09-15266

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs and Appellees,

vs.

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

Defendants and Appellants.

REPLY OF APPELLEES ON MOTION TO DISMISS APPEAL

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INTRODUCTION

This reply brief responds to defendants' opposition (hereafter "Defs.' Oppo.") to plaintiffs' motion to dismiss this purported appeal for lack of jurisdiction.

ARGUMENT

I. THE JANUARY 5, 2009 RULING IS NOT APPEALABLE AS A FINAL COLLATERAL ORDER.

Defendants contend the January 5, 2009 order is appealable under the collateral order doctrine because the order creates "an unprecedented mechanism" for litigating motions for access to classified information under 50 U.S.C. section 1806(f). *See* Defs.' Oppo. at 13. The district court, however, has not yet installed the moving parts of that mechanism, but is still engaged in the process of doing so, in a manner tailor-made to the unique circumstances of this case. It could turn out that, depending on how the district court subsequently proceeds, defendants – or eventually this Court, after Judge Walker finishes building the mechanism and the matter is ready for appellate review– might find the finished product appropriately protective of national security. It is too soon to tell. In that respect, the January 5, 2009 order does not conclusively determine how the case will proceed and thus is not appealable under the collateral order doctrine.

Defendants barely address the doctrine's requirement that an order not be "enmeshed in the factual and legal issues comprising the plaintiff's cause of action"

Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 (1978) (emphasis and internal quotation marks omitted), saying only that the issues decided in the January 5, 2009 order are "distinct" from the merits question of whether defendants "violated FISA." Defs.' Oppo. at 14. Defendants fail to address plaintiffs' point that, in proceedings under section 1806(f), the district court may determine whether surveillance "was *unlawfully* authorized and conducted" and may disclose materials relating to surveillance "where such disclosure is necessary to make an accurate determination of the *legality* of the surveillance," 50 U.S.C. § 1806(f) (emphasis added) – that is, whether defendants *violated FISA*. That makes the January 5, 2009 order "enmeshed" in the merits issue, because the unlawfulness of plaintiffs' surveillance *is* the merits issue, and disclosure (to whatever extent it might occur) is an essential step toward adjudication of that issue. An order that is but a "step toward final disposition of the merits of the case" is not appealable as a collateral order. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949).

II. THE ISSUE OF FISA PREEMPTION WAS DECIDED ON JULY 2, 2008 AND IS NOT CURRENTLY BEFORE THIS COURT.

Defendants also contend the district court's *FISA preemption ruling* is appealable under the collateral order doctrine. *See* Defs.' Oppo. at 13. That ruling, however, occurred on July 2, 2008, and is not what defendants are attempting to appeal here, which is the order of January 5, 2009. Whether the FISA preemption

ruling is "conclusive" (which defendants argue, *see id.*) is irrelevant to the question whether this Court presently has jurisdiction to address that ruling.

The pertinent question is whether, if the January 5, 2009 order were appealable (which it is not), the Court would have *pendent* jurisdiction to address the July 2, 2008 FISA preemption ruling. The answer is *no*. For pendent jurisdiction to exist, "the legal theories on which the issues advance must either (a) be so intertwined that we must decide the pendent issue in order to review the claims properly raised on interlocutory appeal, or (b) resolution of the issue properly raised on interlocutory appeal necessarily resolves the pendent issue." *Meredith v. Oregon*, 321 F.3d 807, 814 (9th Cir. 2003) (internal quotation marks omitted). Neither element is present here. The January 5, 2009 order decided the following: (1) plaintiffs must demonstrate their "aggrieved person" status under 50 U.S.C. section 1806(f) under a "prima facie approach," Doc. #57 at 14; (2) plaintiffs have "[w]ithout a doubt" pled enough non-classified facts "so as to proceed to the next step in proceedings under FISA's sections 1806(f) and 1810," *id.* at 18; (3) the district court "will review the Sealed Document ex parte and in camera," *id.* at 23; (4) defendants shall process applications for security clearance by plaintiffs' counsel, *id.* at 24; and (5) defendants shall report to the court on potential declassification of classified information on file with the court, *id.* at 24-25. FISA preemption need not be considered in order to review those issues, and their resolution does not resolve the FISA preemption issue.

III. DEFENDANTS HAVE WAIVED INTERLOCUTORY REVIEW OF FISA PREEMPTION BY FAILING TO REQUEST CERTIFICATION OF THE JULY 2, 2008 ORDER FOR AN INTERLOCUTORY APPEAL.

Defendants' attempt to obtain interlocutory review of FISA preemption is premised on their argument below that the district court's July 2, 2008 ruling that FISA preempts the state secrets privilege was not a proper subject of a motion to certify an interlocutory appeal under 28 U.S.C. section 1292(b). *See* Doc. #70 at 12-13. Defendants seem to think their first opportunity to seek appellate review of FISA preemption is *now*, on their purported appeal from the order of January 5, 2009. Defendants are wrong.

Defendants argued below that "there simply was no need" for them to request certification of the July 2, 2008 order for an interlocutory appeal because the order had "ended" and "terminated" the case by dismissal. Doc. #70 at 12. But the order dismissed the "complaint," not the "action." *See* Doc. #57 at 2 ("The court dismissed the complaint with leave to amend."). An order of dismissal with leave to amend is final if the order dismisses the "action," but the order is *not* final – that is, it is interlocutory – if it dismisses only the "complaint." *De Tie v. Orange County*, 152 F.3d 1109, 1111 (9th Cir. 1998). The July 2, 2008 order – dismissing the *complaint* – was interlocutory and thus a proper subject of certification for interlocutory appeal.

Defendants could have sought certification of the July 2, 2008 order under

section 1292(b) for the purpose of obtaining appellate "reformation" of the district court's FISA preemption ruling. A prevailing party may seek appellate reformation of a favorable district court decision as to a discussion within the decision that is "immaterial to the disposition of the cause" but establishes "rights or liabilities" of the parties. *Environmental Protection Information Center, Inc. v. Pacific Lumber Company*, 257 F.3d 1071, 1075 (9th Cir. 2001) (internal quotation marks omitted). Defendants argued below that the July 2, 2008 FISA preemption ruling "was immaterial to dismissal of plaintiffs' original complaint." Doc. #70 at 13, n. 6. If that is true, then defendants could have sought reformation of the ruling on a certified interlocutory appeal.

Defendants' failure to request certification of the July 2, 2008 order under section 1292(b) means they have waived interlocutory appellate review of that issue. This Court's review of FISA preemption must await a subsequent appealable ruling. *See, e.g., Baldwin v. Redwood City*, 540 F.2d 1360, 1364 (9th Cir. 1976) (interlocutory appeals being permissive rather than mandatory, an unappealed interlocutory ruling can be challenged on appeal from a final judgment).

IV. THE JANUARY 5, 2009 ORDER IS NOT APPEALABLE AS AN INJUNCTION.

Defendants contend the January 5, 2009 order is appealable as an injunction under 28 U.S.C. section 1292(a)(1) because the order "compel[s] the Government to

authorize disclosure of classified information." Defs.' Oppo. at 16. But the order does no such thing. There is no need for the district court to compel any disclosure by defendants, because the classified information at issue is in the district court's files and under the court's control. Any disclosure will be by the court, not by defendants under court order.

