

No. \_\_\_\_\_

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IN THE  
**Supreme Court of the United States**

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WIKIMEDIA FOUNDATION,

*Petitioner,*

—v.—

NATIONAL SECURITY AGENCY / CENTRAL SECURITY SERVICE, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FOURTH CIRCUIT

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

1. Does the state secrets privilege described by this Court in *United States v. Reynolds* and *General Dynamics Corp. v. United States* authorize courts to dismiss actions in their entirety where plaintiffs can prove their case without reliance on privileged evidence?

2. If the state secrets privilege does in fact authorize courts to dismiss actions in their entirety where plaintiffs can prove their case without privileged evidence, may a court do so without first determining *ex parte* and *in camera* whether the privileged evidence establishes a valid defense?

## **PARTIES TO THE PROCEEDINGS**

Petitioner is the Wikimedia Foundation and was the plaintiff–appellant below.

Respondents are National Security Agency / Central Security Service; General Paul M. Nakasone, in his official capacity as Director of the National Security Agency and Chief of the Central Security Service; Office of the Director of National Intelligence; Avril Haines, in her official capacity as Director of National Intelligence; Department of Justice; and Merrick B. Garland, in his official capacity as Attorney General. They were the defendants–appellees below.

In addition, the National Association of Criminal Defense Lawyers, Human Rights Watch, Amnesty International USA, PEN American Center, Global Fund for Women, The Nation Magazine, The Rutherford Institute, and Washington Office on Latin America were plaintiffs in the proceedings below.

## **CORPORATE DISCLOSURE STATEMENT**

The Wikimedia Foundation has no parent corporation and no publicly held company owns 10 percent or more of its stock.

## **RELATED PROCEEDINGS**

United States District Court (D. Md.):

*Wikimedia Found. v. NSA*, No. 1:15-cv-662 (Dec. 16, 2019)

United States Court of Appeals (4th Cir.):

*Wikimedia Found. v. NSA*, No. 20-1191 (Sept. 15,  
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## PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully requests a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

### OPINIONS BELOW

The opinion of the court of appeals (App. 1a) is reported at *Wikimedia Foundation v. NSA*, 14 F.4th 276 (4th Cir. 2021). The opinion of the district court granting summary judgment (App. 73a) is reported at 427 F. Supp. 3d 582 (D. Md. 2019). The opinion of the district court denying Petitioner’s motion to compel (App. 145a) is reported at 335 F. Supp. 3d 772 (D. Md. 2018). The opinion of the court of appeals vacating, in part, the district court’s dismissal of the complaint (App. 182a) is reported at 857 F.3d 193 (4th Cir. 2017). The opinion of the district court granting Respondents’ motion to dismiss (App. 234a) is reported at 143 F. Supp. 3d 344 (D. Md. 2015).

### JURISDICTION

The court of appeals entered judgment on September 15, 2021 (App. 1a), and it denied rehearing on March 29, 2022 (App. 274–75a). On June 6, 2022, this Court extended the time within which to file a petition for a writ of certiorari to August 26, 2022.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The Fourth Amendment to the U.S. Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The relevant statutory provision, 50 U.S.C. § 1881a, is set forth at App. 276–305a.

## **INTRODUCTION**

This lawsuit challenges the suspicionless search and seizure of U.S. persons' international Internet communications by the National Security Agency ("NSA"). As the government has publicly acknowledged, the NSA systematically searches communications flowing into and out of the United States on the Internet's central arteries, looking for information relating to thousands of foreign-intelligence surveillance targets. This "Upstream" surveillance involves a sweeping invasion of Americans' privacy. It is the digital analogue of the government reading every letter that comes through mail processing centers in order to determine which letters to keep.

Although this mass surveillance of Americans' private communications raises grave constitutional questions, its lawfulness has yet to be considered by any ordinary court, civil or criminal, in the more than twenty years of its operation.

Petitioner filed this lawsuit in 2015 challenging the legality of Upstream surveillance. A divided Fourth Circuit panel held that Petitioner had presented sufficient evidence of its standing, based on public disclosures, to make out a *prima facie* case and defeat summary judgment. But citing the state secrets privilege recognized by this Court in *United States v. Reynolds*, 345 U.S. 1 (1953), the panel held that the mere possibility the government could have secret evidence that might provide a defense required dismissal. App. 55–58a. The court did not conduct an *ex parte*, *in camera* review to determine whether that evidence in fact existed, let alone whether it would establish a valid defense.

Judge Motz dissented. She observed that the majority's approach to the state secrets privilege and its reliance on "far-fetched hypotheticals" represented a "dramatic departure" from *Reynolds*, which warned that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." App. 62a (quoting 345 U.S. at 9–10). And she noted that the court's ruling conflicted with other circuits. App. 62a.

Whether the executive branch can invoke the state secrets privilege to dismiss cases in their entirety where the plaintiff can make its case without privileged evidence—and, if so, under what circumstances—are questions of extraordinary importance. Since *Reynolds* was decided more than 70



years ago, the government's increasingly broad and categorical assertions of privilege have prevented courts from reviewing the constitutionality of executive branch conduct across a wide range of contexts.

This case presents two significant conflicts that only this Court can resolve.

First, the circuit court cases permitting state secrets dismissals where plaintiffs can make their case using nonprivileged information conflict with this Court's decisions in *Reynolds* and *General Dynamics Corp. v. United States*, 563 U.S. 478 (2011). As these decisions emphasize, the state secrets privilege is an *evidentiary* privilege. When successfully invoked, it results in the exclusion of the privileged evidence, leaving the parties to proceed with unprivileged evidence. The lower courts, however, have improperly treated the *Reynolds* privilege as a license to dismiss cases altogether—even where plaintiffs can establish liability based on nonprivileged evidence. This approach wrongly conflates the *Reynolds* evidentiary privilege with the narrow justiciability bar that the Court recognized in *Totten v. United States*, 92 U.S. 105 (1875). But the *Totten* state secrets doctrine is “quite different,” *Gen. Dynamics*, 563 U.S. at 48, and rests on a distinct legal foundation based on the assumption of risk when one enters into a secret government contract.

Second, even if state secrets dismissals are permitted under *Reynolds* where a plaintiff can make out its case with nonprivileged evidence, the circuit courts are in conflict over the standards that govern such dismissals. The D.C. and Ninth Circuits have held that, to obtain dismissal on the ground that the

government's defense would implicate state secrets, the government must establish through an *ex parte*, *in camera* procedure that the defense is "valid"—meaning the privileged evidence exists and supports a legally meritorious defense. The Sixth and Second Circuits have endorsed this approach as well.

The Fourth Circuit, by contrast, permits the government to obtain dismissal based on the government's assertion that "hypothetical" defenses would implicate state secrets—without requiring the government to submit evidence establishing any defense, even in an *ex parte* and *in camera* submission. Under this approach, even if the plaintiff can make out its case with nonprivileged evidence, and the defendant *has no valid defense*—meaning that the challenged conduct is indeed illegal—the court will nonetheless dismiss the suit on privilege grounds. As applied here, that means that even assuming that Upstream surveillance is an indefensible violation of Petitioner's constitutional rights, the case will be dismissed and the constitutional violations will continue.

The Court should grant review to decide whether state secrets dismissals are permitted where a plaintiff can prove its case using nonprivileged evidence, and if so, whether the courts must determine that the defense asserted is meritorious, in both fact and law.

## STATEMENT OF THE CASE

### I. Background

#### A. The Foreign Intelligence Surveillance Act of 1978

In 1975, Congress established a committee, chaired by Senator Frank Church, to investigate allegations of “substantial wrongdoing” by the intelligence agencies in their conduct of surveillance. Final Report of the S. Select Comm. to Study Governmental Operations with Respect to Intelligence Activities (Book II), S. Rep. No. 94-755, at v (1976). The Committee discovered that the intelligence agencies had, for decades, “infringed the constitutional rights of American citizens” and “intentionally disregarded” limitations on surveillance in the name of “national security.” *Id.* at 137. The agencies had “pursued a ‘vacuum cleaner’ approach to intelligence collection,” intercepting Americans’ communications under the pretext of targeting foreigners. *Id.* at 165. The Committee recommended that all surveillance of communications “to, from, or about an American without his consent” be subject to a warrant procedure. *Id.* at 309.

In 1978, Congress responded by enacting the Foreign Intelligence Surveillance Act (“FISA”), which regulates surveillance conducted for foreign intelligence purposes. The statute created the Foreign Intelligence Surveillance Court (“FISC”) and empowered it to review applications for surveillance in certain foreign intelligence investigations. 50 U.S.C. § 1803(a). As originally enacted, FISA generally required the government to obtain an individualized order from the FISC based on a

detailed factual showing before conducting electronic surveillance on U.S. soil. *Id.* §§ 1804(a), 1805. The FISC could authorize surveillance only if it found that, among other things, there was “probable cause to believe that the target of the electronic surveillance [was] a foreign power or an agent of a foreign power.” *Id.* § 1805(a)(2).

## **B. Warrantless Surveillance Under Section 702**

Section 702 of FISA, enacted in 2008, radically altered the FISA regime in two key ways.

First, Section 702 allows the surveillance of U.S. persons’ international communications *without* a warrant or any individualized court approval.<sup>1</sup> Instead, the FISC merely reviews, on an annual basis, the general procedures used in conducting the surveillance. 50 U.S.C. § 1881a(j).

Second, Section 702 authorizes surveillance *not predicated on any suspicion of wrongdoing*. The statute permits the government to target *any* foreigner located outside the United States to obtain “foreign intelligence information,” which is defined broadly to include any information bearing on the foreign affairs of the United States. *Id.* §§ 1881a(a), 1801(e). The government’s targets need not be agents of foreign powers, terrorists, or suspected of criminal activity.

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<sup>1</sup> Consistent with FISA, Petitioner uses the phrase “U.S. persons” to refer to U.S. citizens and residents. 50 U.S.C. § 1801(i). Petitioner uses the term “international” to describe communications that either originate or terminate outside the United States, but not both.

Section 702 exposes every communication between an individual in the United States and a non-American abroad to potential surveillance. And the government is using the statute to conduct precisely the kind of vacuum-cleaner-style surveillance that the Church Committee condemned and that the Fourth Amendment was intended to prohibit.

## **II. Statement of Facts**

### **A. Wikimedia and Its Global Communications**

As the operator of one of the most-visited websites in the world, Wikimedia, a U.S. non-profit organization, engages in more than one trillion international Internet communications each year. JA.3: 2255, 2264.<sup>2</sup> Wikimedia communicates with hundreds of millions of people in every country on Earth—as they read, edit, and contribute to the twelve Wikimedia “Projects.” JA.3: 2264, 2220–31 best-known project is Wikipedia, a free Internet encyclopedia that is one of the largest collections of shared knowledge in human history. Wikimedia’s communications are essential to its organizational mission, as is its ability to protect the privacy of these communications. JA.3: 2235, 2242.

### **B. The Government’s Implementation of Section 702**

The government has relied on Section 702 to intercept and retain huge volumes of Americans’ communications. Privacy & Civil Liberties Oversight

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<sup>2</sup> “JA” citations are to the joint appendix and volume number as filed in the court of appeals, No. 20-1191, on July 1, 2020.

Board (“PCLOB”) Report 152 (JA.4: 2591). Each year, the NSA targets more than 100,000 individuals and groups for surveillance under Section 702. JA.4: 2762; *see also* Office of Dir. of Nat’l Intel., Annual Statistical Transparency Report 17 (Apr. 2022) (reporting 232,432 targets in 2021), <https://perma.cc/GL5C-5DJH>. Whenever a U.S. person communicates with any one of the government’s targets, his or her communications can be intercepted and retained. In 2011 alone, the government relied on Section 702 to intercept and retain more than 250 million communications—a number that does not reflect the far larger quantity of communications whose contents the NSA searched and then discarded. PCLOB Report 37, 111 n.476, 116 (JA.4: 2476, 2550, 2555).

### C. Upstream Surveillance

This case concerns Upstream surveillance, which involves the government’s warrantless search and seizure of U.S. persons’ Internet communications on U.S. soil pursuant to Section 702. PCLOB Report 36–41 (JA.4: 2475–80). The government has disclosed a significant amount of information about Upstream surveillance, including dozens of FISC opinions and filings, an exhaustive report by the Privacy and Civil Liberties Oversight Board, public testimony by intelligence officials, and official statements by the NSA. *See, e.g.*, JA.4: 2436; Off. of the Director of Nat’l Intel., Document Release (JA.4: 2718).

To conduct Upstream surveillance, the NSA intercepts communications that transit Internet “backbone” circuits—the “high-speed, ultra-high bandwidth” Internet circuits operated by major communication service providers. PCLOB Report 36–37 (JA.4: 2475–76); JA.4: 2739; 2d Bradner Decl.

¶¶ 13–16 (JA.7: 3887–88). The NSA scans international Internet communications to find “selectors”—such as email addresses or phone numbers—associated with its many targets. PCLOB Report 37–41 (JA.4: 2476–80); JA.4: 2729–30, 2737–38.

The breadth of Upstream surveillance is a function, in large part, of how communications traverse the Internet. When an individual engages in any kind of Internet activity, such as browsing a webpage or sending an email, her communications are broken up into data “packets”—small chunks of information. Bradner Decl. ¶ 49 (JA.2: 941). These packets are transmitted separately across the Internet circuits described above, and during their journey, they are mixed up with the packets of countless other communications. *Id.* ¶ 104 (JA.2: 959).

As a result, the NSA cannot know in advance which packets belong to communications to or from its targets. 2d Bradner Decl. ¶¶ 54–58, 68–70, 75–84 (JA.7: 3898–3900, 3903–04, 3906–09). Instead, to identify the communications of its targets on any particular circuit, the NSA must copy all packets of potential interest, reassemble those packets into communications, and search those communications for selectors. *Id.* ¶ 55 (JA.7: 3899).

The government’s disclosures make clear that Upstream surveillance involves: (1) the copying of packets on a circuit; (2) the reassembly of packets into “transactions”; (3) the review of those transactions for the presence of selectors associated with its surveillance targets; and (4) the ingestion of transactions that contain selectors into the NSA’s

databases. *Id.* ¶¶ 13–16 (JA.7: 3887–88); Bradner Decl. ¶¶ 6(a)–(c), 250–330 (JA.2: 926, 1012–40).<sup>3</sup>

In some instances, the NSA filters the stream of communications to eliminate packets that are wholly domestic, prior to reassembly and review. Bradner Decl. ¶¶ 290–94 (JA.2: 1025–27). But significantly here, the government does not perform any filtering when it conducts Upstream surveillance at “international Internet links.” 2d Bradner Decl. ¶¶ 25(e), 35, 42–45 (JA.7: 3890, 3893–95). Instead, the NSA is copying and searching *all* of the communications on the international links it is monitoring. 2d Bradner Decl. ¶ 43 (JA.7: 3895).

#### **D. Surveillance of Wikimedia’s Communications**

As Wikimedia’s expert, Scott Bradner, explains, it is “virtually certain that the NSA has, in the course of the upstream collection program, copied, reassembled and reviewed at least some of Wikimedia’s communications.” Bradner Decl. ¶ 6(e) (JA.2: 927); 2d Bradner Decl. ¶¶ 3–4 (JA.7: 3883). That conclusion flows from three central facts:

First, Wikimedia’s trillions of communications traverse every international Internet link carrying public Internet traffic into and out of the United

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<sup>3</sup> Until April 2017, the NSA ingested communications that were to, from, or “about” a targeted selector. FISC Mem. Op. & Order 16 (Apr. 26, 2017) (JA.4: 2806). In April 2017, the NSA chose to suspend “about” collection after disclosing that, for years, it had violated court-ordered rules intended to protect Americans’ privacy. *Id.* at 19–23 (JA.4: 2809–13).



States. Bradner Decl. ¶¶ 6(d), 336–38, 341–50 (JA.2: 927, 1043–47).

Second, the NSA conducts Upstream surveillance on at least one “international Internet link.” *Redacted*, 2011 WL 10945618, at \*15 (FISC Oct. 3, 2011); Bradner Decl. ¶¶ 225, 331–34 (JA.2: 1003, 1040–42).

Third, based on the government’s disclosures about the operation, breadth, and goals of Upstream surveillance, the NSA is copying and reviewing some of Wikimedia’s communications on every link it is monitoring. 2d Bradner Decl. ¶¶ 17–155 (JA.7: 3888–3938); Bradner Decl. ¶¶ 6–7, 250–370 (JA.2: 926–27, 1012–60).

### **E. Proceedings Below**

In 2015, Wikimedia and eight others sued Defendants, claiming that Upstream surveillance violates the Constitution and FISA. The district court dismissed the suit for lack of standing. The Fourth Circuit vacated the district court’s order as to Wikimedia, holding that Wikimedia had plausibly alleged that it was subject to Upstream surveillance. App. 211–12a.

On remand, the district court ordered jurisdictional discovery on Wikimedia’s standing. The parties engaged in paper discovery and Wikimedia conducted a day-long deposition of an NSA witness that provided unclassified information about Upstream surveillance. *See, e.g.*, JA4: 2721; JA.1: 0287.

The government then moved for summary judgment, arguing that Wikimedia did not have

standing and that, in any event, the state secrets privilege required dismissal of the entire case.

In support of both arguments, the government raised a set of hypothetical defenses. It relied principally on the expert declarations of Henning Schulzrinne, who opined that, as a theoretical matter, it would be possible to design a system of Upstream-“style” surveillance that deliberately ignored every one of Wikimedia’s trillions of communications. JA.1: 759. He did not claim that the government had actually done so nor provide any evidence supporting his hypotheticals, and he admitted that he had “no knowledge” of the NSA’s practices. Schulzrinne Decl. ¶ 53 (JA.2: 743); *see* App. 16a. Nonetheless, the government argued that further litigation would reveal state secrets. In response, Wikimedia relied principally on the expert declarations of Scott Bradner. After reviewing the government’s extensive public disclosures in light of fundamental network engineering principles, Bradner explained it was “virtually certain” that Wikimedia’s communications were subject to the NSA’s surveillance. JA.7: 3938. Wikimedia also argued that the state secrets privilege did not entitle the government to dismissal.

The district court granted the government’s motion for summary judgment, App. 143a, holding that Wikimedia had not established a genuine dispute of material fact as to its standing, and that further litigation was barred by the state secrets privilege. *Id.*

On appeal, Judges Diaz and Motz held that Wikimedia had presented sufficient evidence, based on the government’s official disclosures and the Bradner declarations, on which a reasonable factfinder could find standing. App. 25–35a.

Judges Diaz and Rushing, however, affirmed the district court’s dismissal based on state secrets. App. 58a. The court accepted the government’s claim that, in theory, it could have a secret defense—one that relied on privileged evidence and would be “central” to the case. App. 55–58a. The court did not conduct an in camera review to determine whether such evidence existed or whether it would in fact establish a meritorious defense.

Judge Motz dissented from the court’s state secrets ruling, describing the majority opinion as a “dramatic departure” from *Reynolds*. App. 62a. Her dissent expressed “serious concerns” with the majority’s willingness to dismiss the suit based on “far-fetched hypotheticals,” and its “relegat[ion] [of] the judiciary to the role of a bit player in cases where weighty constitutional interests ordinarily require us to cast a more ‘skeptical eye.’” App. 62a (quoting *Abilt v. CIA*, 848 F.3d 305, 312 (4th Cir. 2017)). Judge Motz explained that under *Reynolds*, “in camera review is a ‘necessary process’ when, as here, the Government asserts that the state secrets privilege will preclude it from raising a valid defense to a constitutional claim.” App. 64a (quoting *Molerio v. FBI*, 749 F.2d 815, 825 (D.C. Cir. 1984) (Scalia, J.)).

Wikimedia’s petition for rehearing en banc was denied on March 29, 2022. App. 274–75a.

