Reynolds*, 345 U.S. at 7–8). The assertion of privilege “must be
5 presented in sufficient detail for the court to make an independent determination of the validity
6 of the claim of privilege and the scope of the evidence subject to the privilege.” *Id.*

7 The first of these requirements is indisputably met here. The Government has submitted
8 a formal claim of privilege through the public declaration of the PDDNI (serving then as Acting
9 Director of National Intelligence (“DNI”), and acting head of the Intelligence Community, in the
10 DNI’s absence) following her personal consideration of the matters at issue. *See* PDDNI Decl.
11 ¶¶ 8, 19. The PDDNI’s claim of privilege is supported, in exceptional detail, by Admiral
12 Rogers’ declaration, which over a span of nearly 200 pages explains the nature of the evidence at
13 issue and the specific harms that could be expected to result from the disclosure of that
14 information. *See* Classified NSA Decl. The Government’s submissions in this case fulfill and
15 far surpass the requirement that it detail for the Court the basis for its privilege assertion.

16 Turning to the second step of the analysis, the Government has explained in unclassified
17 terms herein, *see supra*, at 3-4, 6, 9, and detailed in the classified materials submitted for the
18 Court’s *ex parte*, *in camera* review, why “from all the circumstances of the case . . . there is a
19 reasonable danger that compulsion of the evidence will expose matters which, in the interest of
20 national security, should not be divulged.” *Jeppesen*, 614 F.3d at 1081 (quoting *Reynolds*, 345
21 U.S. at 10). Courts considering Government claims of privilege have uniformly recognized that
22 disclosing information of the kind at issue here would be harmful to national security, including
23 (i) who is and is not a subject of surveillance, *see, e.g., Al-Haramain*, 507 F.3d at 1203–04;
24 *Halkin v. Helms*, 598 F.2d 1, 9 (D.C. Cir. 1978); *Wikimedia Found. v. NSA*, 2018 WL 3973016,
25 at *12 (D. Md. Aug. 20, 2018) (as to Upstream surveillance); (ii) the sources, methods, and
26 operational details of Government intelligence programs, *see, e.g., Jeppesen*, 614 F.3d at 1086
27 (sources and methods of CIA intelligence activities); *El-Masri v. United States*, 479 F.3d 296,
28 308-09 (4th Cir. 2007) (same); *Wikimedia*, 2018 WL 3973016, at *12 (operational details of the

1 Upstream collection process); and (iii) the identities of private entities that have assisted in those
2 programs, *see, e.g., Jeppesen*, 614 F.3d at 1086 (private entities assisting CIA intelligence
3 program); *El-Masri*, 479 F.3d at 308-09 (same); *Halkin v. Helms*, 690 F.2d 977, 993 (D.C. Cir.
4 1982). Indeed, this Court has already twice agreed that the Government’s assertions of privilege
5 over these categories of information sought to protect “valid state secrets.” *Jewel*, 965 F. Supp.
6 2d at 1103; *Jewel*, 2015 WL 545925, at *1, *5. Because the Government’s submissions
7 overwhelmingly support the same conclusion here, the Court should again find that the
8 Government has sustained its burden as to the state secrets privilege.

9 In consequence of the Government’s proper invocation of privilege over the classified
10 evidence, it is inescapable that this evidence must be removed from the case entirely. “When the
11 [G]overnment successfully invokes the state secrets privilege, ‘the evidence is completely
12 removed from the case,’” *Jeppesen*, 614 F.3d at 1082 (quoting *Kasza v. Browner*, 133 F.3d 1159,
13 1166 (9th Cir. 1998)). *See also Al-Haramain*, 507 F.3d at 1204 (“The effect of the
14 [G]overnment’s successful invocation of privilege ‘is simply that the evidence is unavailable, as
15 though a witness had died’”); *Jewel*, 2015 WL 545925, at *5.² This result is required
16 irrespective of whether or not the “classified evidence could demonstrate that Plaintiffs [or even
17 some of them] have suffered an injury in fact as to their remaining statutory claims.” *See Order*
18 *Requiring Dispositive Motions Briefing*, at 1 (instructing Government to address that
19 possibility). The state secrets privilege is absolute, and “even the most compelling necessity
20 cannot overcome” it, as the Supreme Court has unequivocally held, *Reynolds*, 345 U.S. at 11,
21 and as both the Ninth Circuit and this Court have recognized, *see Al-Haramain*, 507 F.3d at 1204
22 (“The privilege, once found to exist, cannot be compromised by any showing of need on the part
23 of the party seeking the information.”); *Kasza*, 133 F.3d at 1166; *Jewel*, 965 F. Supp. 2d at 1101
24 (citing *Jeppesen*, 614 F.3d at 1081).

25 _____
26 ² The result is the same under the two statutory privileges the Government Defendants
27 have also invoked, 50 U.S.C. § 3024(i)(1), and 50 U.S.C. § 3605(a). *See Linder v. Dep’t of Def.*,
28 133 F.3d 17, 25 (D.C. Cir. 1998) (affirming withholding of documents pursuant to claim of
privilege under predecessor to § 3024(i)(1)); *Kronisch v. United States*, 1995 WL 303625, at
*8-9 (S.D.N.Y. May 18, 1995) (same); *see also Linder v. NSA*, 94 F.3d 693, 698 (D.C. Cir.
1996) (“The protection afforded by [S]ection 6 [50 U.S.C. section 3605] is, by its very terms,
absolute. If a document is covered by Section 6, NSA is entitled to withhold it”).