Defendants also argue the order is appealable as an injunction because it purportedly directs defendants "to *grant* security clearances" to plaintiffs' counsel. Defs.' Oppo. at 18 (emphasis added). Again, defendants are wrong. The January 5, 2009 order merely directs defendants to "arrange" for plaintiffs' counsel to "apply" for security clearance and to "expedite the processing of such clearances" so as to complete such processing by February 13, 2009. Doc. #57 at 24. Judge Walker did not purport to exercise any control over the decision whether to *grant or deny* such clearances.

Defendants have now made that decision for two of plaintiffs' attorneys, and the decision is to *grant* them security clearance. The FBI has determined that they are "eligible for access to classified information." Exec. Order No. 12,968, § 3.1(a) (1995); *see* Doc. #72 at 2. According to Department of Defense (DoD) regulations, that determination of "eligibility" is, in fact, a "security clearance." *See* DoD 5200.2-R, § DL1.1.21 (1987) (defining "security clearance" as "[a] determination that a person is eligible under the standards of this Regulation for access to classified

information"). It moots any challenge to the district court's directive for defendants to process applications for security clearance.

Defendants further argue the January 5, 2009 order is appealable as an injunction because it "require[s] the Government to grant a need-to-know determination." Defs.' Oppo. at 15. Yet again, defendants are wrong. Access to classified information requires both "eligibility" for such access and a determination that "the person has a need-to-know the information." Exec. Order No. 13,292, § 4.1 (2003). The district court required only that defendants determine the "eligibility" of plaintiffs' counsel for such access. The court did *not* require the government to determine that plaintiffs' counsel have a "need to know" classified information. Rather, the January 5, 2009 order makes clear that *the court* will made the need-to-know determination (which, as we have demonstrated in opposition to defendants' emergency stay motion, the district court has the power to do). There is nothing here in the nature of an injunction.

V. DEFENDANTS CAN NO LONGER CREDIBLY ARGUE THAT ADJUDICATION OF THE MERE FACT OF PLAINTIFFS' SURVEILLANCE WILL HARM NATIONAL SECURITY.

Defendants' recurrent theme has been that an adjudication of the mere fact of plaintiffs' surveillance will harm national security. That theme, however, has become discordant – and deserves no credence – now that FBI Deputy Director John Pistole

has publicly admitted that the FBI used surveillance in the 2004 investigation of Al-Haramain. Defendants refer to an argument they made below – that it is pure speculation to conclude that Pistole was referring to surveillance of *the plaintiffs in this case* – and insist "his actual statements provide no support for plaintiffs' position." Defs.' Oppo. at 7, n. 1. But it is hardly speculation to conclude that, if FBI agents used surveillance in an investigation of Al-Haramain, the surveillance included the *subject* of the investigation – Al-Haramain. That is not speculation; it is logic. If there were any possibility that defendants might still be able to, as Judge Pregerson put it during oral argument before this Court in 2007, "keep them guessing" as to whether surveillance was used in the 2004 investigation of Al-Haramain, Pistole's subsequent public acknowledgment ended that possibility.

VI. MANDAMUS IS INAPPROPRIATE BECAUSE THE DISTRICT COURT'S ORDER IS NOT CLEARLY ERRONEOUS AS A MATTER OF LAW.

Finally, defendants ask this Court to treat their attempted appeal as invoking the Court's mandamus jurisdiction. *See* Defs.' Oppo. at 18-20. Such treatment, however, requires defendants to show, among other things, that "the district court's order is clearly erroneous as a matter of law." *United States v. Austin*, 416 F.3d 1016, 1024 (9th Cir. 2005). Defendants have failed to make that showing on either of the two substantive arguments raised in their emergency stay motion – that Judge Walker lacks authority to make the "need to know" determination, and that FISA does not

preempt the state secrets privilege.

On the issue whether Judge Walker can make the "need to know" determination, defendants insist that "[p]laintiffs cite no authority supporting this startling proposition." Defs.' Oppo. at 10. Plaintiffs do. That authority is the executive order vesting the "need to know" determination in an "authorized holder of classified information," Exec. Order No. 13,292, § 6.1(z) (2003), the statutory and regulatory law (which defendants do not address) making federal judges authorized holders of classified information, 50 U.S.C. § 437, DoD 5200.2-R, § C3.4.4.5 (1987), and the case law (which defendants also do not address) describing the judiciary's supervisory control over its own records and files as an incident of the constitutional separation of powers, *see* Pls.' Mo. to Dismiss Appeal at 17, Doc. #72 at 4-5. Judge Walker will not "clearly err" by deciding plaintiffs' "need to know." The law *authorizes* him to do so.[1]

On the issue of FISA preemption, defendants fail to address the pivotal case of *Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981), which says a federal statutory

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[1] A new decision further confirms Judge Walker's authority to allow plaintiffs' counsel to use a redacted version of the Sealed Document to demonstrate standing. In *United States v. Rosen*, No. 08-4358, 2009 WL 446097, at *6 (4th Cir. Feb. 24, 2009), the Fourth Circuit held that, in proceedings under the Classified Information Procedures Act to determine whether classified evidence was relevant and admissible, the district court did not abuse its discretion in determining the extent to which the evidence should be redacted. Similarly here, Judge Walker has discretion to make that determination.

scheme can preempt federal common law if Congress has "occupied the field through the establishment of a comprehensive regulatory program." Nor do defendants address FISA's legislative history, which demonstrates that FISA and corollary criminal statutes were intended to "blanket[] the field." 124 CONG. REC. 10,903-04 (1978). And defendants ignore this Court's observation that FISA provides a "detailed regime" for determining the lawfulness of electronic surveillance. *Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190, 1205 (9th Cir. 2007); *see* Pls.' Mo. to Dismiss Appeal at 18. That authority amply supports Judge Walker's FISA preemption ruling (which is not even reviewable yet).

Mandamus requires this Court to be "firmly convinced that the district court has erred, and that the petitioner's right to the writ is clear and indisputable." *Austin*, 416 F.3d at 1024 (internal quotation marks omitted). Given plaintiffs' ample showing to the contrary, there is no basis for mandamus here.

CONCLUSION

This Court should dismiss the appeal for lack of jurisdiction.

February 26, 2009

Respectfully submitted,

/s/ Jon B. Eisenberg

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 27(d)(2), this Reply of Appellees on Motion To Dismiss Appeal is proportionately spaced, has a typeface of 14 points or more, and consists of 10 pages.

February 26, 2009 By: /s/ Jon B. Eisenberg
Jon B. Eisenberg

CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2009, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that some of the participants in the case are not registered CM/ECF users.

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE NATIONAL SECURITY AGENCY TELECOMMUNICATIONS RECORDS LITIGATION This Document Solely Relates To: *Al-Haramain Islamic Foundation et al. v. Obama, et al.* (07-CV-109-VRW)	No. M:06-CV-01791-VRW **GOVERNMENT DEFENDANTS' REPLY IN SUPPORT OF MOTION TO STAY PROCEEDINGS PENDING APPEAL AND CERTIFICATION OF INTERLOCUTORY APPEAL UNDER 28 U.S.C. § 1292(b)** **REQUEST FOR INTERIM STAY** Date: April 9, 2009 Time: 2:30 pm Courtroom: 6, 17th Floor Honorable Vaughn R. Walker

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Plaintiffs' Opposition to Defendants' Motion for a Stay Pending Appeal and for Certification of an Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b) (Dkt. 69) ("Pls. Opp."),[1/] fails to address the significant issues now before the Court. As set forth below, the grounds for certification of an interlocutory appeal of the Court's January 5, 2009 Order are amply satisfied, and the need for a stay pending appeal should be clear—indeed, we respectfully submit that certification of the Court's Order, or the entry of a stay pending appeal, are not close questions under the present circumstances.