## REASONS FOR GRANTING THE PETITION

### I. **Whether the government may obtain dismissal of constitutional claims under the state secrets privilege, and what standards control such dismissals, are questions of extraordinary public significance.**

As this Court recognized in *United States v. Reynolds*, 345 U.S. 1 (1953), and reaffirmed in *General Dynamics Corp. v. United States*, 563 U.S. 478 (2011), the state secrets privilege is an *evidentiary* privilege. Yet, as this case illustrates, some lower courts have transformed it into an *immunity* doctrine that effectively places many government policies beyond the reach of the Constitution, even where the plaintiff can establish liability based entirely on nonprivileged information. The questions presented by this case—whether the state secrets privilege entitles the government to the dismissal of an action in its entirety and, if so, when—are of extraordinary importance, with profound implications for the rule of law.

In *Reynolds*, the relatives of three civilians who died in the crash of a military plane in Georgia sued the manufacturer for damages. In response to a discovery request for the flight accident report, the government asserted the state secrets privilege, arguing that the report contained information about secret military equipment that was being tested aboard the aircraft during the fatal flight. 345 U.S. at 3–4. Noting that the government’s privilege to resist discovery of “military and state secrets” was “not to be lightly invoked,” the Court required “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.” *Id.* at 7–8. The greater the necessity for the allegedly privileged information in presenting the case, the more a “court should probe in satisfying itself that the occasion for invoking the privilege is appropriate.” *Id.* at 11. The *Reynolds* Court cautioned that “judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.” *Id.* at 9–10.

The Court emphasized that the privilege was “well established in the law of evidence,” 345 U.S. at 6–7, and cited treatises, including Wigmore’s *Evidence in Trials at Common Law*, as authority. Wigmore acknowledged that there “must be a privilege for secrets of State.” 8 John Henry Wigmore, *Evidence in Trials at Common Law* § 2212a (3d ed. 1940). He cautioned, however, that the privilege “has been so often improperly invoked and so loosely misapplied that a strict definition of its legitimate limits must be made.” *Id.* That included requiring the trial judge to scrutinize closely the evidence at issue:

Shall every subordinate in the department have access to the secret, and not the presiding officer of justice? Cannot the constitutionally coördinate body of government share the confidence? The truth cannot be escaped that a Court which abdicates its inherent function of determining the facts upon which the admissibility of evidence depends will furnish to bureaucratic officials too ample opportunities for abusing the privilege.

*Id.* at § 2379.

In *General Dynamics*, the Court considered the application of the state secrets privilege to a contract dispute between the government and contractors that had agreed to develop a stealth aircraft for the Navy. 563 U.S. at 480. This Court held that the case was governed not by the state secrets privilege, as the lower courts had held, but by the “quite different” rule announced in *Totten*, 92 U.S. at 105, and *Tenet v. Doe*, 544 U.S. 1 (2005). That rule involves “alleged contracts to spy.” 563 U.S. at 485–86. In rejecting the applicability of the *Reynolds* state secrets privilege, the Court reiterated that that privilege is an evidentiary one:

*Reynolds* was about the admission of evidence. It decided a purely evidentiary dispute by applying evidentiary rules: The privileged information is excluded and the trial goes on without it.

*Id.* at 485.

Both *Reynolds* and *General Dynamics* thus emphasize that the state secrets privilege is evidentiary in nature, and that its effect is only to exclude the relevant evidence from the litigation—“and the trial goes on without it.” *Id.* If the plaintiff requires the privileged information to make its case, the suit will be dismissed. But otherwise, the case proceeds without the excluded evidence, as it would with any other evidentiary privilege.

In recent years, however, lower courts have fundamentally expanded the privilege beyond its evidentiary foundation. Courts have relied on it to permit the government to obtain dismissal of cases, including those where the plaintiff can make its case with exclusively nonprivileged evidence. And the

government has invoked the privilege more often, and in cases of greater national significance.<sup>4</sup> When so transformed, the privilege ceases to be merely evidentiary, and obstructs challenges even to unconstitutional conduct.

The government has invoked the privilege to terminate a whistleblower suit brought by a former FBI translator who was fired after reporting serious security breaches and possible espionage within the Bureau. *Edmonds v. U.S. Dep't of Just.*, 323 F. Supp. 2d 65 (D.D.C. 2004), *cert. denied*, 74 USLW 3108 (U.S. Nov. 28, 2005) (No. 05-190). It invoked the privilege to seek dismissal of suits challenging the government's seizure, transfer, and torture of foreign citizens. See *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007); *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1076 (9th Cir. 2010) (en banc); *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006) (dismissed on other grounds). And it has repeatedly invoked the privilege seeking to foreclose judicial review of the NSA's warrantless surveillance of United States citizens. See, e.g., *Jewel v. NSA*, No. 08-CV-04373-JSW, 2019 WL 11504877, at \*2 (N.D. Cal. Apr. 25, 2019), *aff'd*, 856 F. App'x 640 (9th Cir. 2021); *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1193 (9th Cir. 2007); see also *Fazaga v. FBI*, 965

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<sup>4</sup> Margaret B. Kwoka, *The Procedural Exceptionalism of National Security Secrecy*, 97 B.U. L. Rev. 103, 118 (2017) (describing a “steep increase in the invocation of the state secrets privilege”); Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 Fordham L. Rev. 1931, 1939 (2007) (“The Bush Administration has raised the privilege in twenty-eight percent more cases per year than in the previous decade, and has sought dismissal in ninety-two percent more cases per year than in the previous decade.”).

F.3d 1015, 1024–25 (9th Cir. 2020), *rev'd*, 142 S. Ct. 1051 (2022) (invoking the state secrets privilege to dismiss claims challenging FBI surveillance based on religion).

In these cases, the government sought dismissal, not merely the exclusion of evidence, often even before the plaintiff had an opportunity to prove its case with unprivileged information. As a result, a broad range of government action has been shielded from judicial review. In effect, the government has used the privilege to declare these cases nonjusticiable—without producing specific privileged evidence, without having to justify its claims by reference to specific facts that would be necessary and relevant to adjudicate the case, and without having to submit its claims to even modified adversarial testing. And it has done so even in cases where the plaintiff was prepared to proceed on the basis of nonprivileged evidence. *See, e.g., El-Masri*, 479 F.3d at 296; *Jeppesen*, 614 F.3d at 1075.

The lower courts have adopted this course of deferential dismissals on state secrets grounds despite the fact that in the 70 years since *Reynolds*, judges have become more accustomed to assessing claims regarding sensitive and classified information, and are better equipped to do so than when this Court decided *Reynolds*. Under the Freedom of Information Act, for instance, courts routinely determine whether the government has properly classified information. *See* 5 U.S.C. § 552(a)(4)(B), (b)(1); *Ray v. Turner*, 587 F.2d 1187, 1191–95 (D.C. Cir. 1978). Under FISA, Article III judges review highly sensitive information *ex parte* and *in camera* to determine whether surveillance is lawful. *See* 50 U.S.C. §§ 1805, 1806(f). And the Classified Information Procedures Act



(“CIPA”), 18 U.S.C. App. 3, empowers federal judges to employ special procedures for the introduction and handling of classified information in certain kinds of trials. *See United States v. Pappas*, 94 F.3d 795, 799 (2d Cir. 1996). Congress has clearly recognized that courts can and sometimes must review classified materials, and courts have demonstrated that they can securely handle secret information in the context of litigation.

The lower courts’ radical transformation of the *Reynolds* privilege from an evidentiary privilege to a liability shield, even where serious constitutional violations are alleged, warrants this Court’s review.

**II. The circuit court cases permitting state secrets dismissals under *Reynolds* conflict with this Court’s decisions.**

Review is also warranted because the court below, and several others, have now applied the state secrets privilege in a manner that conflicts with *Reynolds* and *General Dynamics*. This Court has never authorized dismissal under *Reynolds*, and the pre-*Reynolds* common law did not permit dismissal where a plaintiff could establish a prima facie case with nonprivileged material.

**A. This Court’s state secrets cases do not permit dismissal under *Reynolds* where the plaintiff can establish its case with nonprivileged evidence.**

This Court has established two distinct state secrets doctrines, which the court below, and several other courts, have erroneously conflated.

The *Reynolds* privilege is a common-law privilege “in the law of evidence,” concerning “military and state secrets.” *Reynolds*, 345 U.S. at 6–7. Where it applies, it operates like other evidentiary privileges: “[t]he privileged information is excluded and the trial goes on without it.” *Gen. Dynamics*, 563 U.S. at 485. As the Court summarized just last term, *Reynolds* “allows the Government to bar the disclosure of information that, were it revealed, would harm national security.” *United States v. Abu Zubaydah*, 142 S. Ct. 959, 963 (2022).

Crucially, however, even if a court approves invocation of the *Reynolds* privilege, “the Court [does] not order judgment in favor of the Government.” *Gen. Dynamics*, 563 U.S. at 485; see *Reynolds*, 345 U.S. at 11. Instead, this Court has directed that plaintiffs be given the opportunity to make their case without the privileged evidence. *Id.* Only if a plaintiff fails to do so should the suit be dismissed.

The other “quite different” state secrets doctrine is a *justiciability* bar. *Gen. Dynamics*, 563 U.S. at 485. It is specific to disputes over *secret government contracts*, and requires dismissal “where the very subject matter of the action . . . [i]s a matter of state secret.” *Tenet*, 544 U.S. at 9; *id.* at 12 (Scalia, J., concurring) (“[T]he bar of *Totten* is a jurisdictional one.”). *General Dynamics* reaffirmed that this jurisdictional bar is no “mere evidentiary point,” and that the authority for it arises “not [from] *Reynolds*, but [from] two cases dealing with alleged contracts to spy.” *Gen. Dynamics*, 563 U.S. at 485–86 (citing *Totten* and *Tenet*).

The *Totten* doctrine rests on the Court’s “authority to fashion contractual remedies in Government-contracting disputes.” *Gen. Dynamics*, 563 U.S. at 485. In both *Totten* and *Tenet*, the Court held the contracts to be unenforceable because the parties to the contracts “must have understood that the lips of the other were to be for ever sealed,” *Totten*, 92 U.S. at 106, and because judicial “refusal to enforce [the contracts] captures what the *ex ante* expectations of the parties were or reasonably ought to have been,” *Gen. Dynamics*, 563 U.S. at 490.

Outside the *Totten* line of cases, however, the state secrets privilege does not warrant dismissal where the plaintiff can prove its case without privileged evidence. “The privileged information is excluded and the trial goes on without it.” *General Dynamics*. 563 U.S. at 485.

**B. The pre-*Reynolds* common law did not permit dismissal.**

A comprehensive review of the pre-*Reynolds* common law authorities, including those cited by *Reynolds*, confirms that they would not permit dismissal in cases like this one. With the exception of *Totten*, in every state secrets case that *Reynolds* cites, and in every case on which those cases rely, if the privilege was sustained, the evidence was excluded and the case proceeded without it. Courts dismissed cases only when the plaintiffs could not make out their case without the excluded evidence.

The American cases *Reynolds* cites confirm this. See *Firth Sterling Steel Co. v. Bethlehem Steel Co.*, 199 F. 353, 356 (E.D. Pa. 1912) (court order “expunging

the exhibits in question from the record,” no dismissal); *Pollen v. Ford Instrument Co.*, 26 F. Supp. 583, 586 (E.D.N.Y. 1939) (motion to compel denied, no dismissal); *Cresmer v. United States*, 9 F.R.D. 203, 204 (E.D.N.Y. 1949) (court conducted ex parte, in camera review in response to privilege assertion and granted motion to compel); *Bank Line Ltd. v. United States*, 68 F. Supp. 587, 588 (S.D.N.Y. 1946) (reaffirming prior order granting motion to compel production of Navy record); *In re Grove*, 180 F. 62, 70 (3d Cir. 1910) (reversing contempt order where witness had refused to produce documents deemed secret by the Navy, without regard to underlying litigation).

The secondary sources cited in *Reynolds* also confirm that the privilege is solely evidentiary. Sanford described the privilege as applicable where “[a] public interest demands that such matters be beyond the reach of court processes for production or disclosure,” without mentioning dismissal as a remedy. William Sanford, *Evidentiary Privileges Against the Production of Data Within the Control of Executive Departments*, 3 *Vanderbilt L. Rev.* 73, 75 (1949). No example cited in Sanford, Wigmore, or Greenleaf involves dismissal where the plaintiff could prove its case without privileged evidence. *See, e.g., H.M.S. Bellerophon*, [1875] 44 LJR 5–9 (cited in Wigmore) (excluding evidence and then resolving the merits for defendants); *Rex v. Watson*, [1817] 2 Stark. 116, 148, 159 (excluding evidence defendant sought; defendant ultimately acquitted); *Worthington v. Scribner*, 109 Mass. 487 (1872) (cited in Greenleaf) (extensively reviewing English and American privilege cases without ever mentioning dismissal, and concluding that reports of potential criminal activity could not be sought by interrogatory).

And the English common law cases *Reynolds* cites are in accord. *Duncan v. Cammell, Laird & Co.*, [1942] A.C. 624 (H.L.), upheld a privilege claim against a subpoena for documents in a private suit, without dismissal. *Duncan* cited many other cases, none of which support dismissal here. See, e.g., *Wyatt v. Gore*, [1816] Holt N.P.C. 299, 305 (plaintiff won even after privileged material was excluded); *Cooke v. Maxwell*, [1817] 2 Stark. 183, 185–86 (same).

**C. The circuit court precedents allowing state secrets dismissals directly conflict with *Reynolds* and *General Dynamics*.**

Notwithstanding the clear conceptual difference between *Reynolds* and *Totten*, the court below, and several other circuit courts, have erroneously conflated the two by permitting dismissal based on the *Reynolds* privilege, even if a plaintiff could prove its case using only public evidence.

For example, in the decision below, the Fourth Circuit ordered dismissal even though Petitioner is prepared to make its case on nonprivileged evidence, because the court believed that *the government's defense* would implicate privileged evidence. App. 56–57a; see also *Abilt*, 848 F.3d at 314 (summarizing circuit precedent). The D.C., Sixth, and Ninth Circuits have similarly dismissed suits where excluding privileged evidence from the suit would deprive the defendant of a “valid defense.” *Molerio*, 749 F.2d at 825 (dismissing suit after reviewing the privileged evidence in camera and determining that the plaintiff's suit was meritless); *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998); *Tenenbaum v.*

*Simonini*, 372 F.3d 776, 777 (6th Cir. 2004). And, more generally, the Ninth Circuit has countenanced dismissal at the pleading stage of cases that do not implicate government contracts based on its mistaken view that “the *Totten* bar and the *Reynolds* privilege form a continuum of analysis.” *Jeppesen*, 614 F.3d at 1089.

All of these decisions conflict with *General Dynamics*, which made clear that the *Totten* bar and the *Reynolds* privilege are “quite different.” 563 U.S. at 485. Where the plaintiff can establish a prima facie case of liability without privileged evidence, there is no basis for ruling in *defendant’s* favor. If the government needs privileged evidence to defend its conduct, it can raise that defense using specialized procedures—*e.g.*, in camera proceedings with security-cleared counsel—just as it does under CIPA, alongside security-cleared amici in the FISC, and in hundreds of habeas cases arising out of Guantánamo. See 18 U.S.C. App. 3; 50 U.S.C. § 1803(i). But allowing the government to prevent judicial consideration of challenges to grave constitutional abuses even where a plaintiff can make a prima facie case would allow it to escape accountability by violating the Constitution in secret.

### **III. The federal courts of appeals are divided over what judicial standards control when the government seeks dismissal under the state secrets privilege.**

Even if the Court were to conclude that state secrets dismissals are sometimes permitted under *Reynolds* where a plaintiff can make its case without privileged information, the courts below are

intractably divided about what the government must show to obtain such a dismissal. These longstanding divisions will remain unless this Court intervenes.

**A. The circuits are divided over whether the government may obtain a state secrets dismissal without establishing that the privileged evidence supports a “legally meritorious” defense.**

The decision below—which dismissed Petitioner’s lawsuit based on the government’s assertion of an entirely hypothetical defense, and without any judicial examination of the assertedly privileged evidence—conflicts with the decisions of the D.C., Ninth, Sixth, and Second Circuits. Those circuits require the government to establish, through *ex parte*, *in camera* review, that the secret evidence would provide a “valid” or “legally meritorious” defense—not merely to hypothesize in the abstract about a defense that might or might not have a factual and legal basis, as the Fourth Circuit permitted here.

The Fourth Circuit dismissed the case based on the government’s assertion that it *might* have defenses that would implicate secret evidence. *See* App. 55–58a, 62a. As the dissent explained, the government “premise[d] its only defenses on far-fetched hypotheticals”—including a claim that the NSA could, in theory, use a system that deliberately avoided every one of Petitioner’s trillions of Internet communications. App. 62a, 65–66a. Although the court found that Petitioner had successfully put forward a *prima facie* case, it granted dismissal because it believed that any possible defenses would involve privileged information. App. 55–58a. The

court did not examine any of the government's assertedly privileged evidence to see whether it in fact supported a valid defense. Thus, even if the government has no valid defense, and even though Petitioner can make its case without any privileged evidence, the court below dismissed this case challenging ongoing and widespread constitutional violations.

The Fourth Circuit has applied similar logic in prior cases. *Abilt*, 848 F.3d at 316 (dismissing employment discrimination claims against CIA); *Sterling v. Tenet*, 416 F.3d 338, 347 (4th Cir. 2005) (same); *El-Masri*, 479 F.3d at 309–10 (dismissing plaintiff's claims that he was abducted, imprisoned, and tortured by the CIA because the court could imagine possible defenses that would require secret information).

Under the Fourth Circuit's test, the government need not present any defense at all, even in an ex parte and in camera filing. The court need not review the evidence that would underlie that defense to determine whether it exists and is properly privileged. And the court need not determine whether the defense is valid. It is enough that the court can envision "possible defenses" that would rely on sensitive information. *Id.* at 310.

This approach conflicts with that of every other circuit that has addressed how courts should evaluate privileged defenses under *Reynolds*. These courts have held that the government must show that it would have a legally meritorious defense—one that "would require judgment for the defendant." *In re Sealed Case*, 494 F.3d 139, 149–50 (D.C. Cir. 2007) (reversing district court dismissal based on "possible



defenses”); see *Molerio*, 749 F.2d at 825; *Jeppesen*, 614 F.3d at 1083; *Fazaga v. FBI*, 965 F.3d 1015, 1067 (9th Cir. 2020), *rev'd in part on other grounds*, 142 S. Ct. 1051 (2022); *Tenenbaum*, 372 F.3d at 777; *Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544, 547 (2d Cir. 1991); *cf. Bareford v. Gen. Dynamics Corp.*, 973 F.2d 1138 (5th Cir. 1992).

Thus, all other courts to address the issue require the government’s secret defense to be *meritorious*, not merely possible. See *In re Sealed Case*, 494 F.3d at 149–50 (defining “valid defense”); *Fazaga*, 965 F.3d at 1067; *Kasza*, 133 F.3d at 1166; *Tenenbaum*, 372 F.3d at 777–78. And they all require that determination to be based on an “appropriately tailored in camera review of the privileged record.” *In re Sealed Case*, 494 F.3d at 151; see *Fazaga*, 965 F.3d at 1067; *Molerio*, 749 F.2d at 825 (granting dismissal only after reviewing evidence in camera); *Tenenbaum*, 372 F.3d at 777–78 (same).

As the D.C. Circuit has explained, “allowing the mere prospect of a privileged defense to thwart a citizen’s efforts to vindicate his or her constitutional rights would run afoul of the Supreme Court’s caution against precluding review of constitutional claims, . . . and against broadly interpreting evidentiary privileges[.]” *In re Sealed Case*, 494 F.3d at 151 (citing *Webster v. Doe*, 486 U.S. 592, 603–04 (1988), and *United States v. Nixon*, 418 U.S. 683, 710 (1974)). “Were the valid-defense exception expanded to mandate dismissal of a complaint for any plausible or colorable defense, then virtually every case in which the United States successfully invokes the state secrets privilege would need to be dismissed.” *Id.* at 149–50.