1 **C. Judgment Must Be Entered for the Government Because Without the Privileged**
2 **Information Plaintiffs Lack Competent Evidence of their Standing, and the Court**
3 **Should Not Proceed Even if it Were Theoretically Possible to Do So.**

4 The final step of the analysis, then, is to consider how the matter should proceed in light
5 of the successful claim of privilege and the removal of the classified evidence. *See Jeppesen*,
6 614 F.3d at 1082. In some cases, “simply excluding or otherwise walling off the privileged
7 information may suffice to protect the state secrets and ‘the case will proceed accordingly, with
8 no consequences save those resulting from the loss of evidence.’” *Id.* at 1082-83 (quoting *Al-*
9 *Haramain*, 507 F.3d at 1204). In others, however, “application of the privilege may require
10 dismissal of the action,” such as where “‘plaintiff[s] cannot prove the *prima facie* elements of
11 [their] claim with nonprivileged evidence.’” *Id.* at 1083 (quoting *Kasza*, 133 F.3d at 1166). That
12 is the case here. Once the classified information bearing on Plaintiffs’ standing is “completely
13 removed from the case,” *id.* at 1082, the effect is to leave Plaintiffs without *any* competent
14 evidence addressing their standing to maintain their remaining statutory claims, because they
15 have adduced no admissible, unclassified evidence with which their standing could be shown.
16 That dearth of evidence compels dismissal of their case. *Id.* at 1083; *Defenders of Wildlife*, 504
17 U.S. at 561; *Celotex*, 477 U.S. at 322.

18 Regarding their Wiretap Act and SCA claims challenging Upstream collection of
19 communications content (Counts IX and XII), this Court has already found that the only
20 unclassified evidence of standing that Plaintiffs have proffered was insufficient “to support
21 standing on their claim for a Fourth Amendment violation of interference with their Internet
22 communications.” *Jewel*, 2015 WL 545925, at *4. In support of their standing to challenge
23 Upstream collection, Plaintiffs argued that the program involves “dragnet” surveillance of all
24 AT&T customers’ communications, and hence their own. *See id.* at *3–4. As evidence of this
25 allegation, Plaintiffs relied principally on the declaration of a former AT&T technician, Mark
26 Klein, and the declaration of an expert in communications technology, J. Scott Marcus. *See id.*
27 at *4. The Court, however, after upholding the Government’s privilege claim over the classified
28 evidence, held that Mr. Klein’s attestations were based on hearsay and speculation, that Mr.
Marcus’s conclusions were not based on sufficient facts or data, and therefore that Plaintiffs

1 lacked sufficient evidence to sustain the allegation of dragnet surveillance underlying their claim
2 of standing. *Id.* While the Court’s ruling pertained, specifically, to Plaintiffs’ constitutional
3 challenge to Upstream collection, they allege that content collection under the PSP operated in
4 the same manner as they believe Upstream does now, *see* Tr. of Case Mgmt. Conf. at 28:18–
5 30:2, and the same factual allegations of dragnet surveillance underlie their statutory as well as
6 their constitutional challenges to both programs. *See* Compl. ¶¶ 50-81. Accordingly, the Court’s
7 determination that Plaintiffs lack sufficient unclassified evidence of their standing to maintain
8 their constitutional challenge to Upstream collection applies with equal force to their statutory
9 challenges to both Upstream collection and content collection under the PSP.

10 The same conclusion follows concerning Plaintiffs’ statutory challenges to the NSA’s
11 prior bulk collection of telephony and Internet metadata under the PSP and FISA. Plaintiffs
12 allege that the NSA, beginning in October 2001, had “continuously solicited and obtained the
13 disclosure of all information in AT&T’s major databases of stored telephone and Internet
14 records,” including records about their communications. Compl. ¶¶ 82–90. Yet they have
15 proffered no more evidence to support this allegation of “dragnet” metadata collection than they
16 have of the alleged “content” dragnet, and the classified evidence concerning the true scope of
17 the NSA’s bulk metadata collection, and the identities of the assisting telecommunications
18 service providers, is excluded and rendered unavailable by the Government’s assertion of
19 privilege. *Al-Haramain*, 507 F.3d at 1204.

20 Although the Government has acknowledged that these bulk-collection programs
21 operated on a large scale, they never involved the collection of metadata pertaining to all, or even
22 virtually all, communications to, from, or within the United States. *See* Classified NSA Decl.
23 (public version) ¶ 64. Nor, with the exception of a single order concerning telephony metadata
24 issued to Verizon Business Network Services during a 90-day period in 2013, has the
25 Government acknowledged the participation of any specific provider in its bulk-collection
26 programs. *See id.* ¶¶ 68, 70. And the mere “existence of the bulk collection program[s]” does
27 not itself support an inference that they must have included records of Plaintiffs’
28 communications, even where Plaintiffs were subscribers of major telecommunications providers.

1 *See Obama v. Klayman*, 800 F.3d 559, 565-67, 569–70 (D.C. Cir. 2015) (*per curiam*) (Williams,
2 J., concurring) (Sentelle, J., dissenting in part), *rev'g* 957 F. Supp. 2d 1 (D.D.C. 2013).