Certification of the Court's Order under 1292(b) is plainly appropriate. The Court of Appeals has previously determined that plaintiffs' case cannot proceed without critical information that the state secrets privilege was properly asserted to protect—including whether or not plaintiffs were subject to alleged surveillance and, in particular, the classified sealed document at issue in this case. *See Al-Haramain v. Bush*, 507 F.3d 1190, 1205 (9th Cir. 2007). The Court of Appeals agreed that disclosure of this information would harm the national security of the United States. *See id*. at 1203-04 (disclosure of information concerning the Sealed Document and the means, sources and methods of intelligence gathering in the context of this case would undermine the government's intelligence capabilities and compromise national security). This Court has now held that Section 106(f) of the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. § 1806(f), displaces the state secrets privilege, and that the case will now proceed under that provision to adjudicate the very fact question at issue in the privilege assertion, using the document previously excluded by the Court of Appeals. The Court has also held that due process requires that plaintiffs' counsel obtain security clearances for access to the classified privileged information in order to litigate their claims. The proper and prudent course is to permit the Court of Appeals to review the key issue previously remanded—whether the

[1] All docket numbers herein are to the docket in Civil Action 07-cv-109-VRW. The Court's January 5 Order is at Dkt. 57. The Government filed a Notice of Appeal on January 16, 2009. *See* Dkt. 59. The Government filed a Motion for a Stay Pending Appeal and for Certification of Interlocutory Appeal ("USG Stay") on January 19, 2009. *See* Dkt 60.

FISA permits the proceedings now ordered by the Court—before steps are taken that would risk or require disclosures that would negate the privilege assertion already upheld by the Ninth Circuit.

A stay pending appeal (whether the Government's appeal of right or permissive appeal under Section 1292(b)) is likewise the proper and reasonable course now. To risk or require the disclosure of privileged information while the Government challenges the legal basis for doing so would plainly impose irreparable harm—not merely on to the Government's position in this litigation, but the grave harm to national security identified by the Ninth Circuit when it upheld the privilege assertion.

Plaintiffs' objections to 1292(b) certification and a stay pending appeal are insubstantial. Plaintiffs' primary contention as to why 1292(b) certification should be denied is that the Government did not seek certification of the Court's July 2, 2008 decision on FISA preemption. *See* Pls. Opp. (Dkt. 69) at 1-4. That argument is clearly meritless. The plaintiffs' pending complaint was *dismissed* by the July 2 Order, rendering interlocutory review at that time senseless. Moreover, the law does not foreclose appellate review of an issue decided in the July 2 Order that is material to the January 5 Order. Likewise, plaintiffs' contention that there is no risk of irreparable harm to the Government warranting a stay pending appeal of the January 5 Order is also wrong. Under the January 5 Order, classified information protected by the Government's privilege assertion is subject to disclosure after February 13, 2009—not months later as plaintiffs contend.

Accordingly, the Government requests that the Court not only certify its Order and enter a stay pending appeal, but that it put in place an interim stay to ensure that no disclosures occur in the meantime, and to permit the Government to seek a stay from the Court of Appeals, if necessary. The Government has submitted proposed Orders that would either grant 1292(b) certification, or a stay pending appeal, or an interim stay while the Government seeks relief from the Ninth Circuit. The Government respectfully requests that the Court indicate how it will proceed by 3 p.m. on February 13, 2009. In order to protect its interests, the Government plans

to seek relief from the Ninth Circuit before the close of business that day in the absence of relief from this Court.

ARGUMENT

I. THE COURT SHOULD CERTIFY ITS JANUARY 5 ORDER FOR INTERLOCUTORY APPEAL UNDER 28 U.S.C. § 1292(b).

Plaintiffs' opposition to the Government's motion to certify the January 5 Order rests primarily on erroneous procedural objections and devotes little attention to the central question at hand: whether 1292(b) certification is warranted because there are substantial grounds for a difference of opinion on a controlling question of law as to which appellate review may materially advance termination of the litigation. *See In re Cement Antitrust Litigation*, 673 F.2d 1020, 1026 (9th Cir. 1981). As set forth in our opening motion, *see* USG Stay (Dkt. 60) at 15-16, the Court's determination that the case will now proceed under FISA Section 1806(f) controls all further proceedings in this case. Under that legal framework, which remains very much in dispute, the Court has ruled that it will decide a threshold jurisdictional question—whether the plaintiffs in fact have been subject to alleged surveillance and thus have standing—in the face of the Ninth Circuit's prior ruling that the case would otherwise have to be dismissed under the state secrets privilege. *See Al-Haramain v. Bush*, 507 F.3d at 1205.

Moreover, there are substantial grounds for a difference of opinion as to the Court's Order. We are aware of no prior case where the state secrets privilege has been held to be preempted by statutory law, nor any case that has applied Section 1806(f) in the manner in which the Court is now proceeding—to decide whether alleged surveillance has occurred and to grant security clearances for the disclosure of classified information to a party seeking that information in order to litigate their claims. An immediate appeal would also materially advance the termination of this litigation. If the Court of Appeals finds that the Court has erred in applying Section 1806(f) of the FISA to adjudicate matters at issue in the Government's privilege assertion, then the case would be dismissed. At a minimum, the Court of Appeals may provide further guidance as to how the Court should proceed in unprecedented circumstances.

Plaintiffs oppose 1292(b) certification primarily "for the simple reason that the

defendants do not seek interlocutory review of an issue decided in the January 5, 2009 Order" but "[r]ather seek review of an issue that this Court decided in its order of July 2, 2008—whether FISA preempts the state secrets privilege." *See* Pls. Opp. (Dkt. 69) at 2. But that simply is wrong; the Government expressly seeks certification of the January 5 *Order*.[2/] And the January 5 Order clearly and expressly applies the procedures of Section 1806(f) to preempt the Government's state secrets privilege assertion. Moreover, under applicable law, the fact that the FISA preemption issue was addressed in the Court's July 2 decision is of no consequence to whether the Court should certify its January 5 Order.

As plaintiffs assert, the Supreme Court stated in *Yamaha Motor Corporation v. Calhoun*, 516 U.S. 199 (1996), that a court of appeals reviewing an order under Section 1292(b) "may not reach beyond the certified order to address other orders made in the case." *Id*. at 205; *see* Pls. Opp. (Dkt. 69) at 2. But "the *Yamaha* opinion did not end with [that] sentence." *United States v. Philip Morris USA, Inc.*, 396 F.3d 1190, 1194 (D.C. Cir. 2005). The Supreme Court went on to state in *Yamaha* that "the appellate court may address any issue fairly included within the certified order because 'it is the *order* that is appealable, and not the controlling question identified by the district court.'" *Yamaha*, 516 U.S. at 205 (citations omitted) (original emphasis). As this statement indicates, a key purpose of the rule that *orders* are reviewed under 1292(b) is to prevent a limitation on appellate review based on how a district court may characterize the controlling issue of law being certified. But plaintiffs' reading of this authority to mean that issues addressed in other orders may never be reviewed under 1292(b) is wrong.

