No. 11-15956

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CENTER FOR CONSTITUTIONAL RIGHTS et al.,

Plaintiffs-Appellants,

v.

BARACK OBAMA et al.,

Defendants-Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLEES

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INTRODUCTION

Plaintiffs ask the Court to render a decision on a significant constitutional question and overturn the judgment of the district court by issuing an injunction or declaration against a foreign intelligence surveillance program that has been over for nearly five years, and to do so even though plaintiffs have not shown that they were ever the subject of the surveillance program. In these circumstances, the district court was manifestly correct in dismissing this case because

plaintiffs lack Article III standing.

Plaintiffs seek injunctive and declaratory relief against the President and other high-level Executive Branch officials, arguing that the Terrorist Surveillance Program carried out by the federal government in the wake of the terrorist attacks of September 11, 2001 was unlawful and unconstitutional. Plaintiffs do *not* seek damages.

The program that plaintiffs attack has not existed for nearly five years. In January 2007, the Attorney General announced that the President's authorization of the program had lapsed, and Congress has subsequently enacted new statutory authority authorizing similar surveillance activities — authority that plaintiffs do not here challenge. In these circumstances, plaintiffs have not come close to demonstrating that the Terrorist Surveillance Program poses an imminent threat to them.

The district court dismissed this case on the ground that plaintiffs lack Article III standing. That ruling was correct because plaintiffs are unable to show that they were surveilled under the program they challenge. Rather, plaintiffs can allege only that they fear they might

have been surveilled under the Terrorism Surveillance Program because they represent persons suspected by the United States of ties to terrorism. Plaintiffs further claim that they incurred costs in order to avoid the possibility that their communications with those clients would have been surveilled under the defunct program, and that, if so, any records of that activity now ought to be destroyed and disclosed.

Precedent from the Supreme Court, this Court, and its sister Circuits establishes that this type of speculative fear is insufficient to meet Article III standing requirements. Those standing requirements are especially important here given that plaintiffs want this Court to determine the constitutionality of a foreign surveillance program designed to counter terrorist threats, but which has been defunct for nearly five years.

This Court need go no further; affirmance of the dismissal of the case for lack of Article III standing is clearly appropriate. If this Court concludes otherwise, affirmance would be warranted on the alternative ground, not reached by the district court, that the state secrets privilege precludes litigation of the case.

JURISDICTIONAL STATEMENT

The district court had statutory jurisdiction over this action pursuant to 28 U.S.C. § 1331. As explained fully below, however, the district court correctly concluded that there is no constitutional Article III jurisdiction here because plaintiffs lack standing.

On February 15, 2011, the district court entered a final judgment in favor of the government disposing of all plaintiffs' claims as to all parties. ER 7-8. Plaintiffs filed a timely notice of appeal on April 15, 2011. ER 1-2. This Court has statutory jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

The issues presented by this appeal are:

1. Whether the district court correctly concluded that plaintiffs lack standing to bring this lawsuit.

2. Whether the judgment of dismissal should be affirmed in the alternative because the state secrets privilege precludes litigation of plaintiffs' claims.

STATEMENT OF THE CASE

Plaintiffs are a nonprofit law firm, several of its lawyers, and a legal staff member at that firm who have represented, among others, individuals who are suspected of ties to terrorism. In January 2006, plaintiffs filed a complaint in the Southern District of New York challenging the lawfulness, on both constitutional and statutory grounds, of aspects of the government's efforts to conduct surveillance of Al Qaeda and affiliated organizations in the wake of the September 11, 2001 terrorist attacks. ER 66; SER 1-2 (Complaint). After the parties filed dispositive motions, the Judicial Panel on Multidistrict Litigation transferred the case to the Northern District of California. ER 77-78.

In January 2007, the Attorney General announced that any surveillance occurring under the Terrorist Surveillance Program would henceforth be conducted subject to the approval of the FISA Court and that the President's authorization of the program had lapsed. SER 17-18. Plaintiffs subsequently twice renewed their motion for summary judgment, and the government twice renewed its motion to dismiss or

for summary judgment. ER 91-92, 95-96. The district court granted the government's motion for summary judgment, denied plaintiffs' motion for summary judgment, and entered final judgment in the government's favor. ER 7, 30. Plaintiffs now appeal.

STATEMENT OF THE FACTS

I. Background

Congress enacted the Foreign Intelligence Surveillance Act of 1978 ("FISA") (Pub. L. No. 95-511, 92 Stat. 1783 (1978)), to subject to regulation, for the first time, certain forms of surveillance conducted by the United States government for foreign intelligence purposes. FISA's purpose was to eliminate surveillance abuses while striking a "sound balance" between the need for national security intelligence and the protection of Americans' civil liberties. *See* S. Rep. No. 95-604, at 9 (1977).

For some kinds of foreign intelligence-related surveillance, FISA required the government to obtain an order from the Foreign Intelligence Surveillance Court ("the FISA Court") before conducting such surveillance. The FISA Court is a judicial body composed of 11

district court judges designated by the Chief Justice of the United States. *See* 50 U.S.C. § 1803(a)(1). FISA did not "appl[y] to *all* electronic surveillance," Pls' Br. 6 (emphasis plaintiffs'); rather, it applied to a specifically defined subset of "electronic surveillance," which includes surveillance that: (1) targets a United States person who is in the United States; (2) occurs in the United States and is of a wire communication to or from a person in the United States; or (3) aims to acquire purely domestic radio communications. 50 U.S.C. § 1801(f); *see id.* § 1809.

FISA left unregulated the bulk of surveillance the government might conduct outside the United States, even if that surveillance could target United States persons abroad or incidentally collected information concerning persons inside the United States. *See* S. Rep. No. 95-701, at 28 (1978) ("[T]his bill does not afford protections to U.S. persons who are abroad. Nor does it regulate the acquisition of the contents of international communications of U.S. persons who are in the United States, where the contents are acquired unintentionally.").

Following the terrorist attacks of September 11, 2001, President

Bush authorized the National Security Agency ("the NSA") to conduct surveillance under the Terrorist Surveillance Program in order to intercept certain international communications into and out of the United States of persons linked to al Qaeda or related organizations. For a communication to have been intercepted under that highly classified program, as later described publicly by President Bush, one party to the communication must have been located outside the United States, and there must have been a reasonable basis to conclude that at least one party to the communication was a member of al Qaeda or an affiliated organization. *See Al-Haramain Islamic Foundation, Inc.* v. *Bush*, 507 F.3d 1190, 1194 (9th Cir. 2007).

President Bush publicly acknowledged the existence of the Terrorist Surveillance Program in December 2005, and that such surveillance was conducted without prior approval from the FISA Court. *See id.* In January 2007, however, the Attorney General announced that any surveillance occurring under that program would henceforth be conducted subject to the approval of the FISA Court and that the President's authorization of the program had lapsed. SER 17-

18; *see* SER 23-25. The Terrorist Surveillance Program has been defunct ever since.

Since the Attorney General's announcement, Congress has provided the government with additional authority to carry out foreign intelligence surveillance similar to the kind conducted under the Terrorist Surveillance Program. Congress enacted the Protect America Act of 2007 (Pub. L. No. 110-55, 121 Stat. 552 (2007)), which clarified certain foreign intelligence surveillance authority, but contained a six-month "sunset" provision, and expired in February 2008. *Id.* § 6(c), 121 Stat. at 557 (codified at 50 U.S.C. § 1803 note).