3 Where parties ultimately bearing the burden of proof have failed to establish the
4 existence of an element essential to their case, Rule 56 mandates the entry of summary judgment
5 against those parties. *Celotex*, 477 U.S. at 322. That is no less the case when the missing
6 element is evidence of plaintiffs' standing. *Defenders of Wildlife*, 504 U.S. at 561. Accordingly,
7 the Court must enter summary judgment against Plaintiffs here.

8 While dismissal of an action based on a failure of proof occasioned by the state secrets
9 privilege may be viewed as harsh, it is no different a result than already anticipated by the Ninth
10 Circuit in this case. *See Jewel v. NSA*, 673 F.3d 902, 911 (9th Cir. 2011) (noting that
11 “procedural, evidentiary, and substantive barriers” might ultimately “doom[]” plaintiffs’
12 standing). And as the Court of Appeals also remarked in *Kasza*, “the results are harsh in either
13 direction . . . [T]he state secrets doctrine finds the greater public good—ultimately the less harsh
14 remedy—to be dismissal.” 133 F.3d at 1167. This Court, too, recognized the unavoidable
15 necessity of dismissal when the exclusion of state-secret information prevented Plaintiffs from
16 establishing their standing to challenge Upstream surveillance. *Jewel*, 2015 WL 545925, at *4-5.
17 The same resolution is now required of Plaintiffs’ other claims.

18 Beyond the failure of the unclassified evidence to support Plaintiffs’ standing in this case,
19 the Court should dismiss Plaintiffs’ remaining claims for an additional reason. As the Ninth
20 Circuit explained in *Jeppesen*, even if it were theoretically possible for a party to establish its
21 *prima facie* case on the basis of non-privileged evidence, application of the state secrets privilege
22 nonetheless may require dismissal because “litigating the case to a judgment on the merits would
23 present an unacceptable risk of disclosing state secrets.” *Jeppesen*, 614 F.3d at 1083; *see also id.*
24 at 1087 (holding that “dismissal is . . . required under *Reynolds*” where “there is no feasible way
25 to litigate . . . alleged liability without creating an unjustifiable risk of divulging state secrets.”).
26 That, too, is the situation presented by this case.

27 The PDDNI, in her role then as Acting DNI, and the then-Director of the NSA have
28 explained that information bearing on Plaintiffs’ standing—including the subjects and targets of

1 the surveillance programs that Plaintiffs seek to challenge, and the sources and methods relied on
2 to acquire foreign-intelligence information under those programs—is so sensitive that the
3 disclosure of that information would cause exceptionally grave damage to the national security.
4 *See* PDDNI Decl. ¶¶ 8, 10, 11, 18; Classified NSA Decl. (public version) ¶¶ 2, 11, 19, 22, 74,
5 §§ VI, VII. In light of that assessment, the Court should decline any invitation by Plaintiffs to
6 speculate about those classified facts, or to try to piece together, based on publicly available
7 materials, information that has been removed from the case by the state secrets privilege.

8 Indeed, faced with analogous circumstances, the Ninth Circuit in *Jeppesen* cautioned that
9 nothing in its opinion assessing the Government’s assertion of the state secrets privilege should
10 be understood as addressing the truth or falsity of the plaintiffs’ allegations in that case. 614
11 F.3d at 1073 (“Whether plaintiffs’ allegations are in fact true has not been decided in this
12 litigation, *and, given the sensitive nature of the allegations, nothing we say in this opinion should*
13 *be understood otherwise.*”) (emphasis added). The Ninth Circuit was careful to assure that it was
14 not misunderstood as deciding the veracity of the plaintiffs’ allegations notwithstanding the
15 “plaintiffs’ extensive submission of public documents” in that litigation. *Id.* at 1087. In light of
16 the Court of Appeals’ careful analysis and acceptance of the Government’s assertion that the
17 information at issue constituted “matters which, in the interest of national security, should not be
18 divulged,” *id.* at 1082, the Court expressly avoided placing the imprimatur of judicial fact-
19 finding on the plaintiffs’ speculation regarding those classified facts. *Id.* at 1087. This Court
20 likewise recognized, in its decision addressing Plaintiffs’ Fourth Amendment challenge to
21 Upstream surveillance, that “adjudication of the standing issue could not proceed without risking
22 exceptionally grave damage to national security.” *Jewel*, 2015 WL 545925, at *5.

23 This is also true concerning Plaintiffs’ remaining claims, even if it were theoretically
24 possible for Plaintiffs to establish their standing. The facts put at issue in litigating the merits of
25 Plaintiffs’ claims inevitably would implicate the operational details of the programs they seek to
26 contest, information that remains currently and properly classified, *see supra*, at 3-4, 9, and
27 which must be removed from the case entirely following the Government’s assertion of
28 privilege. *See Jeppesen*, 614 F.3d at 1090 (dismissing action because “even assuming plaintiffs

1 could establish their entire case *solely* through nonprivileged evidence—unlikely as that may
2 be—any effort . . . to defend would unjustifiably risk disclosure of state secrets).