As the Ninth Circuit and other courts have held, review of a certified order "may address those issues *material* to the order from which an appeal has been taken." *In re Cinematronics, Inc.*, 916 F.2d 1444, 1449 (9th Cir. 1990) (original emphasis) (citing *Ducre v. Executive Officers of Halter Marine, Inc.*, 752 F.2d 975, 983 n.16 (5th Cir. 1985)). The fact that an issue may have

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[2] *See* Dkt. 60 at 22 (the Government "request(s) that the Court certify its *Order* for interlocutory appeal") and *id*. (after discussing applicable standards for 1292(b) review stating that "[t]he Court's January 5 *Order* meets this standard) (emphases added).

been decided in another order is irrelevant to whether that issue may be considered in review of the certified order. In *In re Cinematronics*, the Ninth Circuit, in exercising review of a certified district court order under 1292(b), considered a prior ruling by a bankruptcy court because "the validity of the district court decision. . . [was] inextricably tied to the bankruptcy judge's earlier ruling." *See* 916 F.2d at 1449. Likewise, in *Lee v. American National Insurance Co.*, 260 F.3d 997, 1000 (9th Cir. 2001), the Ninth Circuit reviewed under 1292(b) an order denying a motion to remand a case to state court that was based on the district court's previous holding that the court lacked jurisdiction over the plaintiffs' claim. *See also Philip Morris, USA Inc*., 396 F.3d at 458 (rejecting contention that appellate review under 1292(b) must be limited solely to a new specific theory set forth in the certified order and could not extend to a theory that had been reiterated from a prior order).[3/] Accordingly, there is no bar to 1292(b) certification of an order where a related material issue has been addressed in a prior separate order.

Plaintiffs' contention that the January 5 Order "merely mentions [the July 2 ruling] in reciting the case's multi-faceted procedural history," *see* Pls. Opp. (Dkt. 69) at 4, is wholly inaccurate. On the contrary, there should be no question that issues decided in the Court's July 2 Order are material to the January 5 Order and, indeed, are inextricably bound up in that Order. While the Court generally concluded on July 2 that FISA Section 1806(f) preempted the state

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[3] The case on which plaintiffs rely extensively, *Durkin v. Shea & Gould*, 92 F.3d 1510 (9th Cir. 1996), is not to the contrary. The issue in *Durkin* was whether the Court of Appeals, in reviewing the denial of a motion for summary judgment under 1292(b), could exercise jurisdiction over the denial of a motion to dismiss claims in a *separate* companion case. In that context, the Ninth Circuit held that its review was limited to the particular certified order and that it would not review a non-certified order in a separate case based merely on a passing reference to it in the certified order. *See Durkin*, 92 F.3d at 1515 n.12. Likewise the Supreme Court's decision in *United States v. Stanley*, 483 U.S. 669 (1987), is inapposite here. In *Stanley*, the Supreme Court held that, in reviewing a certified order that denied dismissal of certain *Bivens* claims, the court of appeals did not have jurisdiction to remand the case for consideration of whether the plaintiff's long dismissed claims against the Government under the Federal Tort Claims Act might be viable under recent case law, since the dismissal of the FTCA claims was an "issue [that] had not been addressed in the order from which the interlocutory appeal was taken." *See id.* at 675.

secrets privilege, *see Al-Haramain v. Bush*, 564 F. Supp. 2d 1109, 1115-25 (N.D. Cal. 2008), it did not order that Section 1806(f) proceedings commence or even that they would be applied in this case. The Court stated that the plaintiffs must first establish whether they were "aggrieved persons" who would have standing to invoke Section 1806(f). *See id*. at 1134. And, specifically in accord with the Ninth Circuit's ruling on the state secrets privilege, the Court barred plaintiffs from using the classified sealed document to establish their aggrieved status. *See id.* The Court then dismissed the original complaint without prejudice while granting plaintiffs leave to file an amended complaint. *See id.* at 1137.

After plaintiffs filed an amended complaint, this lawsuit returned to the pleading stage of the case, and the Government then filed its Third Motion to Dismiss or for Summary Judgment challenging the new complaint. *See* Dkt. 49. The Government's motion was based on all of the prior grounds for dismissal and summary judgment that the Government had previously raised in this case, including on its position that the FISA did not preempt the state secrets privilege. *See* Government's Notice of Motion and Motion to Dismiss or for Summary Judgment (Dkt. 49) at 1-3; *see also* Memorandum in Support of the Government's Third Motion to Dismiss or for Summary Judgment (Dkt. 49) at 23-25. The January 5 Order denied the Government's motion and granted the plaintiffs' motion to proceed with discovery under FISA Section 1806(f) (Dkt. 46). *See* Dkt. 57. Thus, all of the issues related to the denial of the Government's motion and the granting of plaintiffs' motion— including the FISA preemption issue—would properly be subject to interlocutory review if the Order is certified.

Plaintiffs' contention that there is "nothing" in the January 5 Order that merits certification, *see* Pls. Opp. (Dkt. 69) at 4, is also clearly wrong. That Order was not limited to merely deciding the standard for invoking Section 1806(f), or merely to facilitate the processing of security clearances, or to direct a declassification review as plaintiffs' contend. *See id.* Rather, the Court went on to decide that that this case would actually proceed under Section 1806(f) of the FISA. After finding that, at the "pleading stage," plaintiffs "have alleged enough to plead 'aggrieved person' status so as to proceed to the next step in proceedings under FISA's

section 1806(f) and 1810," *see* Dkt. 57 at 14-18,[4] the Court ruled as to how FISA Section 1806(f) would now be applied. *See id*. at 19-22.

The Court held that, despite the absence of an Attorney General determination to invoke Section 1806(f), the Court would proceed nonetheless on the ground that nothing in FISA "prohibits the court from exercising its discretion to conduct an *in camera*, *ex parte* review following the plaintiffs' motion and entering other orders appropriate to advance the litigation if the Attorney General declines to act." *See* Dkt. 57 at 22. The Court then held that it would review, initially *ex parte*, the Sealed Document that was the subject of the state secrets privilege assertion and will then issue an order regarding a factual question at issue in that privilege assertion— "whether the Sealed Document establishes that plaintiffs were subject to electronic surveillance not authorized by FISA." *Id.* at 23. The Order then adds that fully *ex parte* proceedings under Section 1806(f) "would deprive plaintiffs of due process to an extent inconsistent with Congress' purpose in enacting FISA Sections 1806(f) and 1810." *Id.* Accordingly, the Order "provides for members of plaintiffs' litigation team to obtain the security clearances necessary to be able to litigate the case, including, but not limited to, reading and responding to the court's future orders." *Id*. The Court's Order also "specifically rejected" the Government's assertion that the Executive branch controls access to classified information, *see id.* at 21, and held that Section 1806(f) "leaves the court free to order discovery of the materials or other information sought by the 'aggrieved person' in whatever manner it deems consistent

[4] The Court initially reviewed the allegations in the amended complaint to determine whether the case may proceed to Section 1806(f) proceedings. *See* Dkt. 57 at 2-8. The Court then considered and rejected the Government's contention that the public evidence cited in the amended complaint was insufficient to establish plaintiffs' standing to proceed under Section 1806(f) as "aggrieved persons" subject to the alleged surveillance. *See id.* at 9. In making this determination, the Court decided an issue held open in its July 2 decision: what the standard would be for determining whether the case could proceed under Section 1806(f), *see id*. at 10-12 (discussing standard applicable under 18 U.S.C. § 3504), and then decided for the first time that it was sufficient for plaintiffs merely to establish a *prima facie* case of alleged surveillance, *see id.* at 13.

with section 1806(f)'s text and purpose." *Id.* at 22.[5/]

Thus, in denying the Government's Third Motion to Dismiss or for Summary Judgment, and granting plaintiffs' motion that the case proceed to discovery under Section 1806(f), the January 5 Order operates to supplant the Government's state secrets privilege assertion with actions that will now be taken under Section 1806(f) procedures. To the extent review of the Court's prior analysis of the preemption issue is necessary to review the January 5 Order, that issue is clearly material to and inextricably bound up in the Order. *See Bassidji v. Goe*, 413 F.3d 928, 935 (9th Cir. 2005) (where the relevant district court order being certified is the denial of a motion to dismiss, any issue material to the effect of the controlling issue on the propriety of dismissing the action is "fairly included" within the certified order).