Under the Fourth Circuit’s approach, even where a plaintiff can establish a prima facie case that its constitutional rights are being violated, and the government has *no valid defense*, the court must dismiss a challenge if a hypothetical defense might implicate state secrets. That approach runs afoul of *Reynolds* and the judiciary’s responsibility to decide cases on the basis of evidence, rather than based on “a system of conjecture.” *In re Sealed Case*, 494 F.3d at 150; see *Reynolds*, 345 U.S. at 9–10.

As the D.C. Circuit has acknowledged, the state-secrets dismissal remedy created by the lower federal courts is an aberration in the law of evidence: it is a “limited” exception to the longstanding principle that successful invocation of the *Reynolds* privilege simply results in the exclusion of certain sensitive evidence, and that the case goes on without it—a rule favoring neither plaintiffs nor defendants. *In re Sealed Case*, 494 F.3d at 148; see Part II *supra*. The rationale for this valid-defense exception is that it would be a “mockery of justice” for the court to allow a jury to reach a manifestly “erroneous conclusion” when the government has a meritorious defense but the need for secrecy precludes public disclosure. *Molerio*, 749 F.2d at 825; see *In re Sealed Case*, 494 F.3d at 148–51. But there is no mockery of justice and no unfairness where the government’s secret defense is not valid, or worse yet, merely hypothetical, as here. See *In re Sealed Case*, 494 F.3d at 150; *In re United States*, 872 F.2d at 481–82 (Ginsburg, J., concurring in part).

In an effort to minimize an obvious conflict with the D.C. Circuit, the court below cited dicta from *In re Sealed Case*, arguing that the D.C. Circuit’s valid-defense rule does not apply where a court believes that “any” conceivable defense would implicate privileged

information. App. 56a (quoting 494 F.3d at 149). But that was not the D.C. Circuit’s holding. The court in *In re Sealed Case* was simply *describing* the Fourth Circuit’s ruling in *El-Masri*, not *embracing* it. Under the D.C. Circuit’s reasoning, it does not matter whether the government has one or many hypothetical defenses; those defenses entitle it to dismissal only if the relevant evidence exists and supports a legally meritorious defense. *See In re Sealed Case*, 494 F.3d at 150.

**B. There is broad confusion in the lower courts about the other circumstances in which dismissal is available under *Reynolds*.**

The Fourth Circuit’s opinion also reflects broader confusion in the lower courts about the circumstances in which dismissal is available. Citing the government’s hypothetical defenses, the court pointed to a related basis for dismissing the case under the privilege: where a court deems state secrets “so central” to a case that proceeding would “present an unjustifiable risk of disclosure.” App. 56–57a. This test, however, is too amorphous to serve as a basis for consistent judicial decision-making, and it has no place where only the government’s defense could put privileged information at issue. The court’s use of it here shows why. Petitioner possesses no privileged information and thus poses no risk of disclosing it. Because Petitioner can establish its case using public evidence, state secrets would be central only if the *government* itself chooses to use privileged evidence and that evidence establishes a defense. Yet rather than assess whether the government’s hypothetical defenses had any validity, *see* App. 64–66a, the Fourth

Circuit simply accepted the claim that privileged information would be “so central” to the case and dismissed.

Other courts have relied on different, but equally amorphous tests to dismiss cases in which the plaintiff could prevail using only public evidence. A number of courts, for example, have held that a case may be dismissed if the “very subject matter” of the suit is a state secret. *See, e.g., Kasza*, 133 F.3d at 1166; *Zuckerbraun*, 935 F.2d at 547–48. As noted above, that erroneously conflates the *Reynolds* evidentiary privilege with the *Totten* justiciability bar. *See* Part II *supra*. But in addition, these courts do not explain how to assess whether the “very subject matter” of a case is a state secret, nor what criteria apply when a plaintiff has unprivileged evidence that would establish its prima facie case. *Cf. Jeppesen*, 614 F.3d at 1084–85 (avoiding “the difficult question of precisely which claims may be barred” under the “very subject matter” test).

In other cases, courts have applied various standards to dismiss suits based on a prediction about the role that secret evidence would play in the litigation. As noted above, the Fourth Circuit will order dismissal if it predicts state secrets would be “so central” to the litigation that the suit could not be litigated without threatening the disclosure of secret information. *See, e.g., Abilt*, 848 F.3d at 313; *El-Masri*, 479 F.3d at 306. The Ninth Circuit, in contrast, permits dismissal where it deems privileged and nonprivileged evidence “inseparable,” such that “litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets.” *Jeppesen*, 614 F.3d at 1083; *see also Bareford*, 973 F.2d at 1144 (similar).

Some courts have eschewed such vague predictions and instead require the development of evidence through discovery before determining the role of state secrets in the case. *See, e.g., In re Sealed Case*, 494 F.3d at 151 (declining to dismiss on state-secret subject-matter grounds, noting that “the court has not looked favorably upon broad assertions by the United States that certain subject matters are off-limits for judicial review”); *Monarch Assurance P.L.C. v. United States*, 244 F.3d 1356, 1364 (Fed. Cir. 2001) (reversing premature dismissal so that plaintiff could engage in further discovery to support claim with nonprivileged evidence); *In re United States*, 872 F.2d 472 at 477 (D.C. Cir. 1989) (refusing to dismiss on basis of the government’s “unilateral assertion that privileged information lies at the core of th[e] case”).

The lower courts also differ concerning whether and when a court must consider alternatives to dismissing a case on the basis of the privilege. Some courts have dismissed on the basis of the privilege without considering any alternatives. *See, e.g., Tenenbaum*, 372 F.3d at 777; *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 281 (4th Cir. 1980). Others have refused to dismiss where procedural safeguards might enable the case to proceed. *See, e.g., In re United States*, 872 F.2d at 478 (discussing measures to protect sensitive information as case proceeds); *see also Halpern v. United States*, 258 F.2d 36, 41 (2d Cir. 1958) (refusing to dismiss suit because case could be tried in camera).

Some courts have correctly held that where dismissal might result from a successful invocation of the privilege, the court must examine the actual evidence over which the government has invoked the privilege. *See, e.g., Ellsberg v. Mitchell*, 709 F.2d 51 at

59 n.37 (D.C. Cir. 1983); *ACLU v. Brown*, 619 F.2d 1170, 1173 (7th Cir. 1980). Others have declined to examine the allegedly privileged evidence, relying solely on secret affidavits submitted by the government. *See, e.g., Sterling*, 416 F.3d at 344; *Black v. United States*, 62 F.3d 1115, 1117–19 (8th Cir. 1995); *Kasza*, 133 F.3d at 1170.

Given this confusion, if dismissals are permitted at all under *Reynolds*, it is vital that this Court clarify that dismissal of a suit on the basis of the state secrets privilege is appropriate solely when the removal of privileged evidence renders it impossible for the plaintiff to make out a prima facie case, or for the defendant to present a valid defense.

**IV. This case is an ideal vehicle to decide whether state secrets dismissals are permitted under *Reynolds* and, if they are, what standards control.**

**A. The case squarely presents the dismissal question.**

This case is an ideal vehicle to address state secrets dismissals.

First, the procedural posture and factual showing in Petitioner’s case squarely present the question of whether a state secrets dismissal is ever proper where a plaintiff can make out its case on nonprivileged evidence. The court below held that Wikimedia had put forward sufficient evidence that it was subjected to Upstream surveillance, App. 24–35a, and therefore the legality of that surveillance is properly presented on the basis of nonprivileged information. Plaintiffs in national security surveillance cases often lack sufficient evidence to make a prima facie showing,

because absent some governmental disclosure, they generally cannot show they were subject to the program. *See, e.g., ACLU v. NSA*, 493 F.3d 644, 653 (6th Cir. 2007). In such cases, exclusion of the privileged evidence causes plaintiffs to be unable to meet their initial burden. As a result, the dismissal issue only properly arises in cases where the plaintiff successfully makes a *prima facie* showing using unprivileged evidence. Wikimedia has done so here. App. 22–35a.

Second, the record also squarely and specifically raises the second question presented: namely, whether, if state secrets privilege dismissals are ever appropriate, the government must establish a valid defense. Here, the court below dismissed without assessing whether the government’s hypothetical defense had any basis in fact, or was meritorious as a legal matter. App. 55–58a; 62–66a.

Third, the Court can resolve these important threshold questions without itself considering classified information. If Petitioner is correct that dismissal is unavailable or that the government cannot prevail merely by asserting a hypothetical defense, then the Court can remand for the lower court to consider any privileged information as necessary: for example, to conduct the “tailored in camera review” necessary to determine whether evidence supporting the government’s possible defense exists and whether that evidence would establish a valid defense. App. 62–66a.

**B. The Fourth Circuit’s decision was wrong.**

The panel was wrong to dismiss Wikimedia’s suit on state secrets grounds.

First, as explained in Part II *supra*, dismissal was improper because the government invoked only the *Reynolds* evidentiary privilege, not the distinct *Totten* bar. The *Reynolds* evidentiary privilege does not support dismissal where a plaintiff can proceed with nonprivileged evidence.

Second, even if this Court were to hold that state secrets dismissals are permitted under *Reynolds*, the panel erred in concluding that the mere *possibility* of a secret defense mandates dismissal. By refusing to require in camera review to assess the validity of the government’s defense, the panel deviated from the valid-defense test in the D.C., Ninth, Sixth, and Second Circuits, *see* Part III.A *supra*, and from this Court’s admonition in *Reynolds* that “[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.” 345 U.S. at 9–10.

As Judge Motz correctly observed in dissent, “particularly when constitutional rights are at stake, courts routinely probe a claim of privilege through an ‘appropriately tailored in camera review’ to determine whether ‘resort to privileged material’ is in fact necessary for the Government to pursue a ‘meritorious and not merely plausible’ defense.” App. 64a (quoting *In re Sealed Case*, 494 F.3d at 149–51). At a minimum,



the Fourth Circuit should have required such a review here.<sup>5</sup>

The Fourth Circuit’s assertion that secret evidence is “so central” to the litigation that the privilege requires dismissal does not justify its failure to assess whether the government actually has any valid defense. Where, as here, a plaintiff can proceed solely on the basis of nonprivileged evidence, state secrets could only be “central” if the government affirmatively chooses to rely on secret evidence to defend itself—and that scenario is specifically addressed by *ex parte*, in camera review under the valid-defense test. If state secrets dismissals are permitted under *Reynolds*, they should be limited to cases in which the government can in fact establish a meritorious defense.

Lastly, the government was wrong when it suggested below that any ruling on the merits of Petitioner’s claim would disclose state secrets. On remand, the district court could assess—in an in camera proceeding—any privileged evidence supporting any defense claimed by the government. *See* App. 65a (“[T]he Government offers no reason why an ‘appropriately tailored in camera review’ could not ascertain the validity of the defense without imperiling state secrets.” (quoting *In re Sealed Case*, 494 F.3d at 151)). If the court rejected the government’s arguments after in camera review, its public ruling would simply leave the existing public evidence in place, and the case would proceed. If,

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<sup>5</sup> In addition, as Judge Motz acknowledged, allowing Wikimedia’s case to proceed would not deprive the government of the ability to mount a defense. App. 65–66a. Rather, the government would remain free to dispute Wikimedia’s public evidence by relying on its own public evidence and arguments, just as it did at summary judgment. *See id.*

instead, it dismissed the case, its ruling would indicate only that the government had established *some* valid defense behind closed doors. It would not reveal how or why the government had prevailed. *See Molerio*, 749 F.2d at 825 (granting valid-defense dismissal without revealing the basis for the defense).

The government should not be able to use the theoretical possibility of a secret defense to foreclose any judicial review of constitutional claims. Crediting the government's theories, without judicial consideration of evidence, would surrender control of a case to the executive branch—an approach to the privilege that *Reynolds* forbids.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Date: August 26, 2022

## **APPENDIX**

**APPENDIX A**

PUBLISHED

UNITED STATES COURT OF APPEALS FOR THE  
FOURTH CIRCUIT

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No. 20-1191

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WIKIMEDIA FOUNDATION,

Plaintiff–Appellant,

and

NATIONAL ASSOCIATION OF CRIMINAL  
DEFENSE ATTORNEYS; HUMAN RIGHTS  
WATCH; PEN AMERICAN CENTER; GLOBAL  
FUND FOR WOMEN; THE NATION MAGAZINE;  
THE RUTHERFORD INSTITUTE; WASHINGTON  
OFFICE ON LATIN AMERICA; AMNESTY  
INTERNATIONAL USA,

Plaintiffs,

v.

NATIONAL SECURITY AGENCY/CENTRAL  
SECURITY SERVICE; GENERAL PAUL M.  
NAKASONE, in his official capacity as Director of  
the National Security Agency and Chief of the  
Central Security Service; OFFICE OF THE  
DIRECTOR OF NATIONAL INTELLIGENCE;  
RICHARD GRENELL, in his official capacity as  
acting Director of National Intelligence; MERRICK  
B. GARLAND, Attorney General; DEPARTMENT  
OF JUSTICE,

Defendants–Appellees.

CENTER FOR DEMOCRACY & TECHNOLOGY;  
NEW AMERICA'S OPEN TECHNOLOGY  
INSTITUTE; DAVID H. KAYE, Evidence Law  
Professor; EDWARD J. IMWINKELRIED, Evidence  
Law Professor; D. MICHAEL RISINGER, Evidence  
Law Professor; REBECCA WEXLER, Evidence Law  
Professor; PROFESSOR STEPHEN I. VLADECK;  
AMERICANS FOR PROSPERITY FOUNDATION;  
BRENNAN CENTER FOR JUSTICE; ELECTRONIC  
FRONTIER FOUNDATION; ELECTRONIC  
PRIVACY INFORMATION CENTER;  
FREEDOMWORKS FOUNDATION;  
TECHFREEDOM; NETWORK ENGINEERS AND  
TECHNOLOGISTS,

Amici Supporting Appellant.

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Appeal from the United States District Court of  
Maryland, at Baltimore. T. S. Ellis, III, Senior District  
Judge. (1:15-cv-00662-TSE)

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Argued: March 12, 2021 Decided: September 15, 2021

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Before MOTZ, DIAZ, and RUSHING, Circuit Judges.

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Affirmed by published opinion. Judge Diaz wrote the  
majority opinion, in which Judge Motz joined as to  
Parts I and II.A, and in which Judge Rushing joined  
as to Part II.B.2 and C. Judge Motz wrote an opinion  
concurring in part and dissenting in part. Judge  
Rushing wrote an opinion concurring in part and in  
the judgment.

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**ARGUED:** Patrick Christopher Toomey, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, New York, New York, for Appellant. Joseph Forrest Busa, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees. **ON BRIEF:** Deborah A. Jeon, David R. Rocah, AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MARYLAND, Baltimore, Maryland; Ashley Gorski, Charles Hogle, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, New York, New York; Benjamin H. Kleine, COOLEY LLP, San Francisco, California; Alex Abdo, Jameel Jaffer, KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY, New York, New York, for Appellant. Ethan P. Davis, Acting Assistant Attorney General, H. Thomas Byron III, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees. Avery W. Gardiner, Gregory T. Nojeim, Mana Azarmi, Stan Adams, CENTER FOR DEMOCRACY & TECHNOLOGY, Washington, D.C.; Sharon Bradford Franklin, Ross Schulman, NEW AMERICA'S OPEN TECHNOLOGY INSTITUTE, Washington, D.C.; Andrew A. Bank, Bret S. Cohen, Allison M. Holt Ryan, Stevie N. DeGross, HOGAN LOVELLS US LLP, Washington, D.C., for Amici Center for Democracy & Technology and New America's Open Technology Institute. Benjamin B. Au, W. Henry Huttinger, Los Angeles, California, Aditya V. Kamdar, DURIE TANGRI LLP, San Francisco, California, for Amici Evidence Law Professors. Lauren Gallo White, San Francisco, California, Brian M. Willen, WILSON SONSINI GOODRICH & ROSATI PROFESSIONAL CORPORATION, New York, New York, for Amicus Professor Stephen I.

Vladeck. Eric R. Bolinder, AMERICANS FOR PROSPERITY FOUNDATION, Arlington, Virginia; Sophia Cope, Mark Rumold, Andrew Cocker, ELECTRONIC FRONTIER FOUNDATION, San Francisco, California, for Amici Americans for Prosperity Foundation, Brennan Center for Justice, Electronic Frontier Foundation, Electronic Privacy Information Center, FreedomWorks Foundation, and TechFreedom. Jonathan Blavin, Elizabeth Kim, Alexander Gorin, MUNGER, TOLLES & OLSON LLP, San Francisco, California, for Amici Network Engineers and Technologists.

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DIAZ, Circuit Judge:

We consider, for the second time, the Wikimedia Foundation’s contentions that the government is spying on its communications using Upstream, an electronic surveillance program run by the National Security Agency (“NSA”). In the first appeal, we found Wikimedia’s allegations of Article III standing sufficient to survive a motion to dismiss and vacated the district court’s judgment to the contrary. On remand, the court again dismissed the case, holding that Wikimedia didn’t establish a genuine issue of material fact as to standing and that further litigation would unjustifiably risk the disclosure of state secrets.

Although the district court erred in granting summary judgment to the government as to Wikimedia’s standing, we agree that the state secrets privilege requires the termination of this suit. We thus affirm.

## I.

Our prior opinion contains many of the relevant facts, including descriptions of the Upstream surveillance program and its authorizing statute, Section 702 of the Foreign Intelligence Surveillance Act (“FISA”), 50 U.S.C. § 1881a. *See Wikimedia Found. v. Nat’l Sec. Agency/Cent. Sec. Serv.*, 857 F.3d 193, 200–07 (4th Cir. 2017). We take a moment here to briefly review the inner workings of Upstream, recap our previous decision, and relate what has occurred since then.

## A.

As its name suggests, Upstream surveillance involves the NSA’s collection of communications on the Internet backbone, “upstream” of the Internet

user, by compelling the assistance of telecommunications-service providers. By contrast, the NSA obtains the “vast majority” of Internet communications collected under Section 702 directly from a user’s Internet-service provider through the PRISM surveillance program, *Redacted*, 2011 WL 10945618, at \*9 & n.23 (FISA Ct. Oct. 3, 2011), which isn’t at issue here.

The Internet backbone consists of domestic “high-speed, ultra-high bandwidth data- transmission lines” and the relatively limited number of submarine and terrestrial circuits that carry Internet communications into and out of the United States, J.A. 2739, which are often referred to as “chokepoint” cables. More specifically:

The NSA performs Upstream surveillance by first identifying a target and then identifying “selectors” for that target. Selectors are the specific means by which the target communicates, such as e-mail addresses or telephone numbers. Selectors cannot be keywords (e.g., “bomb”) or names of targeted individuals (e.g., “Bin Laden”).

The NSA then “tasks” selectors for collection and sends them to telecommunications-service providers. Those providers must assist the government in intercepting communications to, from, or “about” the selectors. “About” communications are those that contain a tasked selector in their content, but are not to or from the target.

*Wikimedia Found.*, 857 F.3d at 202.<sup>1</sup>

Importantly, “[w]hile Upstream surveillance is intended to acquire Internet *communications*, it does so through the acquisition of Internet *transactions*.” *Id.* at 203 (cleaned up). When an individual sends a communication over the Internet, it’s broken up into one or more data packets that are transmitted to, and reassembled by, the receiving device. Each packet travels separately across the Internet backbone. This means that packets may take different paths to the recipient, and while in transit, they’re mixed with countless other packets making their own journeys.

“[A] complement of packets traversing the Internet that together may be understood by a device on the Internet” as one or many discrete communications comprises an Internet “transaction.” *Redacted*, 2011 WL 10945618, at \*9 n.23 (quoting a government submission to the Foreign Intelligence Surveillance Court (“FISC")). “If a single discrete communication within [a ‘multi-communication transaction’] is to, from, or [until 2017] about, a Section 702-tasked selector, and at least one end of the transaction is foreign, the NSA will acquire the entire [multi-communication transaction].” Privacy & Civil Liberties Oversight Board, *Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act* 44 (2014) (“PCLOB Report”).

## B.

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<sup>1</sup> The NSA suspended its collection of “about” communications in 2017 but continues to collect “to” and “from” communications.