3 “The Supreme Court has long recognized that in exceptional circumstances courts must
4 act in the interest of the country’s national security to prevent disclosure of state secrets, even to
5 the point of dismissing a case entirely.” *Id.* at 1077. For all the reasons explained herein,
6 Plaintiffs’ remaining statutory claims present such exceptional circumstances here. Both because
7 Plaintiffs cannot establish their standing based on competent admissible evidence, and because
8 this case cannot be litigated without an unacceptable risk the national security—just as with
9 Plaintiffs’ Fourth Amendment Upstream claim, *see Jewel*, 2015 WL 545925, at * 4–5—
10 Plaintiffs’ remaining statutory challenges must be dismissed.

11 **D. Plaintiffs’ Position That FISA Authorizes *Ex Parte, In Camera* Review of
12 State Secret Information to Determine Their Standing Is Contrary to Law.**

13 Plaintiffs ignore the wealth of precedent requiring courts to “act in the interest of ...
14 national security to prevent disclosure of state secrets,” *Jeppesen*, 614 F.3d at 1077, and instead
15 insist the Court use the classified evidence to adjudicate their standing. Specifically, they argue
16 that 50 U.S.C. § 1806(f), together with 18 U.S.C. § 2712(b)(4), “preempt[s]” the Government’s
17 privileges and “forbids” exclusion of the evidence. Pls.’ Resp. to June 13, 2018 Briefing Order
18 (“Pls.’ Resp. to June 13 Order”), ECF No. 407, at 4–5. Rather, according to Plaintiffs, § 1806(f)
19 “require[s]” use of the classified evidence to decide the case, and that doing otherwise would be
20 “reversible error,” *id.* at 4-6. That dire warning is not well taken, for two reasons.

21 First, even assuming that § 1806(f) “preempt[ed]” the state secrets privilege, it could do
22 so, as this Court concluded, “only in cases within the reach of its provisions.” *Jewel*, 965 F.
23 Supp. 2d at 1106. As recently held in *Wikimedia*, 2018 WL 3973016, at *5-10, situations such as
24 this, in which litigants seek to invoke § 1806(f) to determine whether they have been subject to
25 surveillance, rather than the legality of established surveillance, do not present such a case.

26 Second, even if Plaintiffs’ standing constituted a question “within the reach” of § 1806(f),
27 their invocation of the statute’s procedures does not “displace” the bar erected by the state
28 secrets privilege against use of the classified evidence in this case, as the Court recently (and
correctly) observed in its Order Requiring Dispositive Motions Briefing.

1 **1. Section 1806(f) does not apply to the question of Plaintiffs’ standing.**

2 Section 1806(f) provides:

3 Whenever a court . . . [1] is notified pursuant to subsection (c) or (d) of this
 4 section, or [2] whenever a motion is made pursuant to subsection (e) of this
 5 section, or [3] whenever any motion or request is made *by an aggrieved person*
 6 pursuant to any other statute or rule of the United States . . . to discover or obtain
 7 applications or orders or other materials relating to electronic surveillance or to
 8 discover, obtain, or suppress evidence or information obtained or derived from
 9 electronic surveillance under this chapter, the [court] . . . shall, notwithstanding
 any other law, if the Attorney General files an affidavit under oath that disclosure
 or an adversary hearing would harm the national security of the United States,
 review in camera and ex parte the application, order, and such other materials
 relating to the surveillance as may be necessary *to determine whether the
 surveillance of the aggrieved person was lawfully authorized and conducted.*

10 *Id.* § 1806(f) (emphasis added). Thus, the text of § 1806(f) authorizes *ex parte, in camera* review
 11 in three circumstances:

- 12 (1) when the Government provides notice that it “intends to enter into evidence or
 13 otherwise use or disclose” surveillance-based evidence in proceedings against
 an *aggrieved person* (*see id.* § 1806(c), (d) (emphasis added));
- 14 (2) when an “*aggrieved person*” moves in such a proceeding to suppress
 15 “evidence [or information] obtained or derived from an electronic
 surveillance” (*see id.* § 1806(e), (f) (emphasis added)); or
- 16 (3) when an “*aggrieved person*” moves pursuant to any other statute or rule to
 17 “discover or obtain” “applications or orders or other materials relating to
 18 electronic surveillance” or to “discover, obtain, or suppress” “evidence or
 information obtained or derived from electronic surveillance” (*see id.*
 § 1806(f) (emphasis added)).

19 When one of the foregoing circumstances exists, and § 1806(f) is invoked by the Attorney
 20 General, a court must then conduct an *ex parte* review “**to determine whether the surveillance
 of the aggrieved person was lawfully authorized and conducted.**” *Id.* Under these terms
 21 § 1806(f) does not apply here, for at least three separate and independent reasons.

22 First, the sole stated purpose for which § 1806(f) authorizes *ex parte, in camera* review of
 23 evidence is “to make an accurate determination of the legality of the surveillance.” Yet Plaintiffs
 24 seek § 1806(f) review to determine whether or not they have standing, that is, whether they have
 25 been subjected to electronic surveillance in the first place. By its terms, § 1806(f) does not
 26 authorize, much less require, *ex parte, in camera* review, of classified information to determine
 27 whether a person has been subjected to surveillance. Whether a party has been a subject of
 28

1 surveillance, and whether that surveillance, if it occurred, was legal, are two separate and distinct
2 inquiries. *See Equity Lifestyle Props., Inc. v. Cty. of San Luis Obispo*, 548 F.3d 1184, 1189 n.10
3 (9th Cir. 2008) (“[J]urisdictional question of standing precedes, and does not require, analysis of
4 the merits.”). Only the latter may be the subject of inquiry in a § 1806(f) proceeding.