Accordingly, there simply was no need for the Government to have sought certification of the July 2 Order in order for the January 5 Order to be certified. Moreover, certification of the July 2 Order would have made no sense. The July 2 Order ended the case, at least at that point. For purposes of seeking an appeal, the possibility existed that either the plaintiffs would not pursue the matter further or that the Court would reject their subsequent attempts to re-start the case under the terms of the July 2 Order. Thus, certification of the July 2 Order would not have advanced the termination of a case that had just been terminated, and which might never have proceeded to Section 1806(f) proceedings. The January 5 Order may properly be certified, even where the related FISA preemption issue was addressed in the July 2 Order. As set forth above,

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[5] It bears noting that the Court's January 5 Order appears to shift course from aspects of the July 2 ruling. Whereas the Court appeared to hold on July 2 that the plaintiffs could not utilize Section 1806(f) to determine whether in fact they are aggrieved, *see Al-Haramain*, 564 F. Supp. 2d at 1134, the January 5 Order provides that Section 1806(f) proceedings would be utilized first to decide whether the plaintiffs have been subject to the alleged surveillance at issue. *See* Dkt. 57 at 23. In addition, whereas the July 2 Order did not permit use of the sealed document in adjudication of whether or not plaintiffs are aggrieved, *see Al-Haramain*, 564 F. Supp. 2d at 1134, under the January 5 Order, that document will now be used to decide whether the plaintiffs have standing. *See* Dkt. 57 at 23.

the requirements for certification of the January 5 Order are easily satisfied.[6]

II. THE COURT SHOULD STAY PROCEEDINGS PENDING APPEAL.

The Court should also enter a stay pending either the appeal taken by the Government or any appeal certified by the Court. The Government also requests that at least an interim stay be entered by February 13, 2009—the date after which further proceedings may commence under the January 5 Order.

A. A Stay Pending The Government's Appeal of the January 5 Order Should be Entered.

The question of whether to stay this case pending appeal is straightforward: where national security information has been successfully protected under the state secrets privilege, no action should be taken in district court that might risk or require disclosure of that information until the Court of Appeals determines that it will hear the appeal and then decides whether the course on which the Court is now embarked is proper. Under these circumstances, the harms to national security recognized by the Ninth Circuit should not be risked before it is conclusively determined that further proceedings under the FISA are proper. *See* USG Stay Mem. (Dkt. 60) at 7-14; *Al-Haramain*, 507 F.3d at 1203-04.[7]

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[6] In addition, plaintiffs' contention that the Government would have had standing to appeal the Court's ruling on FISA preemption in the July 2 decision is irrelevant. The question is whether 1292(b) certification of the July 2 Order would have been appropriate, not whether the Government had standing to appeal. Likewise, plaintiffs' contention that the Government could have appealed the July 2 Order because it is somehow collaterally estopped by that Order, *see* Pls. Opp. (Dkt. 69) at 6, is meritless as well, because the Court's preemption analysis was not a final judgment and, in any event, was immaterial to dismissal of plaintiffs' original complaint. *See Environmental Prot. Info. Ctr. v. Pacific Lumber Co.*, 257 F.3d 1071, 1075-76 (9th Cir. 2001); *United States v. Good Samaritan Church*, 29 F.3d 487, 488-89 (9th Cir. 1994). The Court could simply have held that, assuming *arguendo* that FISA Section 1806(f) were applicable, the plaintiffs had failed to fall within its terms as "aggrieved persons" based on the evidence they had presented to date and, thus, that their case must be dismissed. As set forth herein, it was not until after the Government challenged the amended complaint that the Court held, in its January 5 Order, that the case would proceed under FISA Section 1806(f).

[7] Plaintiffs' contention that the Government made "no effort at all to demonstrate a probability of success on the merits" of any appeal, *see* Pls. Opp. (Dkt. 69) at 8-9, is wrong and misapprehends the nature of the stay inquiry. The Government obviously contends that all of its arguments on the substantive legal issues at stake are correct on the merits, including that the

Plaintiffs' primary objection to the entry of a stay pending the appeal is that the Court has already found the pending notice of appeal to be a nullity. *See* Pls. Opp. (Dkt. 69) at 7-8. But that does not address the question at hand: whether a stay is appropriate before privileged national security information is put at risk of disclosure. While the Government believes that the January 5 Order is appealable and, thus, that the Court presently lacks any jurisdiction to proceed, that question will undoubtedly be litigated in the Court of Appeals, and this Court should act to preserve the status quo and avoid irreparable harm before the Ninth Circuit reviews the matter.

Plaintiffs do not dispute that, under the January 5 Order, further proceedings would entail the disclosure of classified information, including to plaintiffs' counsel. They concede that, absent certification and a stay, the Court would now proceed to apply Section 1806(f) to decide the very question at issue in the privilege assertion pursuant to procedures where plaintiffs' counsel would receive classified information. Plaintiffs' main response is that the procedures of Section 1806(f) could be utilized to foreclose any harmful disclosure to the public; that there would be no disclosures to plaintiffs' counsel until after their clearance suitability determinations are completed on February 13, 2009; and that, under plaintiffs' litigation plan, any final adjudication of whether they had standing would not occur until May 2009—by which time the Court of Appeals would have decided whether it has jurisdiction to hear a 1292(b) appeal (if certified by the Court). *See* Pls. Opp. (Dkt. 69) at 10.

But the very issue raised by the Government's appeal of the January 5 Order is *whether* the Section 1806(f) procedures should be applied as now directed by the Court, including

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FISA does not preempt the state secrets privilege, and that any information subject to the privilege assertion may not be disclosed in any further proceedings. But the applicable standard for a stay pending appeal does not require the district court to find that its own decision was likely in error. Rather, a stay may be granted either where the moving party demonstrates probable success on the merits and the possibility of irreparable harm, or that serious questions have been raised and the balance of hardships tips decidedly toward the moving party. *Artukovic v. Rison*, 782 F.2d 1354, 1355 (9th Cir. 1986). The Government's motion satisfies all factors at either end of the continuum, but emphasized the serious constitutional nature of the issues to indicate that the Court need not find that it had likely erred in order to grant a stay.

whether plaintiffs' counsel should be granted access to classified information. That issue is ripe now—not in May 2009. The Court ordered the Government to expedite security clearances by February 13, 2009; after that date, there is no stay in place on any further proceedings under the Order. While the Court indicated that it would not act until after February 13, 2009, to carry out the provisions of the Order,[8] including to review the sealed document or disclose any classified information to the plaintiffs' counsel once cleared, the time for those further proceedings is now upon us. Indeed, plaintiffs' May 2009 timetable assumes that their counsel will receive immediate access to classified information after February 13, 2009. *See* Plaintiffs' Case Management Statement (Dkt. 64) at 8 (the May 2009 hearing schedule proposed by plaintiffs "assumes plaintiffs' counsel will receive their security clearances by February 13, 2009, as contemplated by the Court's Order of January 5, 2009, and then will promptly review any still-classified and de-classified materials.").