Wikimedia and eight other plaintiffs sued the government, seeking “among other things, a declaration that Upstream surveillance violates the First and Fourth Amendments, an order permanently enjoining the NSA from conducting Upstream surveillance, and an order directing the NSA to purge all records of Plaintiffs’ communications” obtained through Upstream surveillance. *Wikimedia Found.*, 857 F.3d at 202 (cleaned up). The district court dismissed the case for lack of Article III standing, and the plaintiffs appealed.

Article III “[s]tanding is part and parcel of the constitutional mandate that the judicial power of the United States extend only to ‘cases’ and ‘controversies.’” *Libertarian Party of Va. v. Judd*, 718 F.3d 308, 313 (4th Cir. 2013) (quoting U.S. Const. art. III, § 2). To establish standing, a plaintiff must show: “(1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision.” *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157–58 (2014) (cleaned up).

In what we called the “Wikimedia Allegation,” Wikimedia claimed it had standing because (1) its communications travel across every international Internet link<sup>2</sup>; (2) the NSA conducts Upstream surveillance on at least one such link; and (3) “in order for the NSA to reliably obtain communications to, from, or about its targets in the way it has described, the government must be copying and reviewing all the

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<sup>2</sup> Wikimedia uses “international” to describe something occurring between the United States and a foreign country and “international Internet link” to mean a chokepoint cable.

international text-based communications that travel across a given link.” J.A. 57.

Together, these assertions were “sufficient to make plausible the conclusion that the NSA is intercepting, copying, and reviewing at least some of Wikimedia’s communications,” establishing an injury-in-fact for a Fourth Amendment violation. *Wikimedia Found.*, 857 F.3d at 211. “And, because Wikimedia has self-censored its speech and sometimes forgone electronic communications” as a result of that surveillance, it established an injury-in-fact for purposes of its First Amendment claim. *Id.* Wikimedia also met the two other requirements for standing because “Upstream surveillance is the direct cause of the alleged injury, and there’s no reason to doubt that the requested injunctive and declaratory relief would redress the harm.” *Id.* at 210.

We thus vacated the district court’s judgment as to Wikimedia. We affirmed as to the other eight plaintiffs, who alleged that given the government’s incentives to cast a wide net, “the NSA is intercepting, copying, and reviewing substantially all text-based communications entering and leaving the United States, including their own.” *Wikimedia Found.*, 857 F.3d at 202 (cleaned up). We concluded that such claims “about what the NSA ‘must’ be doing” based on its goals “lack sufficient factual support to get ‘across the line from conceivable to plausible.’” *Id.* at 214 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

### C.

On remand, the district court ordered jurisdictional discovery. But when Wikimedia sought

evidence related to Upstream, the NSA invoked the state secrets privilege.

The privilege permits the United States to “prevent the disclosure of information in a judicial proceeding if ‘there is a reasonable danger’ that such disclosure ‘will expose [matters of state] which, in the interest of national security, should not be divulged.’” *El-Masri v. United States*, 479 F.3d 296, 302 (4th Cir. 2007) (quoting *United States v. Reynolds*, 345 U.S. 1, 10 (1953)). In *Reynolds*, the decision that modernized the privilege, three civilian observers aboard an Air Force bomber testing secret electronic equipment died when the plane caught fire and crashed. 345 U.S. at 3. Their widows sued the United States under the Federal Tort Claims Act and sought discovery related to the incident. *Id.* at 3, 6. Instead of producing the requested information, the Secretary of the Air Force filed a formal claim of privilege, citing national security concerns. *Id.* at 4–5. The Supreme Court concluded that the government properly invoked the privilege and sustained its refusal to disclose the documents at issue. *Id.* at 6.

Thus, to invoke the state secrets privilege, the United States must make “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.” *Id.* at 7–8. Here, the government filed the declaration of Daniel Coats, the then Director of National Intelligence, who attested that the disclosures requested by Wikimedia “reasonably could be expected to cause serious damage, and in many cases exceptionally grave

damage, to the national security of the United States.”<sup>3</sup> J.A. 174.

In particular, Director Coats asserted the privilege over seven categories of information:

(A) information that would tend to confirm what individuals or entities are subject to Upstream surveillance activities; (B) information concerning the operational details of the Upstream collection process; (C) the location(s) at which Upstream surveillance is conducted; (D) the categories of Internet-based communications collected through Upstream surveillance activities; (E) information concerning the scope and scale of Upstream surveillance; (F) NSA cryptanalytic capabilities; and (G) additional categories of classified information regarding Upstream surveillance contained in opinions and orders issued by, and submissions made to, the [FISC].

J.A. 174–75.

Director Coats also confirmed several key facts about Upstream surveillance. He explained that “in the course of the Upstream collection process, certain Internet transactions transiting the Internet backbone network(s) of certain electronic communication service provider(s) are filtered for the purpose of excluding wholly domestic communications.” J.A. 177. The NSA then scans the remaining communications “to identify for acquisition

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<sup>3</sup> The government also filed the classified declaration of George Barnes, the then Deputy Director of the NSA, describing the national security concerns in greater detail.

those transactions that are to or from” (or, until 2017, “about”) the targeted selector and “ingest[s]” them into government databases. J.A. 177–78.

Director Coats further acknowledged that the NSA “is monitoring at least one circuit carrying international Internet communications.” J.A. 186. But he maintained that “[w]hile the Upstream collection process has been described in general terms in this declaration and in declassified documents and unclassified reports, certain operational details of Upstream collection remain highly classified.” J.A. 178.

Despite the NSA’s claim of privilege, Wikimedia moved to compel discovery. Wikimedia argued that FISA’s discovery procedures, as provided in 50 U.S.C. § 1806(f), displace the state secrets privilege in cases involving government-run electronic surveillance. This provision permits an “aggrieved person” who is the target of electronic surveillance to request, under certain circumstances, that the court conduct an in camera and ex parte review of “the application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted.” 50 U.S.C. § 1806(f). Wikimedia contended that (1) it had successfully alleged that it was an aggrieved person; and (2) § 1806(f) required the district court to review evidence related to Upstream surveillance in camera and ex parte to determine whether the NSA lawfully surveilled Wikimedia’s communications, instead of dismissing the entire action.

The district court, however, concluded that FISA doesn’t apply and denied Wikimedia’s motion. In



particular, the court explained that the “§ 1806(f) procedures do not apply where, as here, a plaintiff has not yet established that it has been the subject of electronic surveillance.” *Wikimedia Found. v. Nat’l Sec. Agency/Cent. Sec. Serv.*, 335 F. Supp. 3d 772, 780 (D. Md. 2018). Because Wikimedia had “merely plausibly alleged that it has been the target of surveillance and ha[d] not yet adduced evidence establishing this fact of surveillance,” the court determined that “it [wa]s not appropriate . . . to engage in *ex parte* and *in camera* review of the materials responsive to plaintiff’s interrogatories or to those plaintiff describe[d] in its motion to compel.” *Id.* at 786.

#### D.

The government then moved for summary judgment, contending that Wikimedia didn’t establish a genuine issue of material fact as to the second or third prongs of the Wikimedia Allegation<sup>4</sup> and that the state secrets privilege independently requires dismissal of the case. As we explain in further detail below, the district court granted this motion, holding that (1) Wikimedia established a genuine issue of material fact as to the second but not the third prong of the Wikimedia Allegation,<sup>5</sup> (2) the state secrets

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<sup>4</sup> The government didn’t dispute that Wikimedia had established the first prong.

<sup>5</sup> The district court held that Wikimedia “established” the second prong of the Wikimedia Allegation “without a genuine dispute as to any material fact.” *Wikimedia Found. v. Nat’l Sec. Agency/Cent. Sec. Serv.*, 427 F. Supp. 3d 582, 603 (D. Md. 2019). Read literally, the court appears to have granted partial summary judgment for Wikimedia on the second prong. But, although Wikimedia opposed the government’s summary judgment motion, it never filed its own motion. Nor did the court

privilege foreclosed further litigation, and (3) Wikimedia didn't show any other injury that gives rise to standing.

1.

The district court first determined that Wikimedia had established a genuine issue of material fact as to the second prong of the Wikimedia Allegation, which posits that the NSA conducts Upstream surveillance on at least one international Internet link.

To prove this assertion, Wikimedia primarily relied on a declassified 2011 FISC opinion, which states that “the government readily concedes that [the] NSA will acquire a wholly domestic ‘about’ communication if the transaction containing the communication is routed through an international Internet link being monitored by [the] NSA or is routed through a foreign server.” *Redacted*, 2011 WL 10945618, at \*15 (citing a government submission to the FISC). An NSA witness confirmed the accuracy of this sentence, and of the opinion generally, as of October 2011.<sup>6</sup>

But the government contended that the meaning of the phrase “international Internet link” as used in the FISC opinion isn't the same as that used in the

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invoke Federal Rule of Civil Procedure 56(f), which allows it to grant summary judgment to a nonmovant under certain circumstances. To square this circle, we assume that the district court found only that Wikimedia established a genuine issue of material fact on the second prong.

<sup>6</sup> The district court recognized the quoted sentence as an admissible statement by a party opponent. *See Wikimedia Found.*, 427 F. Supp. 3d at 602. On appeal, Wikimedia asserts, and the government doesn't dispute, that the NSA also adopted the facts in the FISC opinion as a whole.

Wikimedia Allegation. In fact, the NSA witness testified that the “NSA has an understanding of this term that is specific to how [the FISC] described it,” but that its true definition can’t be confirmed or denied because “it’s classified.” J.A. 447. And the government pointed out that the 2011 FISC opinion may not reflect the NSA’s current practices.

“Rather than belabor the squabble between the parties about the meaning of this particular term” in the FISC opinion, the district court zeroed in on an entirely different government disclosure. *Wikimedia Found.*, 427 F. Supp. 3d at 602–03. The court sua sponte relied on Director Coats’s statement that the “NSA is monitoring at least one circuit carrying international Internet communications” to conclude that Wikimedia had produced sufficient evidence to raise a genuine issue of material fact as to the second prong of the Wikimedia Allegation (i.e., that the NSA conducts Upstream surveillance on at least one international Internet link). *Id.* at 603.

2.

But the district court found that Wikimedia didn’t establish a genuine issue of material fact as to the third prong of the Wikimedia Allegation, which asserts that the NSA is copying all communications on a monitored link. At the motion-to-dismiss stage, Wikimedia had alleged that “as a technical matter, the government cannot know beforehand which communications will contain selectors associated with its targets, and therefore it must copy and review all international text-based communications transiting a circuit in order to identify those of interest.” *Wikimedia Found.*, 857 F.3d at 204 (cleaned up).

To undermine that claim, the government offered the declarations of Henning Schulzrinne, an “expert in internet technology.” Appellee’s Br. at 44. Schulzrinne wasn’t privy to any classified or other non-public information about how the NSA actually operates Upstream surveillance, so he instead opined that the NSA could “in theory” use a technique called traffic mirroring to conduct Upstream-style surveillance without copying Wikimedia’s communications. J.A. 719.

According to Schulzrinne, traffic mirroring requires installing a link (i.e., a fiber-optic cable) between the surveilling entity’s equipment and a mirror port on the router or switch directing Internet traffic at the target location. The router or switch is then configured to copy traffic from one link to another without interrupting the original. It can also be programmed to whitelist or blacklist certain IP addresses, thereby filtering the data before copying it. Whitelisting involves copying only communications from specific IP addresses, while blacklisting involves copying everything except communications from specific IP addresses.

Wikimedia responded with the declarations of Scott Bradner, “an Internet networking expert.” Appellant’s Br. at 23. Although Bradner conceded that it’s “technically possible” to use traffic mirroring with filtering (as envisioned by Schulzrinne), “doing so would purposefully ignore most of the Internet” and “would be inconsistent with the publicly known details about the [U]pstream collection program.” J.A. 3898.

Bradner explained that traffic mirroring with filtering “would require either that the [Internet

Service Provider (“ISP”)] agree to place an NSA-operated device into the heart of its network”—which could negatively impact “the ISP’s network in the event of an equipment failure or misconfiguration—or that the ISP’s personnel have enough knowledge of the filter criteria to configure the ISP’s router.” J.A. 1023. Moreover, these filters would “place potentially significant additional demands on the router’s processing power, which could affect the performance of the router and create a risk of overloading the router, thereby interfering with the ISP’s ability to support its customers’ traffic.” J.A. 1025.

Bradner further opined that rather than traffic mirroring with filtering, the NSA is “most likely” using link-layer copying (essentially traffic mirroring without filtering) or optical splitters. J.A. 1022. An optical splitter is a physical device attached to a fiber-optic cable that reflects a portion of the light traveling down that circuit to a different receiver. The information continues on its original course, while an exact duplicate is sent to the surveilling entity. Any filtering must take place after the copy is made. The technology is “extremely reliable as it consumes no power, has no software, and cannot slow traffic.” Technologists’ Amicus Br. at 10; *see also* J.A. 3921. According to Bradner, link-layer copying and optical splitters offer the NSA the “greatest operational control and confidentiality in carrying out upstream collection with the least risk of interference with the ISP’s ordinary network operations.” J.A. 1025.

Bradner also pointed to several government disclosures as evidence that the NSA is copying all communications on a monitored link. These include the previously discussed statement from the 2011 FISC opinion, which provides that the “NSA will

acquire a wholly domestic ‘about’ communication if the transaction containing the communication is routed through an international Internet link being monitored by [the] NSA or is routed through a foreign server,” *Redacted*, 2011 WL 10945618, at \*15; and a government report stating that the NSA’s goal is to “comprehensively acquire communications that are sent to or from its targets,” PCLOB Report 10, 37, 123.<sup>7</sup>

Of these disclosures, the district court mentioned only the PCLOB Report in the context of Bradner’s opinion that the NSA is likely conducting Upstream surveillance using link-layer copying or optical splitters rather than traffic mirroring with filtering. *See Wikimedia Found.*, 427 F. Supp. 3d at 603–10. It declined to consider this opinion, reasoning that it

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<sup>7</sup> Wikimedia’s evidence also included (1) another government report revealing that the NSA had more than 120,000 Section 702 targets in 2017, Office of the Director of National Intelligence Statistical Transparency Report for 2017 (Apr. 2018); (2) “[t]he leading treatise on national security investigations, co-authored by the former Assistant Attorney General for National Security,” Appellant’s Br. at 31–32 (citing David Kris & J. Douglas Wilson, *Nat’l Security Investigations & Prosecutions* 2d § 17.5 (2015)); (3) “[r]ecent disclosures by the United Kingdom about functionally equivalent surveillance undertaken by the NSA’s British counterpart,” *id.* at 32 (citing *Further Observations of the Government of the United Kingdom, Human Rights Organizations v. United Kingdom*, Eur. Ct. H.R. (Dec. 16, 2016), <https://privacyinternational.org/sites/default/files/2018-02/2016.12.16%20Government%27s%20further%20obs.pdf>); and (4) descriptions of “the U.S. government’s EINSTEIN 2 surveillance program, which protects government networks through a similar form of Internet surveillance,” *id.* (citing *Legal Issues Relating to the Testing, Use, and Deployment of an Intrusion-Detection System (EINSTEIN 2.0)*, 33 Op. O.L.C. 1 (Jan. 9, 2009)).

rests on “speculative assumptions about the NSA’s surveillance practices and priorities and [its] resources and capabilities.” *Id.* at 604–05 (citing Fed. R. of Evid. 702 and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993)).

The court instead focused on the technical arguments presented by both sides and concluded that the record didn’t establish that the NSA must copy all communications on a surveilled circuit by “technological necessity.” *Id.* at 609. It therefore held that Wikimedia had failed to establish a genuine issue for trial as to standing.

3.

The district court next “assum[ed] *arguendo* that[] there is a genuine dispute of material fact as to the third prong of the Wikimedia Allegation,” yet still determined that the case must be dismissed because of the state secrets privilege. *Id.* at 610.

In doing so, the court again rejected Wikimedia’s argument that FISA displaces the state secrets privilege in this case. This time, it distinguished Wikimedia’s case from the only other circuit case directly addressing this issue, *Fazaga v. FBI*, 916 F.3d 1202 (9th Cir. 2019), *amended on denial of reh’g en banc* by 965 F.3d 1015 (9th Cir. 2020), *cert. granted*, 2021 WL 2301971 (June 7, 2021), which holds that FISA’s discovery procedures in § 1806(f) apply instead of the state secrets privilege under certain circumstances.

The plaintiffs there challenged a counter-terrorism investigation involving electronic surveillance conducted by an informant for the Federal Bureau of Investigation. “Several sources,” including the

Bureau, had confirmed the identity of the informant and that he “created audio and video recordings” for the investigation. *Fazaga*, 965 F.3d at 1028.

The *Fazaga* district court dismissed all but one of the plaintiffs’ claims at the pleading stage based on the government’s assertion of the state secrets privilege. But the Ninth Circuit reversed, holding that FISA displaces the privilege whenever “an aggrieved person affirmatively challenges, in any civil case, the legality of electronic surveillance or its use in litigation, whether the challenge is under FISA itself, the Constitution, or any other law” and that “[t]he complaint’s allegations are sufficient if proven to establish that Plaintiffs are ‘aggrieved persons’” who had been subjected to electronic surveillance by the government. *Id.* at 1030, 1053.

The district court here determined that even if *Fazaga* were binding in our circuit such that § 1806(f) displaces the state secrets privilege, it wouldn’t help Wikimedia. That’s because the Ninth Circuit found the *Fazaga* plaintiffs’ allegations sufficient to establish that they were aggrieved persons (as required to apply § 1806(f)) at the motion-to-dismiss stage. Wikimedia, on the other hand, faced summary judgment and thus needed to establish a genuine issue of material fact that it was the subject of electronic surveillance but had failed to do so. Accordingly, the court concluded once more that the § 1806(f) procedures don’t apply.

That being so, the court turned to the government’s claim of privilege. It determined that state secrets are “so central” to litigating the Wikimedia Allegation that “the defendants cannot properly defend themselves without using privileged evidence,”



*Wikimedia Found.*, 427 F. Supp. 3d at 613, and that further proceedings “would present an unjustifiable risk” of disclosing privileged information, *id.* at 612. The court thus ruled that the case must also be dismissed because of the state secrets privilege.

4.

Finally, the district court concluded that none of Wikimedia’s other alleged injuries independently establish standing. In addition to the Wikimedia Allegation, Wikimedia asserted that: (1) Upstream surveillance impaired Wikimedia’s communications with its community members, as evidenced by the drop in readership for certain Wikipedia pages; (2) Wikimedia had to take costly protective measures against Upstream surveillance; and (3) Wikimedia has third party standing to assert its users’ rights. The court held that the first two theories fail under *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013), and the last collapses under its own weight.

In *Clapper*, several plaintiffs in the United States challenged Section 702, alleging that their work “requires them to engage in sensitive international communications with individuals who they believe are likely targets of surveillance.” 568 U.S. at 401. As we described in our prior opinion, the plaintiffs there “had two separate theories of Article III standing: (1) there was an ‘objectively reasonable likelihood’ that their communications would be intercepted in the future pursuant to Section 702 surveillance, and (2) they were forced to undertake costly and burdensome measures to avoid a substantial risk of surveillance.” *Wikimedia Found.*, 857 F.3d at 206 (quoting *Clapper*, 568 U.S. at 407). “They did not, however, have actual knowledge of the Government’s Section 702 targeting

practices.” *Id.* (cleaned up). The Supreme Court held that neither theory was sufficient to prove standing at the summary-judgment stage because they depended on a “speculative chain of possibilities [that] does not establish that injury based on potential future surveillance is certainly impending or is fairly traceable” to Section 702 surveillance. *Clapper*, 568 U.S. at 414.

As relevant to Wikimedia’s claim of decreased readership, *Clapper* explained that “a chilling effect arising merely from the individual’s knowledge that a governmental agency was engaged in certain activities or from 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” doesn’t establish standing. 568 U.S. at 417–18; *see also id.* at 418 (“Because allegations of a subjective ‘chill’ are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm, the plaintiffs . . . lack standing.” (cleaned up)).