Several months later, Congress enacted the FISA Amendments Act of 2008 (Pub. L. No. 110-261, 122 Stat. 2436 (2008)). The 2008 legislation authorizes the Attorney General and the Director of National Intelligence jointly to authorize the targeting, for a period of up to one year, "of persons reasonably believed to be located outside the United States to acquire foreign intelligence information." 50 U.S.C. § 1881a(a). This authorization is subject to approval by the FISA Court, except in exigent circumstances. *Id.* §§ 1881a(a), (i). The new

law does not require the government to establish individualized probable cause or to identify the specific facilities at which the acquisition will take place, but the FISA Court must review the proposed surveillance to ensure, among other things, that the surveillance is designed to target only persons reasonably believed to be outside the United States. *Id.* § 1881a(i)(2); *Amnesty Int'l USA* v. *Clapper*, 638 F.3d 118, 125-26 (2d Cir. 2011). A constitutional challenge to those amendments is pending. *See Amnesty Int'l*, 638 F.3d at 118.

II. This Lawsuit

A. Plaintiffs are a nonprofit law firm, its attorneys, and a legal staff member at that firm who represent individuals and organizations suspected by the U.S. Government of associating with terrorists. Pls.' Br. 23. Plaintiffs filed this suit in the Southern District of New York in January 2006, shortly after President Bush had publicly disclosed the existence (but not the details) of the Terrorist Surveillance Program. ER 66. The suit claimed that the Terrorist Surveillance Program violated FISA, plaintiffs' First and Fourth Amendment rights, and

constituted an unconstitutional encroachment on the separation of powers. SER 13-15.

"The revelation that the government has been carrying on widespread warrantless interception of electronic communications," plaintiffs alleged, "has impaired Plaintiffs' ability to communicate via telephone and e-mail with their overseas clients, witnesses, and other persons, out of fear that their privileged communications are being and will be overheard by the" Terrorist Surveillance Program. SER 12. Plaintiffs provided no evidence that they or any of the individuals with whom they had communicated had been subject to surveillance under the program. Instead, plaintiffs submitted affirmations averring that they had communicated with individuals who were within the general category of suspected terrorists living abroad, and who therefore might be subject to surveillance under the program; plaintiffs claimed they had taken certain actions out of "fear" of the possibility that their communications might be intercepted under the program. *See* ER 41, 49-53.

Plaintiffs sought only injunctive and declaratory relief against the

program, as well as an order directing that the government destroy any materials obtained by the government from surveilling them, assuming such surveillance had happened. SER 15-16.

Plaintiffs moved for partial summary judgment on liability, claiming they were entitled to an immediate injunction against enforcement of the policy based solely on the government's public statements concerning the nature and scope of the Terrorist Surveillance Program. ER 67; *see* S.D.N.Y. DE 6.[1] The government moved to dismiss, or in the alternative for summary judgment. ER 71.

The government argued that the case should be dismissed for lack of jurisdiction because plaintiffs lack Article III standing. The government pointed to the fact that plaintiffs had presented no evidence that any of their communications had been subject to surveillance, and argued that it was entirely speculative whether plaintiffs were imminently threatened with such surveillance in the future. S.D.N.Y. DE 32, at 16-24. The government also invoked the

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[1] References to "S.D.N.Y. DE" are to docket entries in the original Southern District of New York docket in which this action was originally filed. *See* ER 56.

state secrets privilege over operational details of the program, including whether or not plaintiffs had been subject to any surveillance. *Id.* at 24-49. The government therefore contended that plaintiffs could not establish standing, and that their case could not in any event proceed because litigating their claims inevitably would require the disclosure of state secrets in view of the highly classified and sensitive nature of the Terrorist Surveillance Program. Before the district court ruled on those motions, the Multidistrict Litigation Panel transferred the case to the Northern District of California. ER 77.

B. In January 2007, the Attorney General announced that surveillance previously carried out under the Terrorist Surveillance Program was being conducted subject to the approval of the FISA Court, and that the President's authorization for the program had lapsed. SER 17-18.

In view of the changed circumstances, the parties filed renewed motions for summary judgment after the transfer to the Northern District of California. ER 91-92. The government contended that the lapse of the program further demonstrated that there was no

reasonable likelihood that plaintiffs' communications would be intercepted under that now-defunct program and therefore that plaintiffs lacked standing. N.D. Cal. DE 3, at 8-11.[2] Plaintiffs, on the other hand, contended that they continued to be entitled to a declaratory judgment and an injunction because the Terrorist Surveillance Program might be reauthorized. N.D. Cal. DE 13, at 2-25.

In August 2007, Congress enacted the Protect America Act, which amended FISA to provide the government temporarily with express statutory authorization to conduct certain foreign surveillance targeted at individuals located abroad. Plaintiffs moved to file a "supplemental" complaint challenging the constitutionality of that statute; the government opposed. ER 93. The district court did not rule on plaintiffs' motion to file a supplemental complaint before the Protect America Act expired in February 2008, and the court ultimately denied the motion as moot in January 2009. ER 94.

C. In January 2010, the district court directed the parties to file

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[2] References to "N.D. Cal. DE" are to docket entries in the action after it was transferred to the Northern District of California. *See* ER 79.

a joint report advising the district court of the status of the case. ER 94. In that report, plaintiffs contended that they continued to suffer an ongoing injury from the since-ceased Terrorist Surveillance Program because: (1) they may have been subjected to surveillance under that program and, if so, (2) the government may have retained any records of their communications, which should be disclosed or expunged if they in fact exist. SER 30-31.

The parties filed renewed motions for summary judgment, with the government reiterating its arguments that plaintiffs lack Article III standing because they could not show that they had been surveilled under the Terrorist Surveillance Program, and because there was no likelihood of surveillance in the future under that defunct program.

D. The district court granted summary judgment to the government, ruling that plaintiffs lack standing to challenge the defunct Terrorist Surveillance Program. ER 30.

The district court rejected plaintiffs' argument that they had standing based on their alleged fears that the government might have subjected their communications with their clients to surveillance under

the Terrorist Surveillance Program or that those communications might be subject to surveillance under that program at some point in the future. The district court held that this fear was insufficient to establish standing under the Supreme Court's decision in *Laird* v. *Tatum*, 408 U.S. 1 (1972), which had rejected standing to challenge a federal government surveillance program based on the possibility that the plaintiffs might have been subject to surveillance under the program and plaintiffs' subjective decision to alter their own behavior. ER 23-25. "The alleged injury here," the district court explained, "is, in fact, more speculative than in *Laird* given that (unlike *Laird*) the government has ceased the activities that gave rise to the lawsuit." ER 24. The court further noted that, even if plaintiffs had shown that they had suffered a concrete injury as a result of the Terrorist Surveillance Program, any alleged interference with plaintiffs' litigation activities on behalf of their clients as claimed by plaintiffs was not an injury cognizable under the First Amendment. ER 25-27.

The court noted that "plaintiffs make little attempt to establish standing for their remaining claims under FISA, the Fourth

Amendment and the separation of powers doctrine." ER 28. The court rejected plaintiffs' claims to standing to assert each of those claims as well (ER 28-30), and plaintiffs do not seriously press them in their brief on appeal.

SUMMARY OF ARGUMENT

1. The district court correctly concluded that plaintiffs lack standing to pursue this challenge. The district court stressed — and plaintiffs do not dispute — that plaintiffs have not shown that any of their clients' communications was ever subjected to surveillance under the Terrorist Surveillance Program in general, let alone that plaintiffs' communications with their clients were subjected to such surveillance in particular. Nor have plaintiffs shown that, if any of plaintiffs' communications were ever surveilled, the government maintained and retained records of such communications. And plaintiffs' challenge to surveillance that might be conducted in the future under the Terrorism Surveillance Program is speculative: the program ceased nearly five years ago, and thereafter the government has conducted similar surveillance activities pursuant to the Foreign Intelligence Surveillance

Act, as amended by the 2008 FISA Amendments. Under established standing principles, plaintiffs' speculative chain of possibilities does not come close to demonstrating a concrete case or controversy sufficient to invoke the Article III jurisdiction of the federal courts.