5 Second, Plaintiffs have not established that they are “aggrieved person[s]” entitled to
6 invoke § 1806(f)’s procedures. FISA defines an “aggrieved” person as one “who is the target of
7 . . . or . . . whose communications or activities were subject to electronic surveillance.” 50
8 U.S.C. § 1801(k). In effect, an “aggrieved person” is one with standing to contest the legality of
9 contested surveillance. *See Dir., OWCP v. Newport News Shipbldg & Dry Dock Co.*, 514 U.S.
10 122, 126 (1995) (observing that the phrase “‘person adversely affected or aggrieved’ is a
11 [statutory] term of art used . . . to designate those who have standing” to challenge government
12 conduct). But the sole inquiry a court may make under § 1806(f) is whether surveillance-based
13 evidence was lawfully obtained. Nothing in the statute indicates that parties can trigger *ex parte*,
14 *in camera* review to discover whether they have been subjects of surveillance. Rather, Plaintiffs’
15 status *vel non* as “aggrieved person[s]” who were subjected to surveillance is an antecedent
16 question that must be determined as a prerequisite to, and not by means of, proceedings under
17 § 1806(f). *See United States v. Cavanagh*, 807 F.2d 787, 789 (9th Cir. 1987) (noting “[a]s a
18 threshold matter” that the appellant had standing to challenge the lawfulness of the surveillance
19 because he was an “aggrieved person” whose communications had been intercepted).

20 Section 1806(f) also does not apply here for a third reason. Each specified situation in
21 which it authorizes *ex parte*, *in camera* review involves Government use of surveillance-based
22 information in proceedings against a target or subject of surveillance. That is the case when a
23 government entity provides notice of intent to use such evidence under subsection (c) or (d).
24 Motions to suppress under subsection (e) are brought by aggrieved persons seeking to prevent
25 government use of surveillance-based evidence against them. Plaintiffs, however, seek to invoke
26 the statute’s residual clause, which concerns “any motion[s]” made by aggrieved persons under
27 “any other statute or rule . . . to discover . . . materials relating to electronic surveillance.” Yet if
28 this residual clause were taken to authorize *ex parte*, *in camera* review at the filing of “any” type

1 of motion, it would license review where private litigants, not the Government, seek to use
2 surveillance-related information to support their case. Such a construction would render the
3 immediately preceding references to subsections (c)–(e), all of which contemplate government
4 use of evidence, essentially superfluous, and give the statute unintended breadth. To avoid this
5 result, the residual clause concerning “any” motion to discover surveillance-related materials
6 should also be construed, under the canons of *noscitur a sociis* and *ejusdem generis*, to apply
7 only to situations involving Government use of surveillance-based evidence against aggrieved
8 persons. *See Wash. State Dep’t of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537
9 U.S. 371, 384–85 (2003) (general terms following specific terms in a statutory enumeration are
10 considered to embrace only matters similar to those enumerated by the preceding specific terms);
11 *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001); *Gustafson v. Alloyd Co., Inc.*,
12 513 U.S. 561, 575 (1995); *Wikimedia*, 2018 WL 3973016, at *6-7.

13 There is nothing in the legislative history to support Plaintiffs’ understanding of
14 § 1806(f). Congress explained that § 1806(f) “sets out special judicial procedures to be followed
15 when the Government concedes that it intends to use or has used evidence obtained or derived
16 from electronic surveillance.” H.R. Rep. No. 95-1283 at 90. The procedures’ purpose is “to
17 determine whether the surveillance was authorized and conducted in a manner which did not
18 violate the constitutional or statutory right of the person *against whom the evidence is sought to*
19 *be introduced.*” S. Rep. No. 95-701 at 62, 63 (emphasis added); S. Rep. No. 95-604 at 56, 57.

20 At the same time, Congress explained that the residual clause was meant to prevent
21 private parties from evading the statute’s *ex parte* review mechanism, which Congress
22 established “to ensure[] adequate protection of national security interests.” H.R. Conf. Rep. No.
23 95-1720 at 32. When Congress enacted § 1806(f), it noted that “broad rights of access” to
24 surveillance materials “can threaten the secrecy necessary to effective intelligence practices,”
25 and explained that the objective of § 1806(f) was to strike an “effective balance” protecting both
26 a defendant’s right to a fair trial and the secrecy of the Government’s intelligence activities. *See*
27 S. Rep. No. 95-701 at 59; S. Rep. No. 95-604 at 53. The specific purpose of the residual clause
28 was to prevent private parties from upsetting that balance:

1 Although a number of different procedures might be used to attack the legality of
2 the surveillance, it is this procedure “notwithstanding any other law” that must be
3 used to resolve the question. The Committee wishes to make very clear that the
4 procedures set out in [§ 1806(f)] apply whatever the underlying rule or statute
referred to in the motion. *This is necessary to prevent the carefully drawn
procedures in [§ 1806(f)] from being bypassed by the inventive litigant using a
new statute, rule or judicial construction.*

5 S. Rep. No. 95-701, at 63 (1978) (emphasis added); S. Rep. No. 95-604 at 57 (same); H.R. Rep.
6 No. 95-1283 at 91 (same). Viewed in light of Congress’s aims, the residual clause must be
7 understood as a mechanism to prevent “inventive litigants” who contest the use of surveillance-
8 based evidence against them from side-stepping the procedures that Congress established to
9 protect the Government’s intelligence practices. Its purpose is not to allow litigants such as
10 Plaintiffs to invoke § 1806(f) as a weapon where, as here, its procedures would expose rather
11 than protect sensitive intelligence-gathering activities, and place national security at risk. *See* S.
12 Rep. No. 95-701 at 64; *Amnesty Int’l*, 568 U.S. at 412 n.4 (condemning *in camera* proceedings
13 that would reveal subjects of Government surveillance as contrary to national security interests).