The district court found that Wikimedia made a similarly deficient assertion: that its “decreased readership is a result of individual[] fear that the government might be monitoring their Internet activity and might use that information at some later date.” *Wikimedia Found.*, 427 F. Supp. 3d at 616. The court then determined that Wikimedia otherwise lacked objective evidence of “an ongoing and sustained drop in [its] readership,” or that any such decline stemmed from “Upstream surveillance specifically” rather than “media coverage of NSA surveillance generally.” *Id.* (cleaned up). It thus concluded that

Wikimedia’s reduction in readership didn’t establish standing.

In assessing Wikimedia’s standing based on protective measures, the district court pointed to *Clapper’s* admonition that plaintiffs “cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm.” 568 U.S. at 416. By finding the summary judgment record inadequate to establish the Wikimedia Allegation, the court had already ruled that any harm to Wikimedia from Upstream surveillance was “purely hypothetical” and thus insufficient to prove standing. *Wikimedia Found.*, 427 F. Supp. 3d at 617. As an additional nail in the coffin, the court observed that Wikimedia began implementing its protective measures years before learning about Upstream for a variety of other reasons, “including protecting against individual computer hackers and keeping . . . company policies up-to-date and transparent,” so the requested injunctive and declaratory relief “would not redress any alleged injury from these protective expenditures.” *Id.* at 617 n.63.

Nor was the district court persuaded that Wikimedia had established third party standing. For third party standing, a plaintiff must demonstrate “(1) an injury-in-fact; (2) a close relationship between [itself] and the person whose right [it] seeks to assert; and (3) a hindrance to the third party’s ability to protect his or her own interests.” *Freilich v. Upper Chesapeake Health Inc.*, 313 F.3d 205, 215 (4th Cir. 2002).

The court held that Wikimedia didn’t satisfy any of these elements. As discussed, the court had already

rejected all of Wikimedia’s alleged injuries-in-fact. The court also determined that, unlike lawyers and clients or doctors and patients, Wikimedia doesn’t have the requisite “protected, close relationships” with its “largely unidentified contributors.” *Wikimedia Found.*, 427 F. Supp. 3d at 617 & n.65. In fact, Wikimedia “only presented declarations from one single contributor,” who claimed that the “normal burdens of litigation” and her “workload as a medical student” make it “impossible” for her to bring suit. *Id.* at 617–18. The court found this “insufficient” to show that an obstacle prevents her from protecting her own interests. *Id.* at 618.

The district court thus dispatched all of Wikimedia’s theories of standing, dismissed the case, and entered judgment for the government. This appeal followed.

## II.

Wikimedia contends that the district court erred in dismissing its case because (1) the evidence it presented establishes a genuine dispute of material fact with respect to its standing; (2) FISA displaces the state secrets privilege in this context; (3) even if FISA doesn’t apply, the state secrets privilege doesn’t require dismissal because “Wikimedia can establish its standing without resort to privileged evidence[]” and the government hasn’t shown that it can’t defend itself without privileged evidence; and (4) “Wikimedia has presented evidence of additional injuries” that don’t implicate any state secrets. Appellant’s Br. at 14, 17.

As we explain, the record evidence is sufficient to establish a genuine issue of material fact as to Wikimedia’s standing. But FISA doesn’t displace the

state secrets privilege, and further litigation would unjustifiably risk the disclosure of privileged information. And because Wikimedia’s other alleged injuries don’t provide independent bases for standing, this case must be dismissed.

A.

Because standing is jurisdictional, we begin our discussion there. *See Libertarian Party of Va.*, 718 F.3d at 313. Our review of a district court’s decision on summary judgment is de novo, and we view all facts and reasonable inferences in the light most favorable to the nonmovant—here, Wikimedia. *See Sylvia Dev. Corp. v. Calvert Cnty.*, 48 F.3d 810, 817 (4th Cir. 1995).

1.

The government maintains that Wikimedia hasn’t established a genuine issue for trial as to standing on the second prong of the Wikimedia Allegation: that Upstream surveillance occurs on at least one international Internet link. We disagree.

Wikimedia contends that an “international Internet link” is a “chokepoint” cable, which refers to one of the relatively limited number of circuits that carry Internet communications into and out of the United States. Because Wikimedia claims that its communications traverse all chokepoint cables—but not necessarily all other circuits on the Internet backbone—the second prong of the Wikimedia Allegation centers on showing that the NSA is monitoring at least one of these chokepoint cables.

The problem for Wikimedia is that the NSA never uses the words “chokepoint cable” in its public disclosures. The NSA does, however, use the phrase

“international Internet link.” The parties therefore dispute whether those terms are interchangeable, and even if they are, whether the relevant disclosures reveal that the NSA is actually monitoring such a circuit.

At the outset, we focus on the government’s concession in the 2011 FISC opinion and not the Coats declaration (on which the district court relied). As Wikimedia acknowledges, Director Coats’s statement that the NSA is “monitoring at least one circuit carrying international Internet communications,” J.A. 186, doesn’t identify where on the Internet backbone that circuit is located. The Coats declaration thus doesn’t show that the NSA is monitoring a chokepoint cable.

By contrast, the FISC opinion recites a government concession in that case “that [the] NSA will acquire a wholly domestic ‘about’ communication if the transaction containing the communication is routed through *an international Internet link being monitored by [the] NSA.*” *Redacted*, 2011 WL 10945618, at \*15 (emphasis added). According to Wikimedia, this concession—the accuracy of which the NSA has confirmed in this case—is evidence that NSA is in fact monitoring a circuit carrying international communications.

The government argues that the statement from the FISC opinion doesn’t reveal that the NSA is actually monitoring an international Internet link. Rather, it conveys only that *if* the NSA is monitoring such a link, the agency will acquire the communications traversing it. But the government’s strained construction ignores grammar. The consequence described in the independent clause (i.e.,

the NSA's acquisition of a domestic communication) is tied to a conditional clause that turns on whether the transaction is on an international Internet link that the NSA is monitoring—not whether the NSA is monitoring such a link at all. The sentence is thus premised on the NSA surveilling at least one international Internet link, over which a transaction of interest may travel.

The government also says that Wikimedia has no evidence that the NSA still adheres to these practices, even if it did in 2011, and that “at least the conclusion of this conditional statement is no longer accurate” because “‘about’ collection ended in 2017.” Appellee’s Br. at 40 n.3 (quoting *Wikimedia Found.*, 427 F. Supp. 3d at 602 n.38). But the government never says that the way it acquired “about” communications differs from the way it collects “to” and “from” communications. Nor have we seen anything in the record to suggest that.

To the contrary, Upstream collection is often described as a single process across all types of communications. *See, e.g., Redacted*, 2011 WL 10945618, at \*11 (“[The] NSA’s upstream Internet collection devices are generally incapable of distinguishing between transactions containing only a single discrete communication to, from, or about a tasked selector and transactions containing multiple discrete communications, not all of which may be to, from, or about a tasked selector.”). And given the lack of evidence that the NSA has changed the way it operates Upstream, it’s reasonable to infer that the government’s concession in the FISC opinion remains accurate despite the passage of time and even though the government no longer retains “about” communications.

Next, the government argues that Wikimedia didn't dispute the district court's determination that "the differences between the term 'international internet link' and the term ['chokepoint cable'] . . . cannot be known without violation of the state secrets privilege." *Wikimedia Found.*, 427 F. Supp. 3d at 602. Because the "opening brief does not mention the district court's ruling on this point, much less argue that the court erred or explain how [it erred]," the government contends that Wikimedia failed to preserve this issue. Appellee's Br. at 41 (citing *Grayson O Co. v. Agadir Int'l LLC*, 856 F.3d 307, 316 (4th Cir. 2017)).

But it's not clear that the district court actually ruled on the definition of "international Internet link," as opposed to merely describing the government's position on it. See *Wikimedia Found.*, 427 F. Supp. 3d at 602 ("Defendants, however, assert .... Thus, the differences between the term...."). The court then turned away from the FISC opinion to focus on the Coats declaration, suggesting that the court didn't intend to resolve the significance of "international Internet link" at all—on state secrets or any other grounds. *Id.* at 602–03.

Even if the court was commenting on the secret nature of the phrase "international internet link," it ultimately found for Wikimedia on the second prong. Wikimedia thus had no reason to raise any arguments on the second prong before the government contested it.<sup>8</sup> See *Nw. Airlines, Inc. v. Cnty. of Kent*, 510 U.S.

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<sup>8</sup> In any event, Wikimedia's opening brief explains how the FISC opinion supports the second prong based on publicly available information. This preserves its arguments on the point. See Appellant's Br. at 25–27; see also *Blackwelder v. Millman*,



355, 364 (1994) (“A prevailing party need not . . . defend a judgment on any ground properly raised below, so long as that party seeks to preserve, and not to change, the judgment.”).

The government argues that the meaning of “international Internet link” is in fact classified and that Wikimedia thus lacks evidence showing that the meaning of those words as used in the FISC opinion is the same as that used in the Wikimedia Allegation. But the government’s insistence that the true definition of this phrase is a secret doesn’t invalidate its concession in the FISC opinion as “concrete evidence from which a reasonable juror could return a verdict in [Wikimedia’s] favor.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). Even if “international Internet link” could conceivably be code for anything from a chihuahua to a chandelier, it’s sensible to infer that the FISC opinion uses that phrase to refer to a chokepoint cable.<sup>9</sup>

Indeed, the ordinary meaning of “international Internet link” is a connection carrying Internet traffic between two countries. And its usage in describing Upstream surveillance suggests that one of those countries must be the United States. *See, e.g.*, PCLOB Report at 40 (“Upstream collection . . . [occurs] with the compelled assistance (through a Section 702

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522 F.2d 766, 771 (4th Cir. 1975) (holding that a prevailing party “may support the judgment by urging any theory, argument, or contention which is supported by the record, even though it was specifically rejected by the lower court”).

<sup>9</sup> Wikimedia also argues that it’s reasonable to infer from government disclosures that the NSA is monitoring multiple chokepoints. But this assertion is superfluous to what Wikimedia must prove for standing, so we don’t address it further.

directive) of the providers that control the telecommunications backbone . . . . The collection therefore *does not occur at . . . foreign telephone or Internet companies*, which the government cannot compel to comply with a Section 702 directive.” (emphasis added); *id.* at 36–37 (“Once tasked, selectors used for the acquisition of upstream Internet transactions are sent to a *United States electronic communication service provider* to acquire communications that are transiting through . . . the ‘Internet backbone.’” (emphasis added)); J.A. 1003 (Bradner Decl.) (“This of course makes sense, given that public Internet traffic on [chokepoint cables] . . . is the traffic that the NSA is authorized to monitor under its Section 702 procedures.”).

To be sure, “whether an inference is reasonable cannot be decided in a vacuum; it must be considered in light of the competing inferences to the contrary.” *Sylvia Dev. Corp.*, 48 F.3d at 818 (cleaned up). But the government doesn’t offer any evidence suggesting that “international Internet link” has a counterintuitive meaning. Wikimedia’s argument that the government’s concession in the FISC opinion refers to a chokepoint cable thus falls well “within the range of reasonable probability.” *Id.* (quoting *Ford Motor Co. v. McDavid*, 259 F.2d 261, 266 (4th Cir. 1958)). And because we must draw all reasonable inferences in Wikimedia’s favor, this is sufficient to establish a genuine issue of material fact as to the second prong of the Wikimedia Allegation.

## 2.

Wikimedia next argues that summary judgment for the government wasn’t appropriate as to the third prong of the Wikimedia Allegation: that the NSA

copies all communications on a monitored link. In particular, Wikimedia asserts that this prong is supported by (1) “the government’s own disclosures”; (2) the “technical and practical necessities” of conducting Upstream surveillance; and (3) the NSA’s goal of “comprehensively acquir[ing] communications that are sent to or from its targets.” Appellant’s Br. at 28–30. Relatedly, Wikimedia contends that the court shouldn’t have excluded a portion of Bradner’s expert opinion when assessing this prong.

We agree in part. Because reasonable inferences drawn from the government’s concession in the FISC opinion establish a genuine issue of material fact as to the third prong, the district court erred in granting summary judgment to the government.

The government doesn’t dispute that Wikimedia may prove the third prong by showing that the NSA is copying all transactions on a monitored link by choice, as Wikimedia urges now, rather than by technological necessity, as it argued at the motion- to-dismiss stage. This shift in focus is hardly surprising, given Wikimedia’s acknowledgment that it’s technically feasible to conduct Upstream surveillance without copying all communications on a monitored link.

The district court, when discussing the third prong of the Wikimedia Allegation, made no mention of most of the government disclosures Wikimedia cited for its claim that the NSA is copying all communications transiting a monitored link by choice. To the extent that the court touched on copying by choice at all, it did so only in the context of excluding from its analysis Bradner’s expert opinion that discusses why the NSA might prefer link-layer copying or optical splitters (which both result in wholesale copying). We thus

conduct the analysis that the district court passed on: whether Wikimedia “set forth specific facts showing that there is a genuine issue for trial” with respect to the allegation that the NSA has elected to copy all transactions on a surveilled circuit. *Lujan v. Nat’l Wildlife Fed.*, 497 U.S. 871, 888 (1990).

As support for this proposition, Wikimedia again leads with the same statement from the 2011 FISC opinion, this time highlighting a different portion of it. The government’s concession in that case that the “NSA *will acquire* a domestic ‘about’ communication if the transaction containing the communication is routed through an international Internet link being monitored by [the] NSA” can only be true, says Wikimedia, if the NSA is copying all traffic on a surveilled circuit.<sup>10</sup> *Redacted*, 2011 WL 10945618, at \*15 (emphasis added).

The government says that this portion of the FISC opinion lacks technical precision. In particular, it points to another part of the FISC opinion that says the “NSA *may acquire* wholly domestic communications,” *id.* at \*11 n.34 (emphasis added). which it claims is inconsistent with the “will acquire” statement. This argument, however, takes the “may acquire” quote out of context.

The “may acquire” phrase comes from a portion of the opinion describing a specific kind of transaction (a

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<sup>10</sup> The “will acquire” language also appears once more in the FISC opinion, expressing essentially the same notion. *See Redacted*, 2011 WL 10945618, at \*11 (“[The] NSA likely acquires tens of thousands more wholly domestic communications every year, given that [the] NSA’s upstream collection devices *will acquire* a wholly domestic ‘about’ [communication] if it is routed internationally.” (emphasis added)).

multi-communication transaction), and not how transactions on a monitored link are generally acquired. One or more of the discrete communications contained within a single multi-communication transaction may be wholly domestic but the NSA may “lack[] sufficient information . . . to determine the location or identity” of the sender. *Id.* Accordingly, “[the] NSA *may acquire* wholly domestic communications” within a particular multi-communication transaction without knowing that it has done so.<sup>11</sup> *Id.* (emphasis added). But this says nothing about how the NSA obtained the multi-communication transaction—i.e., whether it’s because, as Wikimedia alleges, the NSA is copying all transactions on a monitored link.

The government also offers a competing interpretation of its concession in the FISC opinion. It argues that the “will acquire” quote doesn’t mean the NSA acquires *every* domestic communication on a monitored link. Why? Because, posits the government, the relevant sentence says only the NSA will acquire “a” domestic communication, not “all” such communications. While literally true, the government’s myopic reading ignores the significance of the word “a” in context.

As an indefinite article, “a” can mean “any” and precedes a “singular noun[] when the referent is unspecified.” A, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/a> (last

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<sup>11</sup> In fact, when the NSA manually reviewed a random sample of transactions collected through Upstream, it couldn’t “determine conclusively” whether 224 out of 5,081 multi-communication transactions contained wholly domestic communications. *Redacted*, 2011 WL 10945618, at \*11 n.34.

visited August 18, 2021). Therefore, the best reading of the government’s concession is that the NSA “will acquire” any single, unspecified domestic communication, so long as it’s traversing a monitored international Internet link. In the context of the “will acquire” sentence then, the NSA’s surefire acquisition of “a” domestic communication on a surveilled circuit is equivalent to its acquisition of “all” such transactions.

Judge Rushing says that we take the government’s concession in the FISC opinion out of context. Not so. The fact that the “will acquire” phrase appears in a section of the FISC opinion explaining that the NSA intentionally designed its collection devices to acquire wholly domestic communications is entirely consistent with the inference that the NSA has chosen to copy all communications on a monitored link.

Moreover, the government’s concession isn’t a stray statement swimming against a tide of contrary text. In fact, only a few subparts of the eighty-page FISC opinion are relevant to how the NSA acquires transactions. *See Redacted*, 2011 WL 10945618, at \*9–16 (discussing the scope of the NSA’s Upstream collections and the NSA’s targeting procedures). And it’s telling that the FISC opinion recites the “will acquire” language a second time, *see id.* at \*11, when describing the government’s collection of wholly domestic communications in a portion of the opinion dedicated to “the comprehensiveness of the NSA’s collection practices,” Concurrence at 66. Indeed, neither the government nor my colleague have pointed to a single sentence in the other seventy-nine

pages of the FISC opinion that refutes Wikimedia’s interpretation of the government’s concession.<sup>12</sup>

3.

Wikimedia’s “grab-bag” of other support for the third prong, Appellee’s Br. at 51, doesn’t contain standalone proof that the NSA is copying before filtering. For example, the NSA’s desire to be “comprehensive[]” in its surveillance, PCLOB Report at 10, 123, doesn’t necessarily mean that its collection of communications is exhaustive, especially given the agency’s technical, logistical, and financial restraints in the face of competing mission priorities—all of which are classified.

But Wikimedia’s supplemental evidence is at least consistent with its reasonable interpretation of the government’s concession in the FISC opinion, and the government again fails to offer any contradictory evidence that casts doubt on those inferences. Wikimedia thus has established a genuine issue of material fact with respect to the third prong of the Wikimedia Allegation and its Article III standing.<sup>13</sup>

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<sup>12</sup> At best, Judge Rushing’s belief that the government’s concession in the FISC opinion can be reasonably interpreted another way confirms that Wikimedia has raised a genuine issue of material fact sufficient to preclude summary judgment. *See W. C. English, Inc. v. Rummel, Klepper & Kahl, LLP*, 934 F.3d 398, 404 (4th Cir. 2019) (explaining that when there are “two reasonable interpretations” of a phrase, “the granting of summary judgment for either side [is] improper” (cleaned up)).

<sup>13</sup> Because we hold that the case must nonetheless be dismissed because of the state secrets privilege, we don’t tackle Wikimedia’s claim that the district court abused its discretion in excluding some of Bradner’s opinions. Nor do we address

## B.

Having confirmed our jurisdiction, we now turn to Wikimedia’s contention that the court erred in relying on the state secrets privilege to deny its motion to compel discovery and grant the government’s motion to dismiss because § 1806(f) of FISA displaces the privilege.<sup>14</sup> We review de novo both questions of statutory interpretation, *United States v. Abugala*, 336 F.3d 277, 278 (4th Cir. 2003), and “legal determinations involving state secrets,” *El-Masri v. United States*, 479 F.3d 296, 302 (4th Cir. 2007). Because we conclude that § 1806(f) is relevant only when a litigant challenges the admissibility of the government’s surveillance evidence, it doesn’t apply here. Instead, we apply the state secrets privilege and hold, like the district court, that it forecloses further litigation.

### 1.

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Wikimedia’s arguments about the merits of Schulzrinne’s opinions.

<sup>14</sup> Judge Motz chides us for (as she describes it) rushing to decide this issue in the face of the Supreme Court’s grant of certiorari in *Fazaga*. But this case was briefed and argued months before the Court decided to take *Fazaga*, and we have given it all due deliberation. Moreover, our superior Court is often informed by the views of the circuits. *See, e.g., Hertz Corp. v. Friend*, 559 U.S. 77, 92 (“In an effort to find a single, more uniform interpretation of the statutory phrase, we have reviewed the Courts of Appeals’ divergent . . . interpretations.”). As we’ve done in the past, we respectfully offer our perspective on this “novel and difficult question” (Dissent at 56) before the Court provides a definitive answer. *See, e.g., Int’l Refugee Assistance Project v. Trump*, 883 F.3d 233 (4th Cir. 2018) (affirming the district court’s grant of a preliminary injunction despite the Supreme Court’s grant of a writ of certiorari on the same issues).