Plaintiffs contend that their fears of surveillance under the now-defunct Terrorist Surveillance Program are "reasonable" because they believe their clients who are suspected of associating with terrorists fall into the general category of individuals who likely were subject to surveillance under the program. But those fears cannot support standing without any concrete indication that plaintiffs' communications were ever subject to surveillance or likely to be subject to surveillance in the imminent future.

Nor do plaintiffs have standing based on their speculation that, if the government surveilled their communications with their clients under the Terrorist Surveillance Program, the government may have created and retained records of any such surveillance. This Court held in *Al-Haramain Islamic Foundation, Inc.* v. *Bush*, 507 F.3d 1190 (9th Cir. 2007), that it could not assume that a plaintiff designated by the

government as an organization linked to international terrorist financing had standing to challenge Terrorist Surveillance Program surveillance simply because that organization was in the category of entities that could have been subject to surveillance under that program. *Id.* at 1205. Plaintiffs' claimed fear of government records from hypothetical past surveillance of which they have no knowledge is even more speculative.

Plaintiffs' fears are also unlikely to be redressed by any judgment in this case. Plaintiffs challenge the possibility of surveillance under the Terrorist Surveillance Program, a limited surveillance program established in the wake of September 11, 2001 that is now defunct. The government, however, may conduct foreign intelligence surveillance through a variety of other means outside that program, including activities that are not subject to FISA, as well as intelligence gathered under the supervision of the FISA Court. Plaintiffs provide no adequate explanation for why their fears do not extend to all of those other means of surveillance, none of which would be affected by any remedial order in this case, which deals solely with the Terrorist

Surveillance Program.

2. For these reasons, the Court should affirm the district court's judgment that plaintiffs lack Article III standing and this Court need go no further. If this Court were reject the district court's conclusion that plaintiffs lack Article III standing, however, it should nonetheless affirm the district court's judgment on the alternative ground that the state secrets privilege prevents litigation of plaintiffs' claims.

The government has validly invoked the state secrets privilege in this case as to operational information concerning the Terrorist Surveillance Program, including as to whether plaintiffs were subject to surveillance under that program. This Court upheld a similar privilege assertion in *Al-Haramain*, *see* 507 F.3d at 1203, and should do so again here if it does not affirm dismissal based on the district court's decision that plaintiffs lack standing. And without the privileged information, plaintiffs cannot demonstrate standing to seek expungement or disclosure of records that they cannot show exist, and cannot litigate the merits of their claims, which implicate the nature and extent of the Terrorist Surveillance Program and the government's justifications for

the program.

Those conclusions cannot be overcome by plaintiffs' argument that FISA displaces the state secrets privilege here. That question is not properly presented by this case because plaintiffs have no valid FISA claim. In any event, FISA does not displace the Executive's constitutionally based authority to protect national security by asserting the state secrets privilege. FISA does not mention the privilege and cannot legitimately be read to abrogate it without clear indication in the statute, which does not exist.

STANDARD OF REVIEW

Whether the district court correctly granted summary judgment is a question of law that this Court reviews *de novo*.

ARGUMENT

I. The District Court Correctly Held That Plaintiffs Lack Article III Standing To Challenge The Defunct Terrorist Surveillance Program.

A. Plaintiffs' Supposed Injuries Are Premised On Impermissible Speculation That Their Communications Were Subject To Surveillance Under The Terrorist Surveillance Program Or Are Likely To Be Subject To Such Surveillance In The Imminent Future.

"In limiting the judicial power to 'Cases' and 'Controversies,' Article III of the Constitution restricts it to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law." *Summers* v. *Earth Island Inst.*, 129 S. Ct. 1142, 1148 (2009). To present a case or controversy within the meaning of Article III, a plaintiff must demonstrate first that he has "suffered an injury in fact" that is "concrete and particularized, and . . . actual or imminent, not conjectural or hypothetical." *Az. Christian Sch. Tuition Org.* v. *Winn*, 131 S. Ct. 1436, 1442 (2011) (internal quotation marks omitted). The plaintiff must also demonstrate "a causal connection between the injury and conduct complained of — the injury has to be fairly traceable

to the challenged action of the defendant." *Id.* (internal quotation marks omitted). Finally, "it must be likely, as opposed to speculative, that the injury will be redressed by a favorable decision." *Id.* (internal quotation marks omitted).

Plaintiffs here claim to have been injured by the Terrorist Surveillance Program based on their fear, and the alleged fears of others who wish to communicate with plaintiffs, that some of plaintiffs' communications with their clients, who are suspected of being associated with terrorists, were intercepted under this program or might be intercepted in the future if the program were ever reinstated by the President. Those fears of surveillance, plaintiffs assert, led them to take various steps to minimize the chance that their communications would be intercepted by the government, which, plaintiffs claim, has resulted in concrete injury to them. Pls' Br. 23-32. Plaintiffs also hypothesize that, if any of their communications were intercepted under the Terrorist Surveillance Program, the government may have retained records of those communications. Pls' Br. 26-32.

Based on these asserted injuries, plaintiffs seek a declaratory

judgment and an injunction preventing enforcement of the defunct Terrorist Surveillance Program, as well as an order "expunging" any such records the government has retained (if they ever existed in the first place) and requiring *in camera* disclosure of any such records. Pls' Br. 26. The district court correctly found that plaintiffs lack Article III standing to pursue these claims.

1. Plaintiffs Cannot Seek Prospective Relief Because It Is Speculative Whether They Will Be Subject To Future Surveillance Under The Defunct Program.

In order to seek declaratory and injunctive relief, plaintiffs must demonstrate that they are under a "concrete and particularized" threat of suffering injury in the future that is "actual and imminent, not conjectural or hypothetical," and is "fairly traceable to the challenged action of the defendant." *Summers*, 129 S. Ct. at 1149; *see City of Los Angeles* v. *Lyons*, 461 U.S. 95, 111 (1983) (plaintiff who suffered past chokehold injury lacked standing to obtain prospective relief against future chokehold use).

Past injury, in other words, does not confer standing to seek injunctive and declaratory relief against future injury. Plaintiffs have

not come close to showing standing to seek prospective relief, especially given that, as the district court stressed, the Terrorist Surveillance Program ended in January 2007. ER 24.

a. The only evidence plaintiffs have offered in support of their claim that their communications are at imminent risk of being intercepted under the Terrorist Surveillance Program in the future are affirmations stating that plaintiffs represent individuals suspected of associating with terrorists and that they sometimes communicate with their clients (and similarly situated potential clients) using electronic means. ER 40-41, 45, 48-53, 55.

Plaintiffs have provided nothing to support that any of their communications were actually subject to surveillance under the program while it existed, much less that those communications will be subject to such surveillance in the future. Plaintiffs have provided no reason to believe that the President will institute anew the Terrorist Surveillance Program — an implausible proposition indeed given that Congress has amended FISA to permit the government to obtain from the FISA Court authorization to conduct surveillance directed at

individuals located abroad without the need to demonstrate individualized probable cause (and similar to authority to conduct such surveillance in exigent circumstances without prior authorization from the FISA Court). *See* 50 U.S.C. §§ 1881a(a), (b), (g).

To conclude that plaintiffs' communications would likely be intercepted under the Terrorist Surveillance Program in the near future would require speculating that: (1) the Executive will imminently reinstitute the Terrorist Surveillance Program in the same form; (2) plaintiffs' clients would be among those targeted by the program; and (3) plaintiffs' communications with their clients would be among those communications intercepted under a new program.