The January 5 Order thus presents a clear-cut conflict between the Court and the Executive Branch over whether plaintiffs may receive classified information. *See* Declaration of Ariane Cerlenko, National Security Agency ¶ 9 (NSA finds that plaintiffs have no "need to-know" classified information under applicable executive orders). The Court's Order operates to take that determination from the Government in proceedings under Section 1806(f). In addition, as the Government has previously set forth, even fully *ex parte* proceedings (which are not contemplated by the Order) are used to adjudicate the privileged factual question of whether plaintiffs have been subject to alleged surveillance, they cannot be undertaken without risking or requiring the disclosure of privileged information. *See* USG Stay (Dkt. 60) at 9-10. Under these circumstances, the Government cannot stand by and wait for further interim steps that might

[8] *See* Transcript of Jan. 23, 2009 Hearing at 31:17-32:23 (Court declines Government's request and leaves the February 13, 2009 deadline in place for clearance suitability determination); *id*. at 33:12-18 (Court indicates that disclosure of the sealed document would not occur until after suitability determination and "we can evaluate what to do in the next step"); *id*. at 34:11-22 (Court indicates that sealed document would not be reviewed or disclosed prior to February 13, 2009 and a process is in place "in which both parties have access to the material upon which the Court makes a decision").

occur before its privilege assertion is negated in future proceedings under the terms of this Order.[9/]

B. A Stay Should Be Entered Pending 1292(b) Interlocutory Appeal.

Plaintiffs' separate contention—that the Court should not issue a stay pending interlocutory appeal under 28 U.S.C. § 1292(b) because the Court would be automatically divested of jurisdiction if such review is granted by the Court of Appeals—is meritless. Assuming the Court certifies its January 5 Order, a stay is necessary pending a decision on the granting of an interlocutory appeal to prevent any disclosures in the interim.[10/] Contrary to

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[9] For these reasons, the pending appeal is on solid jurisdictional ground under, *inter alia*, 28 U.S.C. § 1291. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978); *In re: PUC*, 813 F.2d 1473, 1475-76 (9th Cir. 1987) (describing standards for collateral order review). The Order conclusively determines that this case will now proceed under Section 1806(f)—a question distinct from the merits issue of whether any alleged surveillance violated the law. Moreover, the collateral order doctrine generally applies where the disclosure of privileged information is at stake and the privilege is a sufficiently important one. *See In re Napster, Inc. Copyright Litig.*, 479 F.3d 1078, 1088-89 (9th Cir. 2007); *see also In re Copley Press*, 518 F.3d 1022, 1025 (9th Cir. 2008) (collateral order review of disclosure requirement because "[s]ecrecy is a one-way street: Once information is published [or disclosed], it cannot be made secret again," and thus orders of disclosure are "'effectively unreviewable on appeal from a final judgment.'"); *see also Admiral Ins. Co. v. U.S. Dist. Court*, 881 F.2d 1486, 1491 (9th Cir. 1989) (appeal after disclosure of privileged information is "an inadequate remedy"). The Order is also appealable under 28 U.S.C. § 1292(a) because it has the practical effect of granting an "injunction," has serious or irreparable consequences, and can be effectively challenged only by immediate appeal. *Negrete v. Allianz Life Ins. Co.*, 523 F.3d 1091, 1097 (9th Cir. 2008); *Orange County Airport Hotel Assocs. v. HSBC Ltd.*, 52 F.3d 821, 825-26 (9th Cir. 1995). In addition, the order is not only directed at a party and enforceable by contempt but would "accord or protect 'some or all of the substantive relief sought by a complaint.'" *HSBC*, 52 F.3d at 825-26. Here, the Court's Order is squarely directed at the Government and imposes requirements that imminently risk or require the disclosure of privileged information, including to plaintiffs' counsel after they obtain security clearances. Moreover, part of the actual relief sought by the plaintiffs in this case is a mandatory injunction that would require disclosure to plaintiffs of any information related to the alleged surveillance. *See* Am. Compl., Dkt. 30, Prayer for Relief ¶¶ 2-3 (seeking disclosure of information related to alleged surveillance). While we acknowledge that this Court has concluded that an appeal of right is premature, we respectfully disagree and submit that the Court of Appeals is the most appropriate body to make that determination.

[10] In April 2007, when this case was previously pending on interlocutory appeal, the Court of Appeals entered a stay of this Court's Order of March 13, 2007 (*see* Dkt. 3), which had ordered briefing on plaintiffs' motion for partial summary judgment. *See* Dkt. 5.

plaintiffs' assertion, there is no certainty that this process will be completed by May 2009, *see* Pls. Opp. at 10, and disclosures should not occur at any point in the interim. Thus, while we agree that the granting of a petition to hear an interlocutory appeal by the Ninth Circuit would automatically stay further proceedings in district court, a stay should be entered while that petition is pending to preserve the status quo and avoid irreparable harm.[11/]

C. The Court Should At Least Enter an Immediate Interim Stay.

Finally, because further proceedings under the January 5 Order would commence as soon as after plaintiffs' counsel receive their clearances by the February 13, 2009 deadline set by the Court, the Government requests that the Court either rule on this instant motion or at least enter an interim stay of further proceedings—either to allow the Court additional time to consider this motion or to permit the Government to seek a stay from the Court of Appeals should the Court deny this motion. As indicated above, the Government respectfully requests that the Court rule on at least interim relief by 3 p.m. on February 13, 2009. In order to protect its interests, the Government plans to seek relief from the Ninth Circuit before the close of business that day.

CONCLUSION

For the foregoing reasons, the Court should certify its January 5, 2009 Order for appeal pursuant to 28 U.S.C. § 1292(b), and enter a stay of further proceedings pending the current appeal by the Government Defendants noticed on January 19, 2009 (Dkt. 59), or the disposition of any appeal certified by the Court under 1292(b), or enter an interim stay pending disposition of this motion or to permit the Government to seek a stay from the Court of Appeals. Alternative proposed orders are attached hereto.

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[11] Plaintiffs also contend that the declassification review ordered by the Court may also foreclose any harm to the Government. *See* Pls. Opp. (Dkt. 69) at 10 n. 1. The Court ordered that process to be completed by February 19, 2009, the Government expects that the relevant information at issue in the privilege assertion will remain classified, if not all of the information contained in prior classified submissions.

Dated: February 11, 2009

Respectfully Submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE NATIONAL SECURITY AGENCY TELECOMMUNICATIONS RECORDS LITIGATION This Document Relates Solely To: *Al-Haramain Islamic Foundation, Inc., et al. v. Obama, et al.* (C07-CV-0109-VRW) **AL-HARAMAIN ISLAMIC FOUNDATION, INC., et al.,** Plaintiffs, vs. **BARACK H. OBAMA, President of the United States, et al.,** Defendants.	MDL Docket No. 06-1791 VRW **PLAINTIFFS' SUPPLEMENTAL CASE MANAGEMENT STATEMENT**

INTRODUCTION

Pursuant to Local Rule 16-10(d), plaintiffs submit this supplemental case management statement in connection with the case management conference held on January 23, 2009. This statement addresses the Court's authority to decide whether plaintiffs' counsel have a "need to know" some or all of the classified information filed with the Court in this case.