The parties first debate the origin of the state secrets privilege. Wikimedia calls it a common law privilege, which Congress can abrogate by passing a statute that “speak[s] directly to the question addressed by” the privilege, even if the statute doesn’t “affirmatively proscribe it.” *United States v. Texas*, 507 U.S. 529, 534 (1993). The government says the privilege is “constitutionally grounded,” Appellee’s Br. at 11, and can only be supplanted where “Congress specifically has provided” for a statute to do so. *Dep’t of Navy v. Egan*, 484 U.S. 518, 530 (1988).

We have indeed observed that the state secrets privilege is an evidentiary rule “bas[ed] in the common law of evidence.” *El-Masri*, 479 F.3d at 303–04; *see also Gen. Dynamics Corp. v. United States*, 563 U.S. 478, 485 (2011) (“*Reynolds* . . . decided a purely evidentiary dispute by applying evidentiary rules.”). But we’ve also recognized that the privilege “performs a function of constitutional significance[] because it allows the executive branch to protect information whose secrecy is necessary to its military and foreign-affairs responsibilities.” *El-Masri*, 479 F.3d at 303; *see also United States v. Nixon*, 418 U.S. 683, 711 (1974) (“[T]o the extent [an evidentiary privilege] relates to the effective discharge of a President’s powers, it is constitutionally based.”).

Fortunately, we need not decide today who has the better argument. As we explain, even if we agree with Wikimedia that the state secrets privilege is grounded in the common law (which Congress may abrogate), FISA doesn’t “speak directly” to the situation here. *Texas*, 507 U.S. at 534.

2.

a.

37a

“We begin, as always in deciding questions of statutory interpretation, with the text of the statute.” *Othi v. Holder*, 734 F.3d 259, 265 (4th Cir. 2013). The relevant subsection of FISA provides:

Whenever a court or other authority is notified pursuant to subsection (c) or (d) of this section, or whenever a motion is made pursuant to subsection (e) of this section, or whenever any motion or request is made by an aggrieved person pursuant to any other statute or rule of the United States or any State before any court or other authority of the United States or any State to discover or obtain applications or orders or other materials relating to electronic surveillance or to discover, obtain, or suppress evidence or information obtained or derived from electronic surveillance under this chapter, the United States district court or, where the motion is made before another authority, the United States district court in the same district as the authority, shall, notwithstanding any other law, if the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States, review in camera and ex parte the application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted. In making this determination, the court may disclose to the aggrieved person, under appropriate security procedures and protective orders,

portions of the application, order, or other materials relating to the surveillance only where such disclosure is necessary to make an accurate determination of the legality of the surveillance.

50 U.S.C. § 1806(f). FISA further defines an “aggrieved person” as a “person who is the target of an electronic surveillance or any other person whose communications or activities were subject to electronic surveillance.” *Id.* at § 1801(k).

The first lines of this subsection describe three conditions that trigger the district court’s in camera and ex parte review obligations. These are: (i) when the federal or state government notifies the court that it intends to use electronic surveillance information against an aggrieved person, which it’s required to do before introducing such evidence in a judicial proceeding under § 1806(c) or (d); (ii) when an aggrieved person makes a motion to suppress electronic surveillance information used by the government under § 1806(e); and (iii) when an aggrieved person makes “any motion or request . . . pursuant to any other statute or rule . . . to discover or obtain applications or orders or other materials relating to electronic surveillance or to discover, obtain, or suppress evidence or information obtained or derived from electronic surveillance.” *Id.* at § 1806(f).

b.

Relying heavily on *Fazaga*, Wikimedia claims that the third condition unambiguously encompasses the circumstances at hand: Wikimedia is an aggrieved person that made a motion before the district court under Federal Rule of Civil Procedure 37(a) to compel

discovery of “materials relating to electronic surveillance.” *Id.* at § 1806(f). Wikimedia thus reads § 1806(f) as a free-floating right to obtain information related to the government’s electronic surveillance pursuant to any (and all) federal statutes or rules.

But “[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.” *Healthkeepers, Inc. v. Richmond Ambulance Auth.*, 642 F.3d 466, 471 (4th Cir. 2011) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). “This includes employing various grammatical and structural canons of statutory interpretation which are helpful in guiding our reading of the text.” *Id.* (citing *United Sav. Ass’n. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988)).

Reading the third condition in context reveals that Wikimedia’s gloss makes for a shiny but ill-fitting shoe. Both parties agree that § 1806(f) may apply regardless of who initiated the suit. But we agree with the government that § 1806(f) describes procedures for determining the admissibility of electronic surveillance information only when the *government* seeks to use such evidence in a particular proceeding—whether civil or criminal. Thus, even assuming that Wikimedia is an aggrieved person,<sup>15</sup> we conclude that it can’t use § 1806(f) to force the government to introduce electronic surveillance information into this case. To the extent our

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<sup>15</sup> Given our assumption, we don’t have to determine what a litigant must prove to qualify as an aggrieved person and whether Wikimedia has done so.

reasoning, as laid out below, is inconsistent with *Fazaga*, we decline to follow our sister circuit.

“[W]e rely on the principle of *noscitur a sociis*—a word is known by the company it keeps—to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress.” *Yates v. United States*, 574 U.S. 528, 543 (2015) (cleaned up). Both of the specific conditions in § 1806(f) (notice of government intent to use surveillance information and a motion to suppress) presume the government’s introduction of surveillance evidence into the proceedings. The subsequent general condition “is therefore appropriately read to refer, not to any [motion],” as Wikimedia asserts, “but specifically to the subset” of motions contingent on the government’s use of surveillance evidence. *Id.* at 544; *see also id.* at 543 (explaining that the meaning of a word in a list may be limited by the other enumerated terms, “even though the list began with the word ‘any’”).

Relatedly, where “general words follow specific words in a statutory enumeration,” the *ejusdem generis* canon counsels that “the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.” *Wash. State Dep’t of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003); *see also CSX Transp., Inc. v. Ala. Dept. of Revenue*, 562 U.S. 277, 295 (2011) (“We typically use *ejusdem generis* to ensure that a general word will not render specific words meaningless.”). Here, if § 1806(f)’s third condition requiring the district court to act on “any motion or request” were as “all encompassing” as Wikimedia alleges, it would render the second condition superfluous. *See Yates*, 574 U.S.

at 546. “Congress would have had no reason to refer specifically to [motions to suppress]”—in fact, it’s “hard to see why [Congress] would have needed to include the examples at all.” *Id.* at 545–46.

It makes more sense to conclude that, by including the two preceding conditions, Congress signaled its intent to “cabin the contextual meaning” of the third condition. *Id.* at 543. Like its predecessors, the third condition thus applies only when an aggrieved person makes a motion or request *in response* to the government’s attempt to use surveillance evidence in a proceeding.

This interpretation accords with the limitations that Congress attached to the third condition on the back end. Section 1806(f) specifies that the litigant’s motion must be “to discover, obtain, or suppress.” These are familiar “procedural motions pertaining to the admissibility of evidence.” *Fazaga*, 965 F.3d at 1083 (Butamay, J. dissenting). The direct objects of those actions are the “applications or orders or other materials relating to electronic surveillance” or the “evidence or information obtained or derived from [such] surveillance.” 50 U.S.C. § 1806(f). And the district court’s review is correspondingly restricted to the “application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance . . . was lawfully authorized and conducted.” *Id.*

Here, too, *noscitur a sociis* and *ejusdem generis* color our understanding of “other material” and “such other material” to mean those like a FISA application or order—i.e., documents related to officially approving and defining the scope of FISA surveillance that can thus be used to determine the legality of the

government’s surveillance operations. *See also Such*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/such> (last visited August 18, 2021) (defining “such” as “of the character, quality, or extent previously indicated or implied”).

In short, the third condition in § 1806(f) is confined to procedural requests related to a circumscribed body of evidence (i.e., the government’s FISA documentation and the resulting intelligence). This corresponds with interpreting § 1806(f) as directed towards determining the admissibility of the fruits of the government’s surveillance—a question that arises only when the government offers such evidence in a case—and not as an unbounded invitation for litigants to acquire any information they desire about the government’s intelligence programs.

c.

The remedy available to a successful movant confirms our reading of this condition. As the very next subsection provides:

If the United States district court pursuant to subsection (f) determines that the surveillance was not lawfully authorized or conducted, it shall, in accordance with the requirements of law, suppress the evidence which was unlawfully obtained or derived from electronic surveillance of the aggrieved person or otherwise grant the motion of the aggrieved person. If the court determines that the surveillance was lawfully authorized and conducted, it shall deny the motion of the aggrieved person except to the extent that due process requires discovery or disclosure.

50 U.S.C. § 1806(g).

The paradigmatic remedy is thus the suppression of evidence. It's even the focus of the subsection's title: "Suppression of evidence; denial of motion." *Id.*; see also *Fla. Dept. of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008) ("[A] subchapter heading cannot substitute for the operative text of the statute. Nonetheless, statutory titles and section headings are tools available for the resolution of a doubt about the meaning of a statute." (cleaned up)).<sup>16</sup> And a litigant would seek such a remedy only in response to the government's introduction of surveillance evidence into the case.

By contrast, consider the mismatch between the remedy described in § 1806(g) and the remedy that Wikimedia seeks. Rather than request the suppression of evidence, Wikimedia wants the district court to review the evidence requested by the motion to compel to decide both standing and the merits of its unlawful surveillance claims. But that approach would contort the §1806(f) and (g) procedures beyond recognition. The statutory text doesn't permit the district court to rule on anything other than the motion at hand or consider evidence beyond the FISA application and related materials, let alone conduct an entire trial in camera and grant final judgment on the merits of the underlying claim.<sup>17</sup>

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<sup>16</sup> The titles of § 1806 as a whole, "Use of information," and § 1806(f), "In camera and ex parte review by district court," are less illuminating but remain consistent with the notion that it's the government's use of information that matters.

<sup>17</sup> Wikimedia argues that this emphasis on motions to suppress is misguided because § 1806(f) expressly includes more



We note that every other subsection under § 1806 speaks to the government’s use of electronic surveillance evidence. Section 1806(a) provides that such evidence “may be used and disclosed by Federal officers and employees” in compliance with minimization procedures; (b) says that such evidence “may only be used in a criminal proceeding with the advance authorization of the Attorney General”; (c) and (d) mandate that federal and state governments give notice before using such information against an aggrieved person; (e) permits an aggrieved person to file a motion to suppress such evidence when used against him; (i) requires that the government destroy information unintentionally acquired through electronic surveillance; (j) instructs a court about notifying an aggrieved person when the government conducts emergency surveillance without pre-authorization; and (k) allows federal officers who conduct electronic surveillance to coordinate with federal or state law enforcement officers.<sup>18</sup> We think it unlikely that Congress stashed away an expansive right for litigants within a statute directed entirely toward the government’s use of information. See *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001) (“Congress . . . does not, one might say, hide elephants in mouseholes.”).

Still, Wikimedia resists this interpretation, contending that the government’s reading effectively

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than that. Even accepting that as true, we are confident that it doesn’t contemplate what Wikimedia seeks in this litigation.

<sup>18</sup> Section 1806(h) is the only subsection that doesn’t expressly relate to the government’s use of information, but it merely provides that a district court’s decisions under subsection (g) are final and binding upon all other federal courts.

means that a plaintiff can only rely on § 1806(f) after the government has given notice that it's using electronic surveillance information per § 1806(c) or (d),<sup>19</sup> which renders the two other conditions for obtaining in camera and ex parte review superfluous. That might be the case if the government were always scrupulous in providing such notice. But even the government admits that there has been some “dispute” about its withholding of notice in the past, though it claims to have “redoubled its efforts” since the Solicitor General’s 2013 confession of error on this front. Oral Argument at 35:07–35:56.

It’s therefore reasonable for Congress to have crafted additional paths for ascertaining the legality of electronic surveillance evidence that the government intends to marshal against a litigant who can show that it is an “aggrieved person,” even when the government has violated its duty to provide notice of such use. *Cf. United States v. Belfield*, 692 F.2d 141, 146 (D.C. Cir. 1982) (explaining that a litigant “claim[ing] that he has been the victim of an illegal surveillance [operation] and seek[ing] discovery of the [surveillance records] to ensure that no fruits thereof are being used against him” can trigger the § 1806(f) procedures even though the government “has purported not to be offering any [such] evidence”).

Additionally, Wikimedia asserts that the phrase “notwithstanding any other law” is an indication that FISA displaces the state secrets privilege. But that clause applies only when the plaintiff has fulfilled one

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<sup>19</sup> As mentioned above, § 1806(c) and (d) require federal and state governments, respectively, to give notice to the court or to the aggrieved person when they intend to use surveillance evidence against such a person in a judicial proceeding.

of the three pre-requisite conditions for triggering the court's in camera and ex parte review, and the Attorney General has filed the necessary affidavit. Only then "shall" the court apply the §1806(f) in camera procedures, "notwithstanding any other law" that would require some other, public resolution of the litigant's motion challenging the government's use of electronic surveillance information. *See* S. Rep. No. 95-701, at 63 ("Although a number of different procedures might be used to attack the legality of the surveillance, it is this procedure 'notwithstanding any other law' that must be used to resolve the question. . . . This is necessary to prevent the carefully drawn procedures in subsection [(f)] from being bypassed by the inventive litigant using a new statute, rule or judicial construction.").<sup>20</sup>

And although § 1806(f) and the state secrets privilege are triggered by an affidavit from the government, it doesn't follow that FISA speaks directly to the state secrets privilege, as Wikimedia claims. Tellingly, these procedures contemplate different affiants. Because the privilege is a shield to protect state secrets from disclosure, the head of the department controlling the information must assert it. By contrast, FISA applies when the government is attempting to offer electronic surveillance evidence in a case. In such an instance, responsibility for invoking § 1806(f) falls to the one who wields the sword: the Attorney General (or his delegees, under 50 U.S.C. §

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<sup>20</sup> In the draft of the statute discussed by this report, what is now subsection (f) was located under subsection (e). *See* S. Rep. No. 95-701, at 88. Despite the different lettering, the substance of the provision was largely the same. We have edited the quote to correspond with the current organization of § 1806's provisions.

1801(g)). The triggering mechanisms for each procedure thus strengthen the inference that FISA wasn't intended to displace the state secrets privilege.

d.

Wikimedia further contends that limiting the applicability of § 1806(f) and (g) to when the government offers electronic surveillance evidence in a case is inconsistent with FISA as a whole. In particular, Wikimedia complains that if § 1806(f) doesn't displace the state secrets privilege, the government can invoke the privilege "in *every* FISA suit brought by a civil plaintiff." Reply Br. at 5. This would, in turn, give the government "nearly exclusive control over challenges to FISA surveillance" and "profoundly undermine the civil remedies that Congress enacted for surveillance abuses[] and the very purpose of FISA itself," which Wikimedia asserts is "to ensure judicial review of executive branch surveillance." Appellant's Br. at 51–52.

We are not convinced. The government knows that it carries the burden "to satisfy the reviewing court that the *Reynolds* reasonable-danger standard is met," *Abilt v. CIA*, 848 F.3d 305, 312 (4th Cir. 2017) (cleaned up), and that the judiciary is "firmly in control of deciding whether an executive assertion of the state secrets privilege is valid," *El-Masri*, 479 F.3d at 304–05. Indeed, the court stands as a gatekeeper to the privilege, and "[w]e take very seriously our obligation to review the [government's claims] with a very careful, indeed a skeptical, eye," *Abilt*, 848 F.3d at 312 (quoting *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007)), so that "the state secrets privilege is asserted no more frequently and sweepingly than necessary," *id.*

(quoting *Ellsberg v. Mitchell*, 709 F.2d 51, 58 (D.C. Cir. 1983)). There have thus been FISA cases where the government hasn't invoked the privilege, *see, e.g., Am. Civil Liberties Union v. Clapper*, 785 F.3d 787, 801–03 (2d Cir. 2015), or has invoked the privilege narrowly, *see, e.g., Fazaga*, 965 F.3d at 1042 (“Here, although the Government has claimed the *Reynolds* privilege over certain state secrets, it has not sought dismissal of the Fourth Amendment and FISA claims based on its invocation of the privilege.”).

Nor do we see any actual contradictions between FISA and the *Reynolds* privilege. Congress provided for judicial review of executive branch surveillance, but it did so to “strike[] a fair and just balance between protection of national security and protection of personal liberties.” S. Rep. No. 95-604, pt. 1, at 7 (1978). The government’s reading of § 1806(f) fits that schema exactly. In that provision, Congress permits the government to use electronic surveillance evidence in court against a litigant while withholding materials related to that surveillance from that individual in the interests of national security. But in the same breath, Congress also allows an aggrieved person to challenge the government’s use of such evidence and have a court evaluate the lawfulness of the government’s actions.

Far from giving the government exclusive control over challenges to surveillance, we think this reading of § 1806(f) acknowledges the court’s role in preserving the compromise Congress made between individual rights and national security. *See Belfield*, 692 F.2d at 149 (“If anything, the legality inquiry mandated by FISA is easier for a court to perform *ex parte* than the pre-FISA inquiry into the legality of warrantless electronic surveillance . . .”). For instance,

when “the Court believes that disclosure is necessary to make an accurate determination of legality, but the Government argues that to do so . . . would damage the national security,” § 1806(f) says that “the Government must choose— either disclose the material or forgo the use of the surveillance-based evidence.” *See* S. Rep. No. 95-701, at 65.

Additionally, judicial review occurs at another point in the FISA process. “Congress created a comprehensive scheme in which the [FISC] evaluates the Government’s certifications, targeting procedures, and minimization procedures— including assessing whether the targeting and minimization procedures comport with the Fourth Amendment,” *Clapper*, 568 U.S. at 421, which we described more fully in our prior opinion, *see Wikimedia Found.*, 857 F.3d at 200–01. “Any dissatisfaction that [Wikimedia] may have about the [FISC]’s rulings—or the congressional delineation of that court’s role—is irrelevant” to our analysis. *Clapper*, 568 U.S. at 421.

In sum, the government’s reading of § 1806 is entirely consistent with ensuring judicial review of executive branch surveillance. That’s not surprising considering the history of courts uniformly using *in camera* procedures to determine the legality of foreign- intelligence surveillance even before FISA’s enactment. *See Belfield*, 692 F.2d at 149 & n.38 (collecting cases). As the government observes, “[t]hat such [in camera] procedures comfortably coexisted with the [state secrets] privilege before FISA underscores that codification of *in camera* procedures for certain purposes,” without more, doesn’t suggest that Congress intended to displace the privilege. Appellee’s Br. at 35; *see also* H.R. Rep. No. 95-1283 (1978) (“[O]nce the surveillance is determined to be

unlawful, the intent of [§ 1806] is to leave to otherwise existing law the resolution of what, if anything, is to be disclosed.”).

The only “inconsistency” between FISA and the state secrets privilege Wikimedia identifies is that Congress provided civil remedies for violations of FISA that a plaintiff may have to forego when the government invokes the *Reynolds* privilege. These include 50 U.S.C. § 1810, whereby a plaintiff may recover damages from a person who is criminally prosecuted under 50 U.S.C. § 1809 for intentionally engaging in, disclosing, or using electronic surveillance in violation of FISA; and 18 U.S.C. § 2712, which permits a plaintiff to recover damages from the United States for a willful violation of FISA.

But this problem isn’t unique to FISA. Every state secrets case presents the possibility that a plaintiff will be denied—in the interests of national security—a remedy available by law. *See El-Masri*, 479 F.3d at 313 (“[T]he successful interposition of the state secrets privilege imposes a heavy burden on the party against whom the privilege is asserted . . . not through any fault of his own, but because his personal interest in pursuing his civil claim is subordinated to the collective interest in national security.”); *Fitzgerald v. Penthouse Int’l, Ltd.*, 776 F.2d 1236, 1238 n.3 (“When the state secrets privilege is validly asserted, the result is unfairness to individual litigants—through the loss of important evidence or dismissal of a case—in order to protect a greater public value.”); *Sterling v. Tenet*, 416 F.3d 338, 348 (4th Cir. 2005) (“[I]n limited circumstances like these, the fundamental principle of access to courts must bow to the fact that a nation without sound intelligence is a nation at risk.”).