The district court correctly concluded that such speculation is insufficient to establish standing to challenge a government surveillance program, especially in light of the Supreme Court's decision in *Laird* v. *Tatum*, 408 U.S. 1 (1972). There, the plaintiffs challenged the constitutionality of an Army surveillance program that gathered information about peaceful civilian activity. *Id.* at 2. The plaintiffs did not claim that they had actually been subjected to such

surveillance, but instead premised their standing on the assertion that the mere possibility of such surveillance "chilled" their activities because they were in the category of individuals who might be subject to such surveillance in the future. *Id.* at 11.

The *Laird* Court rejected plaintiffs' claim that their standing could be based on "the individual's knowledge that a governmental agency was engaged in certain activities or [on] the individual's concomitant fear that, armed with the fruits of those activities, the agency might in the future take some *other* and additional action detrimental to that individual." *Id.* (emphasis in original).

The *Laird* rationale applies with great force to this case: plaintiffs' claim to standing is premised on the existence of a surveillance program (and its speculated application to plaintiffs), coupled with their assertion that their clients are in the category of individuals whose communications *might* be intercepted under the program.[3] Indeed, as the district court recognized, plaintiffs' "alleged

[3] *See* ER 37 (claiming that plaintiffs' injuries stem from "what is now known about the ongoing NSA program"); ER 41 (asserting that plaintiffs' injuries flowed from "the government's acknowledgment of the" Terrorist Surveillance Program); ER 45 (asserting injury from

injury is, in fact, more speculative than in *Laird* given that (unlike *Laird*) the government has ceased the activities that gave rise to the lawsuit." ER 24. Plaintiffs' injury is also more speculative than in *Laird* because that case involved a surveillance program indisputably targeted at the plaintiffs there. Plaintiffs here, by contrast, claim that their communications could in the future be incidentally intercepted in the course of surveillance that might have been directed at suspected associates of terrorists whom plaintiffs represent.

The federal courts of appeals have followed *Laird* in rejecting challenges to government intelligence-gathering programs where there is no concrete indication that the plaintiffs would be subject to surveillance under those programs. For instance, the D.C. Circuit in *United Presbyterian Church* v. *Reagan*, 738 F.2d 1375 (D.C. Cir. 1984), rejected the plaintiffs' standing, based on alleged "chilling effect[s]," to challenge a federal Executive Order regarding intelligence gathering, on the ground that the plaintiffs failed to "aver[] that any specific

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"[t]he existence of the NSA program"); ER 52 (asserting injury from "[t]he revelation that the government has been carrying on widespread warrantless interception of electronic communications"); ER 54.

action is threatened or even contemplated against them." *Id.* at 1380; *see Halkin* v. *Helms*, 690 F.2d 977, 1001-02 (D.C. Cir. 1982) (rejecting standing in similar challenge).

Likewise, in *ACLU* v. *NSA*, 493 F.3d 644 (6th Cir. 2007), the Sixth Circuit rejected the very type of injury plaintiffs allege here. The court rejected the notion that the plaintiffs, who included lawyers claiming that their fear of surveillance under the Terrorist Surveillance Program disrupted their litigation activities, had standing to challenge that program based on their fears of possible surveillance. Although the panel did not produce a unified majority opinion, both judges in the majority wrote opinions stressing that, under *Laird*, the mere alleged existence of the Terrorist Surveillance Program, coupled with plaintiffs' assertion that they represented individuals who likely would be subject to surveillance under the program, was insufficient to establish the type of concrete injury necessary to establish Article III standing to challenge a government surveillance program. *See ACLU*, 493 F.3d at 662-63 (opinion of Batchelder, J.); *id.* at 690 (Gibbons, J., concurring).

Of a piece with those cases is this Court's decision in *Presbyterian*

Church (USA) v. *United States*, 870 F.2d 518 (9th Cir. 1989), which plaintiffs mistakenly invoke in support of their position. *See* Pls' Br. 35-37. In *Presbyterian Church*, this Court held that the plaintiffs had standing to pursue a *Bivens* action seeking nominal damages for allegedly unconstitutional covert government surveillance of their worship activities. *See* 870 F.2d 521-22. The plaintiffs had standing to seek damages not because they had a "reasonable subjective fear caused by surveillance," Pls.' Br. 35, but rather because their churches had actually been subjected to surveillance — a fact that the Court noted was "a matter of public record." *Id.* at 520; *see id.* 521-22. The Court did not decide whether the plaintiffs had standing to pursue declaratory and injunctive relief, and left it for the district court on remand to decide whether plaintiffs had demonstrated "a credible threat of future injury" as a result of the surveillance program. *Id.* at 528-29 (internal quotation marks and citation omitted).

In this case, by contrast, plaintiffs have neither demonstrated that they were subjected to surveillance under the Terrorist Surveillance Program, nor that they are threatened with such

surveillance in the future under the now-defunct program. *See also* *Riggs* v. *City of Albuquerque*, 916 F.2d 582, 585 (10th Cir. 1990) (plaintiffs had standing to sue to challenge the existence of certain records because they "allege that they were the actual targets of the illegal investigations").

b. Plaintiffs labor to distinguish *Laird* and its progeny, contending that their "fears" of surveillance are "reasonable," whereas the *Laird* plaintiffs' fears were not. Pls' Br. 35-36, 38. The question at this stage, however, is whether plaintiffs have established "a claim of specific present objective harm or a threat of specific future harm." *Laird*, 408 U.S. at 14; *see also Summers*, 129 S. Ct. at 1150 (question is whether plaintiffs have shown that "imminent future injury" is threatened); *Wilderness Society, Inc.* v. *Rey*, 622 F.3d 1251, 1256 (9th Cir. 2010); *Thomas* v. *Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138-41 (9th Cir. 2000) (en banc).

To put the point differently, plaintiffs' fears of surveillance — along with their decisions to incur a variety of alleged costs as a result of that asserted fear — would be "reasonable" only if plaintiffs

demonstrate that they are under a concrete imminent threat of surveillance under the program they seek to challenge. They have not remotely done so. And even if the question were simply whether plaintiffs' "fears" are "reasonable" — untethered to any credible, concrete threat — plaintiffs never explain how it is reasonable for them to fear continuing surveillance from a program that ended nearly five years ago.

Plaintiffs confuse the merits of the case with standing in stressing that this case involves government conduct that they believe was unlawful. Pls' Br. 39-40, 45-46. The determination whether Article III standing exists should not be influenced by some sort of pre-judgment about the merits and in any event is prohibited by *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83 (1998), which holds that a court must determine whether it has jurisdiction before reaching the merits. *Id.* at 93-97. Every plaintiff who challenges a surveillance program claims that the program is unlawful, including the plaintiffs in *Laird* and subsequent cases. *See* 408 U.S. at 2 (plaintiffs claimed that "their rights were being invaded by the Department of Army's alleged

'surveillance of lawful and peaceful civilian political activity'"); *United Presbyterian Church*, 738 F.2d at 1377-78.

Plaintiffs err as well in relying on *Meese* v. *Keene*, 481 U.S. 465 (1987), Pls' Br. 32-34, in which a plaintiff mounted a successful First Amendment challenge to the constitutionality of a statute that labeled certain films as "political propaganda." There was no question whether the statute covered the plaintiff's films and the plaintiff alleged that this statutory designation deterred him from exhibiting the films. *Id.* at 473.