DISCUSSION

I. PLAINTIFFS' COUNSEL NOW HAVE SECURITY CLEARANCE.

The Court indicated in its January 5, 2009 order that, if plaintiffs' counsel are granted TS/SCI security clearance, the Court will then determine whether counsel will be granted access to some or all of the classified filings. *See* Doc. #57 at 23-24. On February 12, 2009, the Department of Justice Litigation Security Section advised plaintiffs' counsel that background investigations for plaintiffs' counsel Jon B. Eisenberg and Steven Goldberg have been "favorably adjudicated" within the meaning of Executive Order No. 12968, § 3.1(b) (1995). That decision means Messrs. Eisenberg and Goldberg have been "deemed to be eligible for access to classified information," *id.*, § 3.1(a), because they are persons "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information," *id.*, § 3.1(b).

According to Department of Defense (DoD) regulations, this determination of "eligibility" for access to classified information is, in fact, a "security clearance." *See* DoD 5200.2-R, § DL1.1.21 (1987) (defining "security clearance" as "[a] determination that a person is eligible under the standards of this Regulation for access to classified information"); *accord, Schmidt v. Boone*, 59 M.J. 841, 852-53 (A.F. Ct. Crim. App. 2004), *vacated as moot sub. nom. United States v. Schmidt*, 60 M.J. 1 (C.A.A.F. 2004). Defendants themselves have characterized an "eligibility" (or "suitability") determination as a "security clearance." *See* Defs.' Memorandum of Points and Authorities In Support of a Motion for Stay Pending Appeal and for Certification of an Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b) at 12, Doc. #60 at 19 ("even if a person is found to be 'suitable' to receive access to classified information after an investigation of their background and, thus, is granted a 'security

clearance' . . . .") Messrs. Eisenberg and Goldberg now have security clearance.[1/]

II. THIS COURT CAN DETERMINE COUNSEL'S "NEED TO KNOW."

The security clearance for Messrs. Eisenberg and Goldberg does not in itself mean they will now have access to the classified filings. According to Executive Order No. 13,292 (issued by President Bush in 2003), which amended Executive Order No. 12,958 (issued by President Clinton in 1995), access to classified information requires not only an "eligibility" determination but also a determination that "the person has a need-to-know the information." Exec. Order No. 13,292, § 4.1(3) (2003). Now that Messrs. Eisenberg and Goldberg have been found eligible, it must be determined whether they have a "need to know" information in the classified filings in this case. That raises the question of *who determines* counsel's "need to know" – this Court, or defendants themselves.

In their motion to certify an interlocutory appeal from the order of January 5, 2009, defendants insisted that only the National Security Agency (NSA), and not this Court, has the power to make the "need to know" determination, and defendants informed the Court that the NSA has unilaterally determined that plaintiffs' counsel do not have the requisite "need to know." *See* Defs.' Memorandum at 13, Doc. #60 at 20. In defendants' reply memorandum in support of that motion, defendants complained that the January 5, 2009 order "operates to take that determination from the Government." Defs.' Reply at 11, Doc. #70 at 15. Thus, according to defendants, the January 5, 2009 order "presents a clear-cut conflict between the Court and the Executive Branch over whether plaintiffs may receive classified information." *Id.*

Defendants' dire warning of a looming constitutional conflict between the Executive and the Judiciary in this case is not grounded in any legal support. In fact, the applicable legal authorities demonstrate that there is no conflict at all, and that this Court possesses the power to determine counsel's "need to know" the information in the classified filings.

Executive Order No. 13,292 defines "need to know" as "a determination *made by an*

[1/] In email to plaintiffs' counsel on February 12, 2009, Department of Justice Security Specialist Christine E. Gunning advised counsel that their eligibility determination does not mean they have been granted security clearance. The applicable legal authorities demonstrate that Ms. Gunning was wrong in that regard.

authorized holder of classified information that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized government function." Exec. Order No. 13,292, § 6.1(z) (2003) (emphasis added). This provision means *this Court* may make the "need to know" determination here, because the Court is an "authorized holder" of the classified filings in this case. According to Department of Defense regulations, "Members of . . the Federal judiciary . . . do not require personnel security clearances. They may be granted access to DoD classified information to the extent necessary to adjudicate cases being heard before these individual courts." DoD 5200.2-R, § C3.4.4.5 (1987); *see also Schmidt v. Boone,* 59 M.J. at 850 (federal judges do not need security clearances to have access to classified information); *cf.* 18 U.S.C. App. 3, § 9, Security Procedures, No. 4 (regulation stating that "[a] security clearance for justices and judges is not required" in proceedings under the Classified Information Procedures Act); *see also* ROBERT TIMOTHY REAGAN, KEEPING GOVERNMENT SECRETS: A POCKET GUIDE FOR JUDGES ON THE STATE-SECRETS PRIVILEGE, THE CLASSIFIED INFORMATION PROCEDURES ACT, AND COURT SECURITY OFFICERS 3 (2007) ("Article III judges are automatically entitled to access to classified information necessary to resolve issues before them . . . ."). Congress has declared that executive orders and regulations pertaining to security clearances "shall not apply to . . . Federal judges appointed by the President." 50 U.S.C. § 437.

Thus, the applicable regulatory and statutory law makes this Court an "authorized holder" of the classified filings here, as the Court needs no security clearance and plainly needs access to the filings in order to adjudicate this case. The Executive Branch's own regulations give this Court, as an "authorized holder," the power to make the "need to know" determination. *See* DoD 5200.2-R, § C3.4.4.5 (1987).

Because of the constitutional separation of powers, it could not be any other way. "Every court has supervisory power over its own records and files . . . ." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978). "So long as they remain under the aegis of the court, they are superintended by judges who have dominion over the court." *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 141 (2d Cir. 2004); *see also In re Motion for Release of Court Records*, 526 F.Supp.2d 484, 486 (FISA Ct. 2007) (Foreign Intelligence Surveillance Court may determine whether and the extent to which to

provide access to its own records). The supervisory power of the courts over their files is "an incident of their constitutional function." *In re Sealed Affidavit(s) To Search Warrants Executed On February 14, 1979*, 600 F.2d 1256, 1257 (9th Cir. 1979); *see also Crystal Grower's Corp. v. Dobbins*, 616 F.2d 458, 461 n. 1 (10th Cir. 1980) ("There are no statutes or rules that seem to limit or preclude the exercise of this power."). Thus, control over the classified filings in this case is a Judicial Branch power which the Executive Branch cannot impair or intrude upon by operation of executive orders or agency regulations. "Because of the separation of powers doctrine and the need for an independent judiciary, the requirements in executive orders and agency regulations relating to access, storage, handling, and transmission of classified information do not apply to the federal judiciary." P. STEPHEN GIDIERE, THE FEDERAL INFORMATION MANUAL 100, § 4.2.3 (2006). This aspect of the constitutional separation of powers is given practical effect by the doctrine of judicial immunity, which gives this Court immunity for its judicial acts and is essential to the "independence without which no judiciary can be either respectable or useful." *Bradley v. Fisher*, 80 U.S. 335, 347 (1871); *see also Forrester v. White*, 484 U.S. 219, 226-27 (1988).