14 Accordingly, § 1806(f) has been applied only in cases involving Government use of
15 surveillance-based evidence against persons who were targets or subjects of surveillance,³ while
16 courts have repudiated the idea of its use as a tool to discover suspected surveillance. *See, e.g.*,
17 *ACLU Found. of S. Cal. v. Barr*, 952 F.2d 457, 462, 468-69 & n.13 (D.C. Cir. 1991) (the
18 Government is not required under FISA to reveal ongoing foreign-intelligence surveillance); *In*
19 *re Mot. for Release of Court Records*, 526 F. Supp. 2d 484, 487 (F.I.S.C. 2007) (holding that
20 § 1806(f) has no application outside of ensuring aggrieved persons the opportunity to contest the
21 legality of FISA-derived evidence to be used against them). Most notable among these, perhaps,
22 is the recent decision in *Wikimedia*, 2018 WL 3973016, at *5-10.

23 Similar to Plaintiffs here, the plaintiff in *Wikimedia* asserts that NSA “Upstream”
24 surveillance violates its First and Fourth Amendment rights. *See* 2018 WL 3973016, at *3-4.
25 As here, the plaintiff moved, pursuant to § 1806(f), for *ex parte, in camera* review of classified
26 discovery materials to adjudicate its standing, arguing that § 1806(f) displaces the state secrets

27
28 ³ *See, e.g., U.S. v. Damrah*, 412 F.3d 618, 623-24 (6th Cir. 2005); *U.S. v. Johnson*, 952
F.2d 565, 571 & n.4 (1st Cir. 1992); *U.S. v. Ott*, 827 F.2d 473, 475 n.1 (9th Cir. 1987);
Cavanagh, 807 F.2d at 789; *U.S. v. Belfield*, 692 F.2d 141, 143-46 (D.C. Cir. 1982).

1 privilege. *Id.* at *5. The court in *Wikimedia* rejected the plaintiff’s argument, and instead upheld
2 the Government’s assertion of privilege. *See id.* at *5–10.

3 Before reaching the question of displacement, the *Wikimedia* court first addressed the
4 “threshold question” whether § 1806(f) procedures apply where “a plaintiff is seeking classified
5 discovery to establish that [its] communications were” subject to the challenged surveillance. *Id.*
6 at *5. The “statutory text points persuasively,” the court held, “to the conclusion that § 1806(f)
7 procedures do not apply where, as here, a plaintiff has not yet established that it has been the
8 subject of electronic surveillance.” *Id.* Rather, evidence establishing “a party’s status as an
9 ‘aggrieved person’ ... is a precondition to the application of § 1806(f)’s procedures.” *Id.*; *see*
10 *also id.* at *8. This interpretation is confirmed, the court further observed, by the fact that
11 1806(f) requires a court to engage in *ex parte, in camera* review to determine “whether the
12 surveillance at issue ‘was lawfully authorized and conducted,’” a decision that cannot be made
13 “unless a determination has previously been made that the surveillance at issue did, in fact,
14 occur.” *Id.* at *6 (quoting § 1806(f)). Concluding, therefore, that § 1806(f) did not apply to the
15 situation before it, the *Wikimedia* court found it unnecessary to consider the separate question of
16 displacement, *id.* at *10, and proceeded to consider, and uphold, the Government’s assertion of
17 privilege, *id.* at *11–14. This Court should do the same in the analogous case presented here.

18 None of these conclusions is altered by Plaintiffs’ reliance on 18 U.S.C. § 2712(b)(4).
19 *See Pls.’ Resp. to June 13 Order at 2.* Section 2712 authorizes suits against the United States to
20 recover money damages for willful violations of the Wiretap Act, the SCA, and certain
21 provisions of FISA. 18 U.S.C. § 2712(a). In such actions, § 2712(b)(4) provides that “the
22 procedures set forth in [§ 1806(f)] ... shall be the exclusive means by which materials *governed*
23 *by [that] section[]* may be reviewed.” (emphasis added). As just shown, however, the classified
24 evidence over which the Government has asserted privilege are not “governed” by § 1806(f),
25 because Plaintiffs seek *in camera* review of the classified evidence to determine whether they
26 are “aggrieved persons” with standing to challenge alleged surveillance of their communications,
27 not to determine the lawfulness of the claimed surveillance itself. That being the case, Plaintiffs’
28 invocation of § 2712(b)(4) adds no weight to their arguments.