That case reflects the unexceptional proposition that a plaintiff may have standing to challenge a statute that actually applies to him and chills his exercise of First Amendment rights. *See, e.g.*, *Lopez* v. *Candaele*, 630 F.3d 775, 785-86 (9th Cir. 2010); *see also Laird*, 408 U.S. at 11 (distinguishing cases in which "the complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions that he was challenging"). But it does not remotely support plaintiffs' premise that they may establish standing without any indication they were subject to the Terrorist Surveillance Program

either in the past or at risk of being subjected to the program in the future, even assuming the program's alleged interference with plaintiffs' litigation activities implicates First Amendment rights.[4]

Plaintiffs also rely on the Second Circuit's recent decision in *Amnesty International* v. *Clapper*, 638 F.3d 118 (2d Cir. 2011), to support their standing claim. In that case, the Second Circuit concluded that the plaintiffs had standing to mount a preenforcement challenge to the constitutionality of the 2008 FISA amendments (not the defunct Terrorist Surveillance Program) based on plaintiffs' "reasonable" fears that their communications would be unlawfully surveilled under the new FISA scheme. *Id.* at 122. The Second Circuit denied the government's petition for rehearing en banc by an equally divided court over the vigorous dissents of six judges, and the time to seek Supreme Court review is still open. *See* 2011 WL 4381737 (2d Cir. Sept. 21, 2011).

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[4] *See* ER 25-28; *ACLU*, 493 F.3d 659 & n.20 (opinion of Batchelder, J.); *Humanitarian Law Project* v. *U.S. Treasury Dep't*, 578 F.3d 1133, 1143 (9th Cir. 2009) (rejecting reliance on alleged First Amendment "chilling effect[s]" in challenge to antiterrorism statute that "on its face does not regulate expressive activity").

We believe that *Amnesty International* was incorrectly decided. In any event, the case is not binding on this Court, and the panel's reasoning there is inconsistent with the settled principle that a plaintiff must demonstrate a concrete harm or a concrete threat of harm in order to establish Article III standing to invoke the jurisdiction of a district court to challenge government action. *See* 2011 WL 4381737, at *13-*16 (Raggi, J., dissenting from denial of rehearing en banc); *id.* at *25-*29 (Livingston, J., dissenting from denial of rehearing en banc).

Even if the reasoning of that case were correct, plaintiffs' asserted fears of surveillance here are plainly "unreasonable." *Amnesty International* stressed that "the government ha[d] authorized the potentially harmful conduct" at issue in that case, meaning "that the plaintiffs [could] reasonably assume that government officials will actually engage in that conduct by carrying out the authorized surveillance." 638 F.3d at 138. Here, that assumption would clearly be unreasonable because the Terrorist Surveillance Program has ceased. Thus, the plaintiffs in *Amnesty International* are complaining about a statutorily authorized scheme that is currently operational; plaintiffs'

claims here are about a defunct program, with no likelihood of being revived in the near future. The panel in *Amnesty International*, moreover, distinguished the Terrorist Surveillance Program, which it noted was a "narrow surveillance program that monitored particular individuals the government suspected were associated with al Qaeda," as opposed to the "considerably broader surveillance program" authorized by the FISA 2008 amendments. 638 F.3d at 149 n.32.

c. Plaintiffs confusingly assert that the district court failed to address their claim for prospective relief (Pls' Br. 54 n.67), and contend that their claim for prospective relief "is not moot" because the government voluntarily terminated the Terrorist Surveillance Program. Pls' Br. 54-55. But the district court did not need to reach the question whether plaintiffs' claims for injunctive relief were "moot" given that it instead found that plaintiffs did not have Article III standing to seek such relief. *See* ER 24-25. To the extent plaintiffs mean to suggest that they continue to have standing to seek a court injunction against the Terrorist Surveillance Program even though the program has been terminated, they are plainly incorrect. Events that occur after the

litigation commences — here, the end of the Terrorist Surveillance Program — can assuredly deprive a plaintiff of standing to sue for prospective relief. *See Mayfield* v. *United States*, 599 F.3d 964, 972-73 (9th Cir. 2010).

Plaintiffs suggest that the government might reauthorize the Terrorist Surveillance Program. Pls' Br. 16, 54. Whether couched as a "standing" or a "mootness" argument, however, that speculative and implausible proposition does not present a valid case or controversy, quite apart from the numerous other difficulties with plaintiffs' asserted injuries. For example, in *America Cargo Transport, Inc.* v. *United States*, 625 F.3d 1176, 1179-80 (9th Cir. 2010), the plaintiff challenged the government's interpretation of a trade regulation, and while the litigation was pending the government changed its position and adopted plaintiff's interpretation. *Id.* at 1179. This Court rejected the plaintiff's view that the case continued to present a case or controversy, noting that "[t]he fact is the government changed its policy" and "there is no basis to suggest it is a transitory litigation posture," *Id.* at 1180. The Court also noted that "we presume the

government is acting in good faith." *Id.* There is likewise no reason to doubt the good faith of the government, or the representations that the Terrorist Surveillance Program has terminated, particularly given the statutory authority Congress provided the government in the 2008 FISA Amendments to conduct surveillance activities targeting individuals abroad for foreign intelligence purposes.

For these reasons, plaintiffs have failed to demonstrate a concrete threat that the Terrorist Surveillance Program will be resurrected and applied to monitor their communications in the imminent future, and thus lack Article III standing to seek prospective declaratory and injunctive relief.

2. Absent Any Evidence Plaintiffs Were Subject To Terrorist Surveillance Program Surveillance, Plaintiffs Lack Standing To Ask The Court To Enter An Order Expunging Or Disclosing Any Records Of Such Alleged Surveillance.

Plaintiffs ask the Court to stack speculation on speculation in requesting that the Court order expunged or, alternatively disclosed *in camera*, any records of their communications the government might have collected under the Terrorist Surveillance Program. Plaintiffs

claim that they "fear" the government may have surveilled them and that, if so, the government may have collected and retained records of those communications. Pls.' Br. 26-32.

Plaintiffs' claimed fears from records of which they have no knowledge, and that may not even exist, is a textbook example of a "purely hypothetical" claim that cannot serve as the basis for standing to sue in federal court. *Thomas*, 220 F.3d at 1137. Plaintiffs have provided no evidence that any of their communications were intercepted under the Terrorist Surveillance Program, much less that, if the government did intercept such communications, it created and retained records of any such communications. It would be an advisory opinion to order any such records expunged or disclosed *in camera*, as plaintiffs request, without evidence that such records exist. Not surprisingly, then, the cases plaintiffs cite that involve challenges to surveillance that occurred in the past found standing only because the surveillance had indeed occurred. *See Presbyterian Church*, 870 F.2d at 521-22; *Riggs*, 916 F.2d at 585-86. And even if such fears ever could be a basis for challenging government action that might or might not have

occurred, plaintiffs' asserted fears are manifestly unreasonable here.

This Court in *Al-Haramain Islamic Foundation, Inc.* v. *Bush*, 507 F.3d 1190 (9th Cir. 2007), rejected a similarly speculative type of standing claim. There, this Court held that a designated terrorist organization could not establish standing to bring a constitutional challenge, including a First Amendment challenge, to surveillance it alleged the government had subjected it to under the Terrorist Surveillance Program. *Id.* at 1205. "It is not sufficient," this Court explained, "for Al-Haramain to speculate that it might be subject to surveillance under the TSP simply because it has been designated a 'Specially Designated Global Terrorist.'" *Id.* Plaintiffs' claim to injury — fear that they were subject to past surveillance — is even more speculative and amorphous than the claim to standing in *Al-Haramain*, because plaintiffs do not press the contention that they were even among the individuals against whom surveillance was specifically targeted. Plaintiffs cannot dress up what is at base a challenge to past surveillance that occurred — if it occurred at all — in the garb of amorphous "fears" absent "a claim of specific present objective harm."

Laird, 408 U.S. at 14.