Even if the Executive Branch *could* control a federal judge's disclosure of classified court filings to persons with security clearance, Executive Order No. 13,292 does not purport to do so, but merely states that "[a]n *agency* shall not disclose information originally classified by another agency without its authorization." Exec. Order No. 13,292, § 4.1(c) (2003) (emphasis added). A federal court is not such an "agency." Executive Order No. 13,292 makes this clear in defining "agency" as "any '*Executiv*e agency,' as defined in 5 U.S. C. [§] 105; any 'Military department' as defined in 5 U.S.C. [§] 102; and any other entity within the *executive branch* that comes into the possession of classified information." *Id.*, § 6.1(b) (emphasis added).

The declaration of NSA Associate General Counsel Ariane E. Cerlenko filed in support of defendants' motion to certify an interlocutory appeal contends that Intelligence Community Directive No. 704 (Oct. 1, 2008) governs access to information classified TS/SCI and gives the Director of National Intelligence control over such access. *See* Doc. #62-2 at 3-4, 6. That directive, however, expressly limits its application to "the IC [Intelligence Community], as defined by the National Security Act of 1947" and other departments or agencies that are designated "as an element of the IC

or those government entities designated to determine eligibility for SCI status." I.C. Dir. No. 704, § C (Oct. 1, 2008), Doc. #62-2 at 6. The Intelligence Community consists of 16 government *intelligence* agencies. The federal judiciary, of course, is not among them. Thus, Intelligence Community Directive No. 704 does not purport to govern the federal courts – nor could it, for that would violate the constitutional separation of powers.

In *United States v. Pollard*, 416 F.3d 48 (D.C. Cir. 2005), Judge Judith Rogers, concurring and dissenting, addressed the power of a federal court to determine the "need to know" classified information to which a person is eligible to have access. Defense counsel in that case had unsuccessfully asked the district court for access to classified documents in the defendant's sentencing file for the purpose of filing a clemency petition with the President. On appeal, defendant challenged the district court's determination that counsel had no "need to know" the contents of the documents. *See id.* at 53. The majority did not reach that issue, instead determining that the court lacked jurisdiction because clemency decisions are within the exclusive province of the Executive Branch. *Id.* at 56-57. Judge Rogers disagreed with the majority on the jurisdictional issue but concluded that the district court had properly determined that counsel had no "need to know." In an edifying discussion of judicial power to determine the "need to know" (which the majority did not address), Judge Rogers observed that, crucially, the documents at issue in that case had been "filed with the district court." *Id.* at 58. Thus, the case did "not involve the traditional request for access to classified documents that are within the Executive Branch's possession." *Id.* at 59. Although the documents in that case – like the Sealed Document and classified government filings in the present case – were "nominally" in the custody of the Department of Justice Litigation Security Section, the district court had "continuing control over them" by virtue of the court's supervisory power over its own files. *Id.* Thus, the district court had the power to make the "need to know" determination, because otherwise the court "would be in the untenable position of lacking jurisdiction over motions that relate to documents that were filed with it and over which it has continuing control." *Id.*

So it is here: The classified filings being within this Court's supervisory control, the Court has the power to make the "need to know" determination.

Analogous authority under the Classified Information Procedures Act (CIPA), 18 U.S.C. App.

3, which governs a criminal defendant's access to classified information, is consistent with the notion of judicial authority to determine the "need to know" with regard to classified information that is under a court's control. The provision of CIPA governing discovery of classified information by defendants, 18 U.S.C. App. 3, § 4, "gives *the court* the authority to regulate the access to classified information of persons assisting the defense." *United States v. Musa*, 833 F.Supp. 752, 756 (E.D. Mo. 1993) (emphasis added). Implementing regulations provide that defense counsel "may, *at the discretion of the court*, be afforded access to classified information provided by the government in secure quarters . . . ." 18 U.S.C.App. 3, § 4, Security Procedures, No. 8(a) (emphasis added). Similarly, the "final authority to decide" whether *judicial branch employees* may see classified court filings after the Executive Branch completes a favorable background check is vested in the court. *United States v. Smith*, 899 F.2d 564, 567 (6th Cir. 1990).

In this regard, the Sixth Circuit observed that "[u]nder no circumstances should the Judiciary become the handmaiden of the Executive." *United States v. Smith*, 899 F.2d at 569. Those words ring as true for "need to know" determinations in FISA proceedings as they do in CIPA proceedings.

CONCLUSION

The applicable legal authorities plainly demonstrate that this Court is vested with the power to determine whether, as a matter of due process, Messrs. Eisenberg and Goldberg have a "need to know" information contained in the classified filings in this case.

DATED this 18th day of Februrary, 2009.

/s/ Jon B. Eisenberg

Jon B. Eisenberg, Calif. Bar No. 88278
William N. Hancock, Calif. Bar No. 104501
Steven Goldberg, Ore. Bar No. 75134
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Attorneys for Plaintiffs Al-Haramain Islamic Foundation, Inc., Wendell Belew, and Asim Ghafoor

CERTIFICATE OF SERVICE

RE: In Re National Secrurity Agency Telecommunications Records Litigation
MDL Docket No. 06-1791 VRW

I am a citizen of the United States and employed in the County of San Francisco, State of California. I am over eighteen (18) years of age and not a party to the above-entitled action. My business address is Eisenberg and Hancock, LLP, 180 Montgomery Street, Suite 2200, San Francisco, CA, 94104. On the date set forth below, I served the following documents in the manner indicated on the below named parties and/or counsel of record:

- **PLAINTIFFS' SUPPLEMENTAL CASE MANAGEMENT STATEMENT**

___ **Facsimile** transmission from (415) 544-0201 during normal business hours, complete and without error on the date indicated below, as evidenced by the report issued by the transmitting facsimile machine.

___ **U.S. Mail**, with First Class postage prepaid and deposited in a sealed envelope at San Francisco, California.

XX **By ECF:** I caused the aforementioned documents to be filed via the Electronic Case Filing (ECF) system in the United States District Court for the Northern District of California, on all parties registered for e-filing in In Re National Security Agency Telecommunications Records Litigation, Docket Number M:06-cv-01791 VRW, and *Al-Haramain Islamic Foundation, Inc., et al. v. Obama, et al.*, Docket Number C07-CV-0109-VRW.

I am readily familiar with the firm's practice for the collection and processing of correspondence for mailing with the United States Postal Service, and said correspondence would be deposited with the United States Postal Service at San Francisco, California that same day in the ordinary course of business.

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 18, 2009 at San Francisco, California.

/s/ Jessica Dean
JESSICA DEAN

CERTIFICATE OF SERVICE

RE: In Re National Secrurity Agency Telecommunications Records Litigation
MDL Docket No. 06-1791 VRW

I am a citizen of the United States and employed in the County of San Francisco, State of California. I am over eighteen (18) years of age and not a party to the above-entitled action. My business address is Eisenberg and Hancock, LLP, 180 Montgomery Street, Suite 2200, San Francisco, CA, 94104. On the date set forth below, I served the following documents in the manner indicated on the below named parties and/or counsel of record:

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/s/ Jessica Dean
JESSICA DEAN