Accordingly, we conclude that § 1806(f) doesn't displace the state secrets privilege, even in actions pertaining to government-run electronic surveillance.

3.

Because FISA's discovery procedures don't govern here, we turn to whether the district court properly applied the state secrets privilege. We hold that the privilege indeed requires dismissal of this case.

a.

When a state secrets question arises, a court applies a three-part analysis. First, "the court must ascertain that the procedural requirements for invoking the state secrets privilege have been satisfied"—i.e., that the government properly made a formal claim of privilege. *El-Masri*, 479 F.3d at 304. Wikimedia doesn't dispute that the government satisfied this condition.

Second, "the court must decide whether the information sought to be protected qualifies as privileged" because it is a state secret. *Id.* That is, it must determine, "from all the circumstances of the case," whether "there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." *Reynolds*, 345 U.S. at 10.

This inquiry "pits the judiciary's search for truth against the Executive's duty to maintain the nation's security." *El-Masri*, 479 F.3d at 305. Accordingly, "[t]he degree to which such a reviewing court should probe depends in part on the importance of the assertedly privileged information to the position of the party seeking it": "where there is a strong showing of necessity, the claim of privilege should not be lightly



accepted,” but “even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that [state] secrets are at stake.” *Id.*

b.

The district court found that “the entities subject to Upstream surveillance activity and the operational details of the Upstream collection process” were state secrets because their disclosure “would (i) undermine ongoing intelligence operations, (ii) deprive the NSA of existing intelligence operations, and significantly, (iii) provide foreign adversaries with the tools necessary both to evade U.S. intelligence operations and to conduct their own operations against the United States and its allies.” *Wikimedia Found.*, 427 F. Supp. 3d at 613. The court thus sustained the government’s claim of privilege for the seven categories of information identified by the NSA.

Wikimedia doesn’t meaningfully dispute the court’s finding on this prong either. Instead, it quibbles that to the extent the seven categories cover material that the government has already disclosed, the district court’s ruling is overly broad. But we don’t read the court’s decision to make privileged what’s already public. The court instead concluded that because of the state secrets privilege, Wikimedia couldn’t compel the government to produce, or otherwise continue to pursue litigation that would risk the disclosure of, additional information related to those categories. *See Wikimedia Found.*, 427 F. Supp. 3d at 611.

And based on the totality of the circumstances, including the Coats and Barnes affidavits, we agree that “there is a reasonable danger” to national

security should these facts be disclosed. *El-Masri*, 479 F.3d at 305; *see also id.* (“Frequently, the explanation of the department head who has lodged the formal privilege claim . . . is sufficient to carry the Executive’s burden.”).

This leads us to the third step, which is to resolve “how the matter should proceed in light of the successful privilege claim.” *El-Masri*, 479 F.3d at 304. Once a court determines that certain facts are state secrets, they are “absolutely protected from disclosure.” *Id.* at 306. “[N]o attempt is made to balance the need for secrecy of the privileged information against a party’s need for the information’s disclosure.” *Id.*

As a result, “[i]f a proceeding involving state secrets can be fairly litigated without resort to the privileged information, it may continue.” *Id.* But if “any attempt to proceed will threaten disclosure of the privileged matters, dismissal is the proper remedy.” *Id.* (cleaned up). The latter situations include where: (1) “the plaintiff cannot prove the prima facie elements of his or her claim without privileged evidence”; (2) “even if the plaintiff can prove a prima facie case without resort to privileged information, . . . the defendants could not properly defend themselves without using privileged evidence”; and (3) “further litigation would present an unjustifiable risk of disclosure.” *Abilt*, 848 F.3d at 313–14.<sup>21</sup>

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<sup>21</sup> Wikimedia asserts (without further explanation) that the third basis for invoking the state secrets privilege “wrongly collapses the *Reynolds* privilege and the *Totten* [*v. United States*, 92 U.S. 105 (1876)] bar.” Appellant’s Br. at 58 n.19 (citing *Gen. Dynamics*, 563 U.S. at 485). “*Totten* has come to primarily represent . . . a categorical bar on actions to enforce secret

Here, the district court determined that both the second and third situations apply such that “dismissal is the appropriate, and only available, course of action.” *Wikimedia Found.*, 427 F. Supp. 3d at 611. Wikimedia now argues that because it established a prima facie case for standing using public evidence, the court should have reviewed the purportedly privileged material in camera to determine the validity—or at least the existence—of the government’s hypothetical defense before ordering the case dismissed.

We agree with the district court that in camera review in this instance would fly in the face of the state secrets privilege as espoused by “both Supreme Court precedent and our own cases.” *Sterling*, 416 F.3d at 345. A district court may consider any evidence it deems necessary at step two of the *Reynolds* inquiry—i.e., when determining whether the information at issue comprises state secrets. *See id.* (“There may . . . be cases where the necessity for evidence is sufficiently strong and the danger to national security sufficiently unclear that in camera review of all materials is required to evaluate the claim of privilege.”). But after a court makes that determination, the privileged evidence is excised from the case, and not even the court may look at such material in camera. *See id.* (“[W]hen a judge has

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contracts for espionage” that leads to dismissal at the pleading stage “without ever reaching the question of evidence,” but it rested “on the proposition that a cause cannot be maintained if its trial would inevitably lead to the disclosure of privileged information.” *El-Masri*, 479 F.3d at 306 (citing *Totten*, 92 U.S. at 107; *Reynolds* 345 U.S. at 11 n.26). *Abilt* held that dismissal is appropriate in such a circumstance, and we are bound by circuit precedent.

satisfied himself that the dangers asserted by the government are substantial and real, he need not—indeed, should not—probe further.”); *El-Masri*, 479 F.3d at 306 (“On this point, *Reynolds* could not be more specific: ‘When the occasion for the privilege is appropriate, the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.’” (cleaned up)).

Nevertheless, Wikimedia contends that we should hold that a court dismissing a claim in the second situation (for defenses made unavailable by the state secrets privilege) must first determine that the putative defense is “valid,” even if that requires limited review of privileged material by the court. See *In re Sealed Case*, 494 F.3d 139, 149 (D.C. Cir. 2007). But even if we adopted that rule—a decision we leave for another day—it wouldn’t apply here. In the very case that Wikimedia cites for this proposition, the D.C. Circuit distinguishes between a situation where the government alleges that there are “possible defenses that [the defendant] cannot pursue without resort to privileged materials,” in which dismissal is not required unless the government demonstrates that one of those defenses is valid, and where “*any* valid defense . . . would require resort to privileged materials,” in which dismissal is warranted without further ado. *Id.* at 149 (emphasis added).

The latter ties into the third condition for dismissal under the state secrets privilege: where “further litigation would present an unjustifiable risk of disclosure.” *Abilt*, 848 F.3d at 314. Circumstances in which any valid defense would require resort to privileged materials are those in which “state secrets are so central to [the] proceeding that it cannot be

litigated without threatening their disclosure.” *El-Masri*, 479 F.3d at 308; *see also In re Sealed Case*, 494 F.3d at 149.

That’s the situation here. Wikimedia claims that the NSA is acquiring all communications on a chokepoint cable that it is monitoring. There’s simply no conceivable defense to this assertion that wouldn’t also reveal the very information that the government is trying to protect: how Upstream surveillance works and where it’s conducted. Indeed, “the whole object of [Wikimedia’s] suit and of the discovery” is to inquire into “the methods and operations of the [NSA]”—“a fact that is a state secret.”<sup>22</sup> *Sterling*, 416 F.3d at 348.

Wikimedia contends that “the district court need not conclusively determine that Wikimedia is or was in fact subject to Upstream surveillance.” Appellant’s Br. at 61–62. Even at trial, says Wikimedia, the factfinder need only find by a preponderance of the evidence that the NSA copied Wikimedia’s communications.

We, however, can’t condone holding a one-sided trial. At the summary-judgment stage, the nonmovant

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<sup>22</sup> Judge Motz says that the district court could ascertain in camera the validity of the government’s “discrete” defenses that (1) it’s not copying all communications on a monitored link, and (2) it’s hypothetically possible for Upstream to avoid Wikimedia’s communications. Dissent at 60-61. Respectfully, a hypothetical is not a defense to reasonable inferences drawn from specific facts (here, a 2011 FISC opinion). Yet that’s all the government can offer because how the NSA is actually conducting Upstream is a state secret. That’s exactly why the case must be dismissed. In short, there isn’t a state secrets problem because the government offers only hypothetical defenses; the government only offers hypothetical defenses because there’s a state secrets problem.

need only support its claims with specific facts that “will be taken to be true.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). But “at the final stage, those facts (if controverted) must be supported adequately by the evidence adduced at trial.” *Id.* (cleaned up). And given that the government’s hands are so clearly tied by state secrets, “it would be a mockery of justice for the court” to permit Wikimedia to substantiate its claims by presenting its half of the evidence to the factfinder as if it were the whole. *In re Sealed Case*, 494 F.3d at 148 (quoting *Molerio v. FBI*, 749 F.2d 815, 825 (D.C. Cir. 1984)).

The district court thus correctly held that, in the face of the state secrets privilege, Wikimedia can’t continue to litigate the Wikimedia Allegation to support standing.<sup>23</sup>

### C.

In a last-ditch attempt to avoid dismissal, Wikimedia maintains that Upstream inflicted three additional injuries that independently establish standing without implicating state secrets (and therefore may continue to be litigated): (1) a drop in the readership of certain Wikipedia pages; (2) the cost of implementing protective measures against surveillance over its communications; and (3) third party standing.

On the first, we conclude for substantially the reasons given by the district court that Wikimedia’s decline in readership isn’t “fairly traceable to the

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<sup>23</sup> Although this case can’t proceed to the merits because of the state secrets privilege, that result is not a *fait accompli* in every case, as Judge Motz fears. Rather, “[t]he *El-Masri*, 479 F.3d at 306.

challenged action” such that it confers standing. *Clapper*, 568 U.S. at 409.

The second and third theories of standing aren’t actually independent of the Wikimedia Allegation. Both require that Wikimedia establish an injury-in-fact. *See id.* at 402 (“[R]espondents cannot manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending.”); *Freilich*, 313 F.3d at 215 (“Our [third-party] standing inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise. . . . [A] plaintiff must demonstrate . . . an injury-in-fact.”). Because further litigation premised on the Wikimedia effect of a successful interposition of the state secrets privilege by the United States will vary from case to case.” Allegation—the only remaining and viable injury-in-fact—is foreclosed by the state secrets privilege, so too are these supplementary theories of standing.

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To sum up, evidence of the Wikimedia Allegation establishes a genuine issue of material fact as to standing, but the state secrets privilege prevents further litigation of that issue. And because Wikimedia’s other alleged injuries don’t support standing, the district court’s judgment dismissing this case is

*AFFIRMED.*

DIANA GRIBBON MOTZ, concurring in part and dissenting in part:

I concur in Parts I and II.A of Judge Diaz’s majority opinion. Specifically, I concur in the holding that the district court erred in granting summary judgment as to Wikimedia’s standing. But I cannot join the remainder of Judge Diaz’s opinion. For reasons unclear to me, both of my colleagues rush to decide a novel and difficult question that the Supreme Court will resolve within the year.

I.

My colleagues conclude that § 106(f) of the Foreign Intelligence Surveillance Act (“FISA”), 50 U.S.C. § 1806(f), does not displace the common law state secrets privilege. *See* Maj. Op. Part II.B.2; Judge Rushing Concurring Op. at 64. Two months ago, the Supreme Court granted certiorari on this very question. *See Fazaga v. Fed. Bureau of Investigation*, 965 F.3d 1015 (9th Cir. 2020), *cert. granted*, 2021 WL 2301971 (U.S. June 7, 2021). I would stay this case pending the outcome of the case before the Supreme Court.

In *Fazaga*, the Ninth Circuit closely examined FISA’s text and history and concluded that “the procedures outlined in § 1806(f) [of FISA] . . . constitute Congress’s specific and detailed description for how courts should handle claims by the government that the disclosure of material relating to or derived from electronic surveillance would harm national security.” *Id.* at 1048 (cleaned up). The *Fazaga* court reasoned that FISA’s “plain language, statutory structure, and legislative history demonstrate that Congress intended FISA to displace



the state secrets privilege and its dismissal remedy with respect to electronic surveillance.” *Id.* at 1052.

When, as here, the Supreme Court will, in a matter of months, address a question that is central to a case before a lower court, that court should exercise its “inherent” “power to stay proceedings.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). We have followed precisely this practice in the past, *see Hickey v. Baxter*, 833 F.2d 1005 (4th Cir. 1987) (unpublished table decision) (holding that it was proper to “stay[] proceedings while awaiting guidance from the Supreme Court in a case that could decide relevant issues”), as have our sister circuits, *see, e.g., Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, 746 F.3d 42, 47–48 (2d Cir. 2014); *Golinski v. U.S. Office of Personnel Mgmt.*, 724 F.3d 1048, 1050 (9th Cir. 2013); *Trump Plaza Assocs. v. NLRB*, 679 F.3d 822, 826 (D.C. Cir. 2012). In such cases, staying our hand to await the Supreme Court’s guidance “is an expression of prudence, judicial restraint, and respect for the role of a [lower court] that must scrupulously adhere to the instructions of” a higher authority. *Benisek v. Lamone*, 266 F. Supp. 3d 799, 808 (D. Md. 2017). With these principles in mind, I would not attempt to resolve a question that the Supreme Court will soon answer.

## II.

Because I would not, at this time, reach the question whether FISA displaces the state secrets privilege, judicial restraint similarly counsels against determining whether the state secrets privilege requires dismissal of Wikimedia’s case. I will not do that here. But I must note that Judge Diaz’s state

secrets analysis, *see* Maj. Op. Part II.B.3, does raise some serious concerns.<sup>1</sup>

That opinion stands for a sweeping proposition: A suit may be dismissed under the state secrets doctrine, after minimal judicial review, even when the Government premises its only defenses on far-fetched hypotheticals. Maj. Op. at 52. This conclusion marks a dramatic departure from *United States v. Reynolds*, 345 U.S. 1 (1953), and its progeny. And it relegates the judiciary to the role of bit player in cases where weighty constitutional interests ordinarily require us to cast a more “skeptical eye.” *Abilt v. CIA*, 848 F.3d 305, 312 (4th Cir. 2017) (cleaned up).

In *Reynolds*, the Supreme Court cautioned that, even in cases implicating national security, “[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.” 345 U.S. at 9–10. Thus, the Court developed a “formula of compromise,” mindful that “[t]oo much judicial inquiry into [a] claim of privilege would force disclosure of the thing the privilege was meant to protect, while a complete abandonment of judicial control would lead to intolerable abuses.” *Id.* at 8–9.

Under the *Reynolds* framework, before a court passes on a claim of privilege, it must first “determine

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<sup>1</sup> Judge Rushing believes that Wikimedia did not demonstrate a dispute of material fact as to its standing, and so she would hold that the Government’s motion for summary judgment — not the state secrets doctrine — requires dismissal of this case. *See* Judge Rushing Concurring Op. at 64 (joining only Parts I, II.B.2, and II.C of Judge Diaz’s opinion). However, Judge Rushing does agree with Judge Diaz that the Government “successful[ly] assert[ed] [] the state secrets privilege” when opposing Wikimedia’s discovery requests. *Id.* at 68.

how far [it] should probe in satisfying itself that the occasion for invoking the privilege is appropriate.” *Id.* at 11. This threshold inquiry necessitates considering both the Government’s “showing of privilege” and the plaintiff’s “showing of necessity.” *Id.* On one end of the spectrum, “[w]here there is a strong showing of necessity” or the security threat posed by disclosure is unclear, “the claim of privilege should not be lightly accepted.” *Id.*; *Sterling v. Tenet*, 416 F.3d 338, 345 (4th Cir. 2005), *cert. denied*, 546 U.S. 1093 (2006). At the other end, “where necessity is dubious, a formal claim of privilege . . . will have to prevail.” *Reynolds*, 345 U.S. at 11.

Applying this framework, the Court in *Reynolds* determined that the plaintiff’s “necessity was greatly minimized” by the availability of non-privileged evidence and so a formal claim of privilege — filed by the Secretary of the Air Force — constituted “a sufficient showing of privilege to cut off further demand for the [privileged evidence].” *Id.* at 10–11. The Court concluded that in the case before it, “examination of the [privileged] evidence, even by the judge alone, in chambers” was inappropriate, because a “court should not jeopardize the security which the [state secrets] privilege is meant to protect” when it is confident the privilege applies. *Id.* at 10.

While the *Reynolds* Court refused to “automatically require a complete disclosure to the judge before [a] claim of privilege will be accepted,” it expressly recognized that in camera review might sometimes be necessary to evaluate a privilege claim. *Id.*; *Sterling*, 416 F.3d at 345 (“There may of course be cases where the necessity for evidence is sufficiently strong and the danger to national security sufficiently unclear that in camera review of all materials is

required to evaluate the claim of privilege.”); *see also Doe v. CIA*, 576 F.3d 95, 105 (2d Cir. 2009).

In the decades since *Reynolds*, courts have repeatedly concluded that in camera review is a “necessary process” when, as here, the Government asserts that the state secrets privilege will preclude it from raising a valid defense to a constitutional claim. *Molerio v. FBI*, 749 F.2d 815, 825 (D.C. Cir. 1984) (Scalia, J.); *Fazaga*, 965 F.3d at 1067; *In re Sealed Case*, 494 F.3d 139, 149–51 (D.C. Cir. 2007); *see also Tenenbaum v. Simonini*, 372 F.3d 776, 777 (6th Cir. 2004). Indeed, “allowing the mere prospect of a privileged defense to thwart a citizen’s efforts to vindicate his or her constitutional rights would run afoul of the Supreme Court’s caution against precluding review of constitutional claims.” *In re Sealed Case*, 494 F.3d at 151 (citing *Webster v. Doe*, 486 U.S. 592, 603–04 (1988)). Thus, particularly when constitutional rights are at stake, courts routinely probe a claim of privilege through an “appropriately tailored in camera review” to determine whether “resort to privileged material” is in fact necessary for the Government to pursue a “meritorious and not merely plausible” defense. *Id.* at 149–51.

Judge Diaz eschews this widely adopted approach. Instead, he concludes that we need not scrutinize the Government’s claim of privilege because the Government has demonstrated that “*any* valid defense” to Wikimedia’s arguments “would require resort to privileged materials.” Maj. Op. at 52. My colleague concludes that “state secrets are so central to [the] proceeding that it cannot be litigated without threatening their disclosure,” and so the case must be dismissed. *Id.* (quoting *El-Masri v. United States*, 479 F.3d 296, 308 (4th Cir. 2007)).

That simply is not so. The Government has offered two discrete defenses to Wikimedia’s standing: (1) that the Government might not engage in Upstream surveillance at any chokepoint cables carrying Internet traffic between the United States and other countries; and (2) that it is hypothetically possible for Upstream to operate such that the Government filters communications before copying or reviewing them, thus avoiding Wikimedia’s communications entirely. Gov’t Br. at 39, 44–45, 60. Judge Diaz himself explains at some length that the first defense cannot be reconciled with numerous public disclosures — and simple common sense. Maj. Op. at 22–27. As to the second defense, the Government offers *no* reason why an “appropriately tailored in camera review” could not ascertain the validity of the defense without imperiling state secrets. *In re Sealed Case*, 494 F.3d at 151. As Wikimedia concedes, such review need not probe “the identities of [the Government’s] targets, the specific geographic locations where Upstream surveillance is conducted, or the participating companies.” Reply Br. at 15–16.