Even apart from those fatal legal flaws, plaintiffs have provided no evidentiary support for their assertions that the possible government retention of records derived from hypothetical surveillance causes them continuing harm. None of plaintiffs' affirmations — all of which date from 2006, before the Terrorist Surveillance Program was terminated in January 2007 — appears to mention or describe any injuries from hypothetical records the government allegedly possessed from past Terrorist Surveillance Program surveillance. Plaintiffs' affirmations instead focus on purported harm from continued surveillance. *See, e.g.*, ER 40-55.[5]

Plaintiffs attempt to fill this gap in their appellate briefs, stating, for instance, that the fact that the government may have such records caused them to analyze past electronic communications to evaluate "whether measures ought to be taken in response"; that they "must still

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[5] One of those affirmations "describ[es] the reluctance of a potential class member to continue communicating electronically with a CCR staff member." Pls.' Br. 28. That alleged "reluctance" stemmed not from the fact that the government may have surveillance records, but rather from the potential plaintiff's "fears of surveillance pursuant to the NSA Program." ER 45.

be vigilant to the risk that the confidentiality of *past* privileged communications relevant to *current-day litigation decisions* was breached"; Pls.' Br. 27 (emphasis plaintiffs'); and that "responsible attorneys would still maintain caution in continuing those lines of conversation with potential litigation participants," Pls.' Br. 28.

Those and similar amorphous, unsworn assertions of harm are insufficient to establish plaintiffs' Article III standing to sue for destruction or disclosure of records the government might or might not have compiled under the Terrorist Surveillance Program and might or might not have retained.

B. Plaintiffs' Claimed Fears Of Hypothetical Past, Or Potential Future, Surveillance Under The Terrorist Surveillance Program Are Not Redressable In This Litigation.

Even if plaintiffs' fears of surveillance under the Terrorist Surveillance Program presented a cognizable injury fairly traceable to that program, plaintiffs would still lack Article III standing because it is entirely speculative whether their alleged injuries would be redressed by this litigation. *See Summers*, 129 S. Ct. at 1149.

1. As discussed above, the Terrorist Surveillance Program is now

over and, thus, any chill resulting from the fear of surveillance under a defunct program is not redressable.

To the extent plaintiffs assert continuing injury from the possibility that the government may have records of their communications as the result of possible prior Terrorist Surveillance Program surveillance, that injury is also not likely to be redressed. Pls.' Br. 26-32. The government has various means outside the confines of that program for collecting foreign intelligence, some of which are not subject to FISA or, indeed, any form of judicial supervision whatsoever. *See Amnesty International*, 2011 WL 4381737, at *22 n.22 (Raggi, J., joined by four other Circuit judges, dissenting from denial of rehearing en banc). Intelligence agencies of the United States, including the National Security Agency, are authorized by the President to collect foreign intelligence information and may do so through means other than surveillance regulated by FISA. *See* Executive Order 12333, 46 Fed. Reg. 59941 (Dec. 4, 1981). The government, for example, obtains intelligence derived from surveillance conducted by foreign governments. Plaintiffs never explain how to wall

off their fears from possible Terrorist Surveillance Program surveillance from those alternative means of conducting surveillance, none of which would be affected or redressed by any remedial decree in this case. *See Amnesty International*, 2011 WL 4381737, at *21-*22 (Raggi, J., joined by four other Circuit judges, dissenting from denial of rehearing en banc) (concluding that plaintiffs' asserted injuries from FISA surveillance were not redressable because "[i]t will not shield plaintiffs or their contacts from the universe of alternative electronic surveillance options available to the government").

As Judge Batchelder pointed out in the Sixth Circuit *ACLU* case, moreover, plaintiffs' asserted fears of surveillance would also appear to be applicable to surveillance that was conducted under the supervision of the FISA Court or under the procedures of the wiretapping provisions of Title III of the U.S. Code. Plaintiffs do not claim that surveillance conducted under judicial supervision is unlawful and such surveillance would be unaffected by any remedial order in this case. *See* 493 F.3d at 671-72.

2. Plaintiffs answer that the Terrorist Surveillance Program

"introduces a threat to Plaintiffs' privileged communications that is different both in degree and in kind from the threat posed by lawful surveillance." Pls.' Br. 48. Plaintiffs point out that the government may conduct "FISA or Title III surveillance *only* if the government could produce the requisite probable cause before a court." Pls.' Br. 48 (emphasis plaintiffs'). Plaintiffs also argue that they have less to fear from surveillance conducted with the approval of the FISA Court because such surveillance "was subject to judicially-supervised minimization requirements designed to protect privileged information." Pls.' Br. 48-49. But those arguments do not address the forms of surveillance that occur without any judicial supervision, such as surveillance unregulated by FISA, or intelligence obtained from foreign governments who conduct their own surveillance.

And even with respect to surveillance conducted under FISA or Title III judicial supervision, plaintiffs never explain how to distinguish their claimed fear that the government has surveilled their privileged attorney-client communications from surveillance the government conducts pursuant to a valid court order. Plaintiffs' own legal expert

opined that plaintiffs' ethical obligation to protect client confidences from government surveillance stems from the fact that their communications "have been or will be *intercepted* by the United States," ER 37 (emphasis added), which happens even when surveillance occurs pursuant to a court order. *See also* ER 38 (opining that "[i]t is *disclosure itself* that is the evil against which lawyers must protect clients" (emphasis added)). Moreover, even if it were relevant what the government subsequently did with any intercepted information, FISA's minimization procedures do not categorically forbid the government from retaining such information. *See* 50 U.S.C. § 1801(h).[6]

Thus, even accepting for the sake of argument that plaintiffs' fears could establish standing here — and they do not — plaintiffs have

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[6] Under the current version of FISA, moreover, plaintiffs' communications can indeed be surveilled under a valid FISA Court order; the statute prohibits targeting persons if they are United States citizens, but does not forbid interception of plaintiffs' communications with properly targeted non-U.S. persons overseas. *See* 50 U.S.C. § 1881a(b), (g). Indeed, one of the key premises for standing found by the Second Circuit panel in *Amnesty International* was that the U.S. plaintiffs in that case reasonably feared that their conversations would be surveilled pursuant to a FISA Court order under the new statutory scheme. *See* 2011 WL 4381737, at *2-*3 & n.4 (Lynch, J., concurring in the denial of rehearing en banc).

not distinguished their asserted fear from Terrorist Surveillance Program surveillance from a range of other lawful means of conducting surveillance at the government's disposal. Because this suit challenges only Terrorist Surveillance Program surveillance, plaintiffs' asserted injury — fear of surveillance — is unlikely to be redressed by prevailing in this case.

II. The Judgment Of Dismissal Should Alternatively Be Affirmed Because The State Secrets Privilege Precludes Litigation Of Plaintiffs' Claims.

In the district court, the government invoked the state secrets privilege, contending that it barred this lawsuit over the highly classified Terrorist Surveillance Program. There is, however, no need to reach the issue of state secrets in this case if the Court affirms the district court's entirely correct ruling that plaintiffs lack Article III standing. This case is different from *Al-Haramain Islamic Foundation, Inc.* v. *Obama*, Nos. 11-15468, 11-15535, another challenge to the Terrorist Surveillance Program currently pending before the Court in which the state secrets question is more centrally presented. Unlike *Al-Haramain*, plaintiffs here do not seek to establish standing by

proving whether they were in fact subject to Terrorist Surveillance Program surveillance — an issue protected by the state secrets doctrine — and thus have not attempted to rely on information protected by the state secrets doctrine to support their standing. Instead, plaintiffs contend that they have established standing based simply on their fears of the Terrorist Surveillance Program as it was described in public statements by government officials. The state secrets doctrine is unnecessary to reach the conclusion that those fears are insufficient to establish standing to sue.