1 In short, § 1806(f) may be invoked only to determine the legality of surveillance in a
2 proceeding where the Government may use surveillance-based evidence against an aggrieved
3 person, and not where litigants such as Plaintiffs seek to use surveillance-related information to
4 determine whether they are aggrieved persons with standing to challenge allegedly unlawful
5 surveillance. *Wikimedia*, 2018 WL 3973016, at *5. Thus, even assuming that § 1806(f)
6 displaced the state secrets privilege “in cases within the reach of its provisions,” *Jewel*, 965 F.
7 Supp. 2d at 1106, this is not a case of that kind.

8 **2. Even if, by its terms, § 1806(f) applied here, it does not displace the state secrets**
9 **privilege, or the Government’s statutory privileges, in these circumstances.**

10 The Court has correctly rejected Plaintiffs’ position that “once the procedures for the
11 handling of materials and information set forth in section 1806(f) have been invoked, the state
12 secrets doctrine may not be a potential substantive bar to the ongoing litigation.” Order
13 Requiring Dispositive Motions Briefing at 2. Even if this were a situation to which § 1806(f)’s
14 procedural mechanism applied, Plaintiffs’ contention that § 1806(f) “displaces” the state secrets
15 privilege would still be “inaccurate.” *Id.*

16 **a. To displace the state secrets privilege would require a clear and**
17 **unequivocal statement of legislative intent.**

18 For several reasons, Congress would need to speak clearly in a statute to override the
19 state secrets privilege. First, the privilege “has a firm foundation in the Constitution.” *El-Masri*,
20 479 F.3d at 304. Although “developed at common law, it performs a function of constitutional
21 significance, because it allows the executive branch to protect information whose secrecy is
22 necessary to its military and foreign-affairs responsibilities.” *Id.* at 303. *See also Dep’t of the*
23 *Navy v. Egan*, 484 U.S. 518, 527 (1988) (Executive authority to control access to national-
24 security information flows primarily from Article II’s “investment of power in the President.”).

25 A clear expression of intent is therefore required before a court can conclude that
26 Congress meant to abrogate the Executive’s authority to invoke the state secrets privilege in
27 support of its national security functions. *See Franklin v. Massachusetts*, 505 U.S. 788, 800–01
28 (1992) (express statutory statement is required to conclude that Congress meant to regulate the
President’s exercise of his executive functions); *Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir.

1 1991) (“When Congress decides purposefully to enact legislation restricting or regulating
 2 presidential action, it must make its intent clear.”); *see also United States v. Bass*, 404 U.S. 336,
 3 349 (1971). Indeed, a statute susceptible of a reading that would curtail Executive authority to
 4 protect the secrecy of information in the interest of national security would raise serious
 5 constitutional concerns, and should be construed to avoid that result unless “plainly contrary to
 6 the intent of Congress.” *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 465–66 (1989).

7 In contrast, as this Court has observed, *see Jewel*, 965 F. Supp. 2d at 1105–06, precedent
 8 addressing the displacement of “federal common law” holds that a common-law rule may be
 9 “abrogate[d]” by a statute that “speak[s] directly to the question addressed by the common law.”
 10 *E.g., United States v. Texas*, 507 U.S. 529, 534 (1993). These cases, however, address only
 11 displacement of judge-made doctrines adopted as necessary expedients to “fill in statutory
 12 interstices” where guidance from Congress is lacking, *Am. Elec. Power Co. v. Connecticut*, 564
 13 U.S. 410, 421 (2011),⁴ not a privilege grounded in authority conferred by the Constitution itself.

14 Even assuming *arguendo* that the standard applied in *Texas*, *Milwaukee*, and *County of*
 15 *Oneida*, *supra*, at n.4, also applied here, statutes must be read as retaining “long-established and
 16 familiar principles, except when a statutory purpose to the contrary is evident.” *Texas*, 507 U.S.
 17 at 534. The fact that a statute addresses the same subject-matter as a common-law doctrine is
 18 insufficient to displace the common-law rule. Rather, “the relevant inquiry is whether the statute
 19 ‘speaks *directly* to the question’ otherwise answered by federal common law.” *Cty. of Oneida*,
 20 470 U.S. at 236-37; *see also City of Milwaukee*, 451 U.S. at 313-14 (statute must “speak
 21 directly” to the “particular issue” to supplant common law). Regardless, however, of the
 22 standard applied, § 1806(f) does not displace the state secrets privilege.

23 **b. Neither the text nor legislative history of § 1806(f) speaks**
 24 **to abrogation of the state secrets privilege in this situation.**

25 Nothing in the text or legislative history of § 1806(f) refers to the state secrets privilege at
 26 all, much less to displacing or preempting the privilege. And less still does it make a clear and

27 ⁴ *See also U.S. v. Texas*, 507 U.S. 529, 534 (1993) (common-law rule regarding interest
 28 on debts to the Government); *City of Milwaukee v. Illinois*, 451 U.S. 304, 307-08, 313-14 (1981)
 (common-law claim for abatement of nuisance); *Cty. of Oneida v. Oneida Indian Nation*, 470
 U.S. 226, 237 (1985) (common-law remedies for unlawful conveyance of land).

1 unequivocal statement on the subject. That alone should end the matter. By 1978, when FISA
2 was enacted, the state secrets privilege already “head[ed] the list” of “privileges recognized in
3 our courts.” *Halkin*, 598 F.2d at 7. It does not stand to reason that Congress would have meant
4 to abrogate the privilege, in a field so critical as foreign intelligence, without acknowledging its
5 intention to do so. *See Jones v. United States*, 526 U.S. 227, 234 (1999) (“Congress is unlikely
6 to intend any radical departures from past practice without making a point of saying so.”).

7 That silence would be determinative even under the less rigorous standard applied for
8 displacement of ordinary federal common law. To displace a common-law rule, a statute must
9 “speak[] directly” to the “particular issue” addressed by the rule, not merely concern the same
10 subject matter. *Cty. of Oneida*, 470 U.S. at 236–37; *Milwaukee*, 451 U.S. at 313–15. The issue
11 here is whether plaintiffs can compel *ex parte*, *in camera* review of surveillance-related
12 information when it is they, not the Government, that seek to make use of that information to
13 support their case. The issue, too, is whether such parties can invoke § 1806(f) to obtain a
14 determination of their standing, where the court’s decision would imperil national security by
15 revealing classified information about the Government’s intelligence activities – the very danger
16 against which the Supreme Court warned in *Amnesty International*, 568 U.S. at 412 n.4.

17 More than six decades of precedent under the state secrets privilege answer that question
18 with an emphatic “no,” whereas § 1806(f) contains no terms that directly address the question at
19 all. At best, the statute can be said to reach the situation here only by construing the general
20 terms of the residual clause so broadly as to render the rest of the statute’s terms meaningless,
21 and compromising its intended protections against disclosure of national-security information as
22 a result. *See supra*, at 18-19. That outcome cuts against displacement, not in favor of it. *See*
23 *Texas*, 507 U.S. at 536-37 (rejecting displacement of common-law rule regarding interest on
24 certain debts to the Government, in part because statute was meant to strengthen incentives to
25 pay debts owed to the Government, while displacement would have weakened them).

26 Similarly, nothing in the legislative history speaks directly to the question whether civil
27 litigants may invoke § 1806(f) procedures where it is they, rather than the Government, that seek
28 to make use of surveillance-based evidence to support their case. Indeed, as discussed above,

1 what the legislative history says concerning the residual clause reveals otherwise. As explained
 2 therein, the specific purpose of the residual clause is to prevent litigants from upsetting the
 3 balance struck by Congress to vindicate the due-process interests of litigants while maintaining
 4 the secrecy required for effective intelligence gathering. *See supra*, at 18-20. There is no
 5 support in the House or Senate reports for the conclusion that Congress contemplated the use of
 6 § 1806(f) procedures in situations that would threaten to expose, rather than protect, the
 7 Government’s intelligence-gathering practices, and place national security at risk.⁵

8 For all these reasons Plaintiffs’ argument that § 1806(f) “require[s]” use of the classified
 9 evidence to decide this case, Pls.’ Resp. to June 13 Order at 5, must be rejected. If, indeed, it is
 10 “reversible error,” *id.*, for a court to “act in the interest of the country’s national security to
 11 prevent disclosure of state secrets,” *Jeppesen*, 614 F.3d at 1077, instead of embarking on a
 12 course that would place national security at risk, then the Court should accept that remarkable
 13 proposition only at the instruction of a superior tribunal, and not from the mouths of Plaintiffs.

14 CONCLUSION

15 For the reasons stated above, judgment should be awarded to the Government Defendants
 16 on Plaintiffs’ remaining claims (Counts IX, XII, and XV of the Complaint) as a matter of law,
 17 and final judgment entered in favor of the Government Defendants on all counts.⁶

18 ⁵ Section 1806(f) also does not displace the statutory privileges the Government invokes
 19 because, (i) as discussed above, it does not apply to the present circumstances, and (ii) 50 U.S.C.
 20 §§ 3024(i)(1) and 3605(a) are more specific statutes, and therefore control in this case. *See*
 21 *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). Section
 22 3024(i)(1) specifically concerns intelligence “sources and methods;” and § 3605(a) applies
 23 where, as in this case, a party seeks information specifically concerning NSA’s intelligence-
 gathering activities. Additionally, § 3024(i) was also enacted in 2004, *see* Intelligence Reform and
 Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (Dec. 17, 2004), §§
 1011-1020, well after § 1806(f)’s enactment in 1978, and should control here for that reason as
 well. *See, e.g., Smallwood v. Allied Van Lines, Inc.*, 660 F.3d 1115, 1124–25 (9th Cir. 2011).

24 ⁶ Plaintiffs also have sued several former Government officials in their personal capacity
 25 for both damages and equitable relief under the Constitution and various statutes. *See* Complaint
 26 Counts I-VIII, X-XI, XIII-XIV, XVI-XVII. Those personal-capacity claims have been stayed
 27 pursuant to a stipulation and order “until after resolution of any dispositive motion by the
 28 Government Defendants.” ECF No. 93. The stay contemplated that arguments raised for
 dismissing the claims against the Government Defendants would bear directly on Plaintiffs’
 personal-capacity claims, as they do here. Although the present motion is brought solely by the
 Government Defendants sued in their official capacity, Plaintiffs’ inability to establish their
 standing necessarily forecloses all of their claims, including their personal-capacity claims.
 Granting the present motion, in combination with the Court’s prior orders dismissing Plaintiffs’
 other official-capacity claims, therefore warrants the dismissal of this action in its entirety.

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2 Respectfully submitted,

3
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