But should the Court conclude that the district court was wrong and that plaintiffs might have standing to sue based simply on the current public record and their fears of hypothetical government surveillance, the judgment dismissing this case should be affirmed on the alternative ground that the government validly invoked the state secrets privilege over certain information involving the Terrorist Surveillance Program and plaintiffs cannot litigate their standing and claims on the merits without state secrets. *See Benay* v. *Warner Bros. Entmt., Inc.*, 607 F.3d 620, 629 (9th Cir. 2010) ("A grant of summary

judgment may be affirmed on an alternative ground so long as that ground is fairly supported by the record.").

A. Plaintiffs Cannot Prevail Without Information That Is Protected From Disclosure By The State Secrets Privilege.

1. "[I]n exceptional circumstances courts must act in the interest of the country's national security to prevent disclosure of state secrets, even to the point of dismissing a case entirely." *Mohamed* v. *Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1077 (9th Cir. 2010) (en banc). "'[E]ven the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.'" *Al-Haramain*, 507 F.3d at 1205 (quoting *United States* v. *Reynolds*, 345 U.S. 1, 11 (1953)). Information subject to the privilege is excluded from the case altogether and cannot be used by the parties as evidence. *Mohamed*, 614 F.3d at 1077. And if plaintiffs cannot establish their standing or the elements of their cause of action without information that is subject to the state secrets privilege, the action must be dismissed. *See Al-Haramain*, 507 F.3d at 1205.

Assertion of the state secrets privilege requires a "formal claim of

privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." *Reynolds*, 345 U.S. at 7-8 (footnotes omitted). It also requires a judgment at the highest level of the department involved that disclosure of the information would be harmful to national security. *See, e.g.*, *Halkin*, 690 F.2d at 996.

The claim of privilege must be based on the personal judgment of the certifying official, and must include "sufficient detail for the court to make an independent determination of the validity of the claim of privilege and the scope of the evidence subject to the privilege." *Mohamed*, 614 F.3d at 1080. This Court "'take[s] very seriously [its] obligation to review the [government's claims] with a very careful, indeed a skeptical, eye, and not to accept at face value the government's claim or justification of privilege." *Mohamed*, 614 F.3d at 1082 (quoting *Al-Haramain*, 507 F.3d at 1203). In conducting that careful review, the Court has also "acknowlege[d] the need to defer to the Executive on matters of foreign policy and national security" and that the Court "surely cannot legitimately find [itself] second guessing

the Executive in this arena." *Al-Haramain*, 507 F.3d at 1203.

The government properly invoked the state secrets privilege in this case, consistent with those standards. The Director of National Intelligence in office at the time, John Negroponte, lodged a formal claim asserting the privilege in this case on the government's behalf after personally considering this matter. *See Reynolds*, 345 U.S. at 7-8. The Director submitted an unclassified declaration and an *in camera*, *ex parte* classified declaration, both of which state that disclosure of intelligence information, sources, and methods described herein would cause exceptionally grave harm to the United States. *See* Class. SER; SER 40. The assertion of privilege was further supported by the declaration of Maj. Gen. Richard J. Quirk, an NSA official. Class. SER; SER 46-48.

The declaration submitted by Director Negroponte demonstrates that exceptional harm would be caused to U.S. national security by disclosure of the privileged information at issue, including whether or not plaintiffs were subject to alleged Terrorist Surveillance Program surveillance. That information is subject to the state secrets privilege

claim, and the declaration puts forth a reasoned, detailed basis to conclude that disclosing this information would cause exceptionally grave harm to national security and, thus, may not be used in this case. Full detail is provided in the classified declarations submitted to the district court and this Court *in camera* and *ex parte* in the Classified Supplemental Excerpts of Record. The government does not lightly invoke the state secrets privilege or seek dismissal of litigation on the basis of privilege. *See Mohamed*, 614 F.3d at 1090.[7] The extraordinary circumstances and grave national security implications of this case, however, justify raising the privilege and compel dismissal of plaintiffs' claims.

In *Al-Haramain*, which also involved a challenge to the Terrorist Surveillance Program, this Court considered whether the government had validly invoked the state secrets privilege as to information concerning whether the plaintiffs in that case were subject to

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[7] As this Court noted in *Mohamed*, the government in September 2009 adopted new procedures for determining whether to invoke the state secrets privilege in particular cases and stringent standards for such invocations, *see id.*, although the assertion of privilege in this case occurred before the government adopted that policy.

surveillance under the Terrorist Surveillance Program. 507 F.3d at 1202-03. This Court concluded that the information was protected by the privilege, finding that the government's assertion of that privilege was "exceptionally well documented." *Id.* at 1203. The Court explained that disclosure of information concerning the individuals subject to surveillance under the Terrorist Surveillance Program "would undermine the government's intelligence capabilities and compromise national security." *Id.* at 1204.

This case is different from *Al-Haramain* in that the plaintiffs here seek to establish standing solely through fears of surveillance based on public disclosures about the Terrorist Surveillance Program, whereas the plaintiffs in *Al-Haramain* seek to show standing through information protected by the state secrets doctrine. But should the Court reach the issue of state secrets in this case, it should uphold the privilege because the declarations included in the Classified Supplemental Excerpts of Record protect similar information at issue in this case, notably whether or not plaintiffs were subject to alleged Terrorist Surveillance Program surveillance and the harms that would

result if the government were to confirm or deny that information. *See* Class. SER.[8]

2. As in *Mohamed*, the next question is whether this litigation may go forward without the information that is subject to the privilege. *See* 614 F.3d at 1082. In *Al-Haramain*, after concluding that the state secrets privilege forbade disclosure of information concerning whether the plaintiffs were subject to surveillance under the Terrorist Surveillance Program, this Court concluded that, without that information, the plaintiffs' "claims must be dismissed" because the plaintiffs could not establish that they had standing to challenge the Terrorist Surveillance Program. 507 F.3d at 1205. So too here, without information subject to the state secrets privilege, plaintiffs cannot establish essential elements of their challenge to the Terrorist

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[8] In *Al-Haramain*, this Court remanded the matter for the district court to determine whether the Foreign Intelligence Surveillance Act "preempts the state secrets privilege." 507 F.3d at 1205. The district court then held that FISA did displace the state secrets privilege in that context of that case. The government is challenging that ruling in a separate appeal currently before this Court. *See Al-Haramain Islamic Foundation* v. *Obama*, Nos. 11-15468, 11-15535. As explained below, however, any displacement question is irrelevant to this case because plaintiffs here cannot validly invoke FISA.

Surveillance Program, and the case thus must be dismissed.

Plaintiffs claimed below that the Terrorist Surveillance Program violated FISA, the First Amendment, the Fourth Amendment, and the constitutional separation of powers. On appeal, however, plaintiffs press only their First Amendment claim, and do not pursue these other claims.[9]

Plaintiffs' lawsuit cannot proceed without state secrets. Plaintiffs have attempted to establish their standing solely on the basis of their fears of the Terrorist Surveillance Program based on the government's public descriptions of the program, and the Court can and should reject that attempt without reaching the issue of state secrets. But because plaintiffs attempt to establish standing based on the alleged existence of surveillance records that might possibly be in government files, Pls.' Br. 26-32, that claim must fail because the state secrets privilege covers whether or nor plaintiffs' communications were intercepted, and thus

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[9] Plaintiffs mention their other claims in a brief footnote, Pls.' Br. 51 n.60, but plaintiffs limit their standing argument to asserted First Amendment "chilling effects," *see* Pls.' Br. 22-23, and do not challenge the district court's conclusion that they lack standing to assert any other claims, *see* ER 28-30.

necessarily whether the government has any records.

Moreover, privileged state secrets would be necessary for plaintiffs to succeed even if the Court accepted plaintiffs' argument that they have created a genuine issue of material fact as to standing sufficient to survive the government's summary judgment motion. Again, plaintiffs' case is based on what they characterize as a "reasonable" fear that they were subject to Terrorist Surveillance Program surveillance. Pls.' Br. 37. But whether those fears were in fact "reasonable" in any relevant sense crucially depends on the nature and scope of the Terrorist Surveillance Program, as to which the government has asserted the state secrets privilege. *See ACLU*, 493 F.3d at 656 n.13 (opinion of Batchelder, J.); *id.* at 692-93 (Gibbons, J., concurring).

Nor could the rest of plaintiffs' First Amendment claim be adjudicated without state secrets. Even if — contrary to the district court's ruling (ER 25-28; *see ACLU*, 493 F.3d 657 n.15, 659 n.20; *Reporters Comm. for Freedom of the Press* v. *Am. Tel. & Tel. Co.*, 593 F.2d 1030, 1054 (D.C. Cir. 1978)) — this case even implicates First

Amendment rights in the first place, any such claim would necessarily turn on information concerning the nature and extent of the Terrorist Surveillance Program and the nature of the al Qaeda threat that the program was designed to combat. *See United States* v. *Mayer*, 503 F.3d 740, 752 (9th Cir. 2007). The government has asserted the state secrets privilege as to that information. SER 41-42.

3. If this Court does not affirm on the reasoning of the district court, it can and should examine the declarations in the record supporting the invocation of the state secrets privilege, and should affirm on that basis. As part of the en banc consideration in *Mohamed*, this Court carried out its own inquiry into the effect of the privilege asserted on that litigation. There, the en banc majority expressly disagreed with the dissent's call for a remand to allow the district court to undertake that inquiry. *See Mohamed*, 614 F.3d at 1087 n.10.

Should the Court need to reach the issue, the Court should follow the same course here. As this Court observed in *Mohamed*, there is "no point, and much risk, in . . . prolonging the process" by remanding to the district court for initial consideration of the effect of the privilege.

Id. Unnecessary prolonging of this dispute risks inadvertent disclosure of privileged information in any remand proceeding, with the exceptionally grave harm to national security that would result from such disclosure. "It is not to slight judges, lawyers, or anyone else to suggest that any such disclosure carries with it serious risk that highly sensitive information may be compromised." *Halkin* v. *Helms*, 598 F.2d 1, 7 (D.C. Cir. 1978); *see Reynolds*, 345 U.S. at 10.

B. The Foreign Intelligence Surveillance Act Does Not Abrogate The State Secrets Privilege.

In district court, plaintiffs challenged the government's assertion of the state secrets privilege based on the argument that Congress through FISA abrogated the Executive's ability to rely on that privilege to protect sensitive national security information. As noted earlier, the district court in *Al-Haramain* accepted that argument, which is now the subject of a separate government appeal before this Court. Plaintiffs' displacement argument is inapplicable here, and incorrect in any event.

1. As an initial matter, plaintiffs cannot assert that FISA displaces the state secrets privilege in this case because plaintiffs do

not have a valid FISA claim. Plaintiffs are apparently not invoking FISA's express cause of action for "aggrieved person[s]" who were subject to surveillance — which is not surprising, since FISA authorizes only damages and attorneys fees and costs as a remedy; it does not authorize the declaratory and injunctive relief plaintiffs seek here. 50 U.S.C. § 1810; *see ACLU*, 493 F.3d at 683 (opinion of Batchelder, J.). Instead, plaintiffs purport to be suing for violations of FISA under the Administrative Procedure Act's waiver of sovereign immunity for declaratory and injunctive relief. *See* Pls.' Br. 51 n.60.

Plaintiffs, however, cannot employ the general APA remedy as a vehicle to assert alleged violations of FISA. A plaintiff cannot employ the general provisions of APA to circumvent a statute such as FISA that contains its own specific, comprehensive remedies. *See Weber* v. *Dep't of Veterans Affairs*, 521 F.3d 1061, 1066-67 (9th Cir. 2008) (comprehensive remedies of the Civil Service Reform Act preclude resort to the more general APA remedy). Not only does FISA not authorize the declaratory and injunctive relief plaintiffs are seeking here, but the United States government is not a proper defendant

under FISA's express cause of action authorized against "person[s]," which does not clearly and expressly name the United States government officials in their official capacities as defendants and thus cannot subject the federal government to suit. 50 U.S.C. § 1810; *see, e.g.*, *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992). Although § 1801(m) defines federal officials as among the "person[s]" who may be defendants in an action under § 1810, there is no indication that Congress intended as proper defendants federal officials in their official, as opposed to their personal, capacities. Plaintiffs in this case, however, are suing various federal government officials solely in their official capacities. *See* SER 4-6. And "any lawsuit . . . against an officer of the United States in his or her official capacity is considered an action against the United States." *Balser* v. *Dep't of Justice*, 327 F.3d 903, 907 (9th Cir. 2003). In addition, a separate provision of FISA creates an express damages remedy against the United States for specifically enumerated FISA provisions. *See* 18 U.S.C. § 2712. Given how specific and comprehensive this scheme is, and the fact that it includes express remedies against the United States that plaintiffs do

not and cannot invoke here, plaintiffs cannot circumvent FISA's remedies by purporting to sue under the APA.

2. Even if plaintiffs had a valid a FISA claim here, however, FISA would not displace the state secrets privilege in any event. FISA nowhere mentions the privilege, and it is incorrect to read FISA to vitiate a crucial, constitutionally based national security privilege that is nowhere alluded to in the statute's provisions. The state secrets privilege is deeply rooted both in the common law and in the President's Article II Commander-in-Chief power. *See United States* v. *Nixon*, 418 U.S. 683, 710 (1974); *Kasza* v. *Browner*, 133 F.3d 1159, 1167-68 (9th Cir. 1998). And the Court should not hold the common law repealed absent clear indication in the legislation. *See, e.g.*, *Norfolk Redevelopment & Housing Auth.* v. *Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35 (1983); *In re Niles*, 106 F.3d 1456, 1461 (9th Cir. 1997). Although FISA contains a detailed regime addressing foreign intelligence collection, the statute nowhere abrogates the state secrets privilege, much less with the clarity necessary to override a fundamental and deeply rooted national-security privilege or

Presidential power. *See Armstrong* v. *Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991) (statute cannot be read to infringe on Presidential power without clear indication).

Plaintiffs have also argued that § 1806(f) of FISA codifies and restricts the state secrets privilege, but that is not so. Section 1806(f) governs circumstances in which the government seeks to use surveillance evidence against an individual in some other proceeding. In such cases, if a district court is asked to decide whether surveillance of that person was authorized under FISA, § 1806(f) requires the district court to conduct an *in camera* and *ex parte* hearing "if the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States." 50 U.S.C. § 1806(f). This limited provision cannot plausibly be read to displace, or even address, assertion of the state secrets privilege writ large.

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared in 14-point Century Schoolbook, a proportionally spaced font, and according to the word-count function of Corel WordPerfect X5 contains 11,082 words from its Introduction to its Conclusion.

/s/ Henry Whitaker
Henry C. Whitaker

STATEMENT OF RELATED CASES

We are aware of the following related cases: *Hepting* v. *AT&T Corp.*, No. 09-16676 (9th Cir.); *McMurry* v. *Verizon Communications, Inc.*, 09-17133 (9th Cir.); *Jewel* v. *NSA*, Nos. 10-15616, 15638 (9th Cir.); and *Al-Haramain Islamic Foundation* v. *Obama*, Nos. 11-15468, 11-15535.

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit on October 28, 2011.

I certify as well that on that date I caused a copy of this brief to be served on the following counsel registered to receive electronic service.

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