Moreover, the Government’s public disclosures and publicly available information about the Internet’s workings raise serious doubts about whether privileged material even exists to bolster the Government’s second defense. *See* Brief of Amici Curiae Network Engineers and Technologists in Support of Plaintiff-Appellant Wikimedia and Reversal at 3, 12, *Wikimedia Found. v. Nat’l Sec. Agency* (No. 20-1191) (concluding, based on public disclosures and expertise in Internet networking, that the Government’s defense “lacks a basis in both Internet technology and engineering” and so “[i]t is highly unlikely, if not virtually impossible,” that

Upstream’s operation resembles the Government’s hypothetical).

Judge Diaz suggests that, because the Government offered only totally inadequate hypotheticals as defenses, we must assume — based on nothing more than boilerplate claims of privilege — that any valid defense would resort to privileged materials. But this turns *Reynolds* on its ear. When the Government makes an inadequate showing, that is precisely when we should not “lightly accept[]” its claims. *Reynolds*, 345 U.S. at 11; *Ellsberg v. Mitchell*, 709 F.2d 51, 59 (D.C. Cir. 1983) (holding that the scope of a court’s review should depend on whether the Government’s claims are “plausible and substantial”), *cert. denied*, 465 U.S. 1038 (1984); *see also In re United States*, 872 F.2d 472, 479 (D.C. Cir.) (rejecting a claim of privilege after in camera review, notwithstanding the Government’s submission of an “affidavit ostensibly describ[ing] the harms that would be dealt to our nation’s security . . . were [the] case to continue through the normal course of litigation”), *cert. denied sub nom.*, *United States v. Albertson*, 493 U.S. 960 (1989).

At bottom, my colleague concludes that whenever the Government has not disclosed whether a plaintiff’s communications have been subject to FISA surveillance, vague claims of privilege and far-fetched hypotheticals will suffice to obtain dismissal. But FISA surveillance is not a subject that categorically falls outside the bounds of judicial review. *Cf. Tenet v. Doe*, 544 U.S. 1, 9 (2005) (noting that “where the very subject matter of [an] action,” such as “a contract to perform espionage, [is] a matter of state secret,” a case may be “dismissed on the pleadings without ever reaching the question of evidence, since it [is] so

obvious that the action should never prevail over the privilege”) (quoting *Reynolds’s* discussion of *Totten v. United States*, 92 U.S. 105 (1876)) (emphasis omitted). And if the *Reynolds* privilege is stretched to require dismissal — before a court may scrutinize the Government’s claims — in cases like this one, I am left to wonder whether *any* electronic surveillance case could *ever* proceed to the merits.<sup>2</sup>

\* \* \*

I recognize that when it considers the issues raised in *Fazaga* and the case at hand, the Supreme Court may bless the majority’s approach. But the Court may conclude that the Ninth Circuit properly reconciled “transparency, accountability and national security” in resolving the difficult questions before it. *Fazaga*, 965 F.3d at 1068. The Court may even articulate new factors for lower courts to consider in electronic surveillance cases. In any event, I would await guidance from the Supreme Court.

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<sup>2</sup> My colleagues suggest that we should be comforted by the fact that the Government has, in two cases involving FISA surveillance, either declined to invoke the state secrets privilege or declined to seek outright dismissal of some claims pursuant to the privilege. Maj. Op. at 44-45; Judge Rushing Concurring Op. at 64 (joining Part II.B.2 of Judge Diaz’s opinion). Recent history indicates that these two cases are outliers. See Daniel R. Cassman, Note, *Keep It Secret, Keep It Safe: An Empirical Analysis of the State Secrets Doctrine*, 67 Stan. L. Rev. 1173, 1190–91 (2015) (documenting a dramatic increase in Government assertions of the state secrets privilege, including in FISA cases). In any event, *Reynolds’s* admonition remains applicable: “Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.” 345 U.S. at 9–10.

RUSHING, Circuit Judge, concurring in part and in the judgment:

I agree with Judge Diaz that FISA’s discovery procedures do not govern here, therefore the district court did not err in denying Wikimedia’s motion to compel discovery. *See* Maj. Op. Part II.B.2. And I join my colleagues in concluding that Wikimedia’s supplementary theories of standing fail. *See* Maj. Op. Part II.C. I write separately because I would also hold that Wikimedia has failed to demonstrate a dispute of material fact regarding its standing based on the Wikimedia Allegation and therefore would affirm the district court’s grant of summary judgment on standing grounds.

Summary judgment is proper if Wikimedia—which bears the burden to prove its standing at trial—failed to make a showing sufficient to establish that it has suffered an injury in fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986); *see also Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). At the summary judgment stage, Wikimedia “can no longer rest on mere allegations but must set forth . . . specific facts” that create a genuine dispute at each necessary step of its standing theory. *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 411–412 (2013) (original alterations and internal quotation marks omitted). The third prong of the Wikimedia Allegation requires Wikimedia to prove that the NSA actually copies and reviews “all the international text-based communications that travel across a given link upon which it has installed surveillance equipment.” *Wikimedia Found. v. Nat’l Sec. Agency*, 857 F.3d 193, 210 (4th Cir. 2017) (internal quotation marks omitted). Because much of the information about how the NSA collects communications is shielded from



discovery by the state secrets privilege, Wikimedia’s task is a difficult one. Unlike the majority, I would hold that Wikimedia has not presented evidence from which a reasonable jury could find in its favor on prong three of the Wikimedia Allegation and therefore the Government “is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (“[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.”).

The majority hangs its hat on the statement in a declassified 2011 FISC opinion that the “NSA will acquire a wholly domestic ‘about’ communication if the transaction containing the communication is routed through an international Internet link being monitored by NSA.” *Redacted*, 2011 WL 10945618, at \*15 (FISA Ct. Oct. 3, 2011). Wikimedia reads this sentence as conceding that the NSA will acquire *all* wholly domestic “about” communications routed through a monitored link, which, for technological reasons, can only be true if the NSA is copying all traffic on a surveilled circuit. The premise of Wikimedia’s argument—that the Government has admitted the NSA collects *all* domestic “about” communications routed through a monitored link—is based not on technological facts, expert opinion, or other evidence in the record but on an unreasonable inference from the 2011 FISC opinion.

By relying on a capacious reading of an indefinite article while ignoring the other eighty pages of the FISC opinion, it is Wikimedia that fails to account for “context.” Maj. Op. 31. The section of the 2011 FISC opinion from which Wikimedia plucks its chosen quotation analyzed whether the NSA’s acquisition of

wholly domestic communications was unintentional. After reviewing the facts concerning collection of both single communication transactions and multiple communication transactions, the FISC concluded that the collection of wholly domestic communications within those transactions could not be considered unintentional because nothing “suggest[s] that NSA’s technical means are malfunctioning or otherwise failing to operate as designed. Indeed, the government readily concedes that NSA will acquire a wholly domestic ‘about’ communication if the transaction containing the communication is routed through an international Internet link being monitored by NSA or is routed through a foreign server.” *Redacted*, 2011 WL 10945618, at \*15; *see id.* (“[After] a manual review of a sample of its upstream collection . . . there is no question that the government is knowingly acquiring Internet transactions that contain wholly domestic communications through its upstream collection.”). Read in context, this statement affirmed that, by design rather than accident, the NSA was collecting communications containing tasked selectors—even wholly domestic communications—on the circuits it monitored.

Nothing in this statement or the surrounding analysis, however, suggested that the NSA was collecting *all* such communications. In reviewing the NSA’s targeting and minimization procedures, the FISC was concerned with whether the NSA was intentionally acquiring *any* wholly domestic communications. *Id.* at \*15–\*16; *see also* 50 U.S.C. § 1881a(d)(1)(B). It was not evaluating the comprehensiveness of the NSA’s collection practices, *i.e.*, whether the agency was acquiring every last communication “about” a tasked selector or was

leaving some communications of interest uncollected because of other restrictions or priorities irrelevant to the question before the FISC. And it did not purport, in this statement, to present a comprehensive description of the NSA's collection procedures.

The Government's traffic-mirroring-with-filtering hypothetical illustrates the point. Both parties agree that, as a technological matter, the NSA would acquire some wholly domestic "about" communications if it applied filters before copying Internet traffic. The Government's concession in the 2011 FISC opinion is thus entirely compatible with the possibility that the NSA filtered out certain categories of Internet traffic before acquiring the wholly domestic transactions discussed. It says nothing about filtering one way or the other, because that stage of the collection process was not the focus of the FISC's analysis. Wikimedia stretches the bounds of inference too far when it reads into the FISC's statement an off-topic proposition not necessarily implied by that statement, and one that would, apparently by accident, reveal state secrets to boot.

Even drawing "all justifiable inferences" in Wikimedia's favor, its out-of-context interpretation of one statement from the 2011 FISC opinion could not support a jury finding in its favor that the NSA actually copies and reviews all communications on a monitored link. *Anderson*, 477 U.S. at 255. And as the majority correctly acknowledges, "Wikimedia's 'grab-bag' of other support" does little to help it bear its burden. Maj. Op. 32. Nor does the excluded portion of Brader's expert report—which is based on speculative assumptions about the NSA's undisclosed surveillance priorities and capabilities—appreciably

boost Wikimedia's evidentiary showing. *See, e.g., Obama v. Klayman*, 800 F.3d 559, 567 (D.C. Cir. 2015) (Williams, J.) (rejecting the plaintiffs' assertion that the NSA's collection must be comprehensive to be effective because it "rests on an assumption that the NSA prioritizes effectiveness over all other values" and fails to account for "competing interests that may constrain the government's pursuit of effective surveillance").

The Government's successful assertion of the state secrets privilege erected a significant hurdle for Wikimedia's effort to set forth specific facts showing a genuine dispute on the third prong of the Wikimedia Allegation. I would hold that Wikimedia failed to surmount its burden.

## APPENDIX B

### IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

WIKIMEDIA  
FOUNDATION,

Plaintiff,

v.

NATIONAL SECURITY  
AGENCY / CENTRAL  
SECURITY SERVICE,

*et al.*,

Defendants.

Case No. 1:15-cv-662

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#### MEMORANDUM OPINION

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Plaintiff, Wikimedia Foundation (“Wikimedia”),<sup>1</sup> challenges the legality of the National Security Agency’s (“NSA”) Upstream surveillance data gathering efforts, one of a series of recent cases challenging the constitutionality of the NSA’s surveillance programs.<sup>2</sup> According to the Director of

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<sup>1</sup> This action was originally brought by nine organizations, including Wikimedia, that communicate over the Internet. The other eight organizations were dismissed at the threshold because those organizations lacked Article III standing. See *Wikimedia Found v. Nat’l Sec. Agency*, 857 F.3d 193, 216-17 (4th Cir. 2017) (affirming in part *Wikimedia Found v. Nat’l Sec. Agency*, 143 F. Supp. 3d 344 (D. Md. 2015)).

<sup>2</sup> See *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1144 (2013) (involving a facial challenge to Section 702 of the Foreign Intelligence Surveillance Act); *Obama v. Klayman*, 800 F.3d 559

National Intelligence (“DNI”), Upstream surveillance is a surveillance program authorized pursuant to § 702 of the Foreign Intelligence Surveillance Act (“FISA”) that involves the targeted collection of non-U.S. persons’ international Internet communications by the NSA.<sup>3</sup> Wikimedia alleges that the NSA has intercepted, copied, and collected Wikimedia’s Internet communications pursuant to the Upstream surveillance program and that such interception, duplication, and collection exceeds the NSA’s authority under FISA and violates Wikimedia’s rights under the First and Fourth Amendments of the Constitution.

At issue in this matter is defendants' motion for summary judgment. Defendants argue that judgment must be entered in their favor because Wikimedia, the only remaining plaintiff, lacks Article III standing. Defendants also argue that even if a genuine dispute of material fact exists as to Wikimedia’s standing, the state secrets doctrine precludes further litigation of Wikimedia's standing, and thus requires entry of

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(D.C. Cir. 2015) (involving a challenge to the NSA’s bulk collection of telephone metadata produced by telephone companies); *Am. Civil Liberties Union v. Clapper*, 785 F.3d 787 (2d Cir. 2015) (involving a challenge to the NSA’s bulk telephone metadata collection program); *Jewel v. Nat’l Sec. Agency*, No. C 08-04373 (N.D. Cal. April 25, 2019), *appeal docketed*, No. 19-16066 (9th Cir. May 21, 2019) (involving a challenge to the NSA's interception of Internet communications); *Schuchardt v. Trump*, 2019 WL 426482 (W.D. Pa. Feb. 4, 2019), *appeal docketed*, No. 19-1366 (3d Cir. Feb. 14, 2019) (involving a challenge to the NSA’s interception of Internet communications through the PRISM surveillance program).

<sup>3</sup> See Pub. Decl. of Daniel R. Coats, Director of National Intelligence, ¶ 15, ECF No. 138-2.

judgment in defendants' favor.

Before analyzing the parties' arguments on the issue of Article III standing and the state secrets doctrine, however, it is important to address briefly three topics: (i) the definition of Upstream surveillance and the statutory authority for the NSA's Upstream surveillance program, (ii) the procedural history of this case, and (iii) the undisputed factual record developed by the parties. After addressing these three preliminary topics, which frame all of the analysis that follows, the pertinent summary judgment standard is set forth, and the parties' arguments are analyzed under that standard. For the reasons that follow, Wikimedia has failed to establish that it has Article III standing sufficient to survive summary judgment, and further litigation of this matter is precluded by the state secrets doctrine. Accordingly, this case must be dismissed, and judgment must be entered in favor of defendants.

## I.

To begin with, it is necessary to define Upstream surveillance, the NSA program at issue in this litigation, and to clarify what is meant by the term Upstream surveillance as that term is used in this litigation. The NSA conducts Upstream surveillance pursuant to § 702 of FISA, 50 U.S.C. § 1881a. The government has acknowledged that it conducts § 702 surveillance through two programs, namely the Upstream and PRISM programs.<sup>4</sup> In PRISM

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<sup>4</sup> See Privacy and Civil Liberties Oversight Board, *Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act 1* (2014) ("PCLOB 702 Report"), available at <https://www.pclob.gov/library/702-Report-2.pdf>.

surveillance, the government acquires communications directly from a United States-based Internet Service Provider (“ISP”). *See* PCLOB 702 Report, at 33. In contrast, the acquisition of communications via Upstream surveillance does not occur “with the compelled assistance of the United States ISPs, but instead with the compelled assistance ... of the providers that control the telecommunications backbone over which communications transit.”<sup>5</sup> *Id.* at 35. Thus, Upstream collection, unlike PRISM collection, “does not occur at the local telephone company or email provider with whom the targeted person interacts.” *Id.* Instead, the collection of communications for Upstream surveillance “occurs ‘upstream’ in the flow of communications between communication service providers.” *Id.* Only the Upstream surveillance program is at issue in this case.

As noted, the government contends that its Upstream surveillance program is conducted pursuant to FISA § 702. Specifically, § 702 permits the Attorney General and the DNI to authorize jointly, for up to one year, foreign-intelligence surveillance targeted at non-U.S. persons located abroad,<sup>6</sup> if the

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<sup>5</sup> The telecommunications or Internet “backbone” is the network of high-capacity fiber-optic cables, switches, and routers operated by telecommunications service providers that facilitates both domestic and international communication via the Internet. This backbone primarily consists of a network of fiber-optic cables, including terrestrial cables that link areas across the U.S. and transoceanic cables that link the U.S. to the rest of the world.

<sup>6</sup> Importantly, the statute expressly prohibits the intentional targeting of any persons known at the time of acquisition to be in the United States or any U.S. person reasonably believed to be located outside the United States. 50 U.S.C. § 1881a(b). Section 702 does allow the government, however, to intercept



Foreign Intelligence Surveillance Court (“FISC”)<sup>7</sup> approves the government's written certification demonstrating that the intended surveillance complies with statutory requirements.<sup>8</sup> To approve such a certification, the FISC must determine that the government’s targeting procedures are reasonably designed:

(i) to ensure that acquisition “is limited to targeting persons reasonably believed to be located outside the United States,” 50 U.S.C. § 1881a(j)(2)(B)(i);

(ii) to prevent the intentional acquisition of wholly domestic communications, *id.* §1881a(j)(2)(B)(ii);

(iii) to “minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign-intelligence information,” *id.* § 1801(h)(1); *see id.* § 1881a(j)(2)(C); and

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communications between a U.S. person inside the United States and a foreigner located abroad who has been targeted by intelligence officials. *See id.* § 1881a(a)-(b).

<sup>7</sup> FISC, a tribunal composed of eleven federal judges designated by the Chief Justice of the U.S. Supreme Court, is charged with the review of applications for electronic surveillance. *See* 50 U.S.C. § 1803(a).

<sup>8</sup> The government must certify that a significant purpose of the acquisition is to obtain foreign intelligence information and that the acquisition will be conducted in a manner consistent with the Fourth Amendment and the targeting and minimization procedures required by statute. 50 U.S.C. § 1881a(b), (g).

(iv) to ensure that the procedures “are consistent with... the [F]ourth [A]mendment,” *id.* § 1881a(j)(3)(A).<sup>9</sup>

In effect, FISC approval of government surveillance pursuant to § 702 means that the FISC has found that the surveillance comports with the statutory requirements and the Constitution.

The recent release of public reports and declassification of some FISC opinions have revealed additional details regarding the collection of communications pursuant to § 702. After the FISC approves a § 702 certification, the NSA designates “targets,” which are non-U.S. persons located outside the United States who are reasonably believed to possess or receive, or are likely to communicate, foreign-intelligence information designated in the certification.<sup>10</sup> The NSA then attempts to identify “selectors,” namely the specific means by which the targets communicate, such as email addresses or telephone numbers.<sup>11</sup> Importantly, selectors cannot be key words (e.g., “bomb”) or targets’ names (e.g.,

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<sup>9</sup> In addition, following the passage of the FISA Amendments Reauthorization Act of 2017, the FISC must now also find that the government's querying procedures meet the statutory requirements and are consistent with the Fourth Amendment. *Id.* § 1881a(j)(2)(D); (j)(3)(A). These provisions have been cited to the version of § 1881a in effect since January 18, 2018. All of these provisions are identical to those in the version of § 1881a effective between June 2, 2015 and January 18, 2018, but the provisions are now located within § 1881a(j) rather than § 1881a(i).

<sup>10</sup> PCLOB 702 Report, at 41-46.

<sup>11</sup> NSA Director of Civil Liberties and Privacy Office Report, *NSA's Implementation of FISA Section 702* 4 (2014), available at <https://www.nsa.gov/Portals/70/documents/news-features/press-room/statements/NSAimplementationofFISA702I6Apr2014.pdf>.

“Bin Laden”); rather, selectors must be specific communication identifiers.<sup>12</sup> The government then may issue a § 702 directive to a U.S. telecommunications service provider requiring it to assist the government in acquiring communications involving those selectors.<sup>13</sup>

As for the actual collection of communications containing these targeted selectors, the government has described the Upstream surveillance collection process as follows:

[C]ertain Internet transactions transiting the Internet backbone network(s) of certain electronic communication service provider(s) are filtered for the purpose of excluding wholly domestic communications[,] and are then scanned to identify for acquisition those transactions [that contain communications] to or from ... persons targeted in accordance with the applicable NSA targeting procedures; only those transactions that pass through both the filtering and the scanning are ingested into Government databases.

Defs.’ Br. 4 (quoting Pub. Decl. of Daniel R. Coats, Director of National Intelligence, ¶15, ECF No. 138-2).<sup>14</sup> Thus, the Upstream surveillance collection

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<sup>12</sup> *Id.*; PCLOB 702 Report, at 32-33, 36.

<sup>13</sup> 50 U.S.C. § 1881a(i); PCLOB 702 Report, at 32-33.

<sup>14</sup> Prior to April 2017, Upstream collection included Internet communications “that were to, from *or about* (i.e., containing a reference in the communication's text to) a selector tasked for acquisition under Section 702.” FISC Mem. Op. & Order, at 16 (April 26, 2017) (emphasis in original), *available at* [https://www.dni.gov/files/documents/icotr/51117/2016\\_Cert\\_FIS\\_C\\_Memo\\_Opin\\_Order\\_Apr\\_2017.pdf](https://www.dni.gov/files/documents/icotr/51117/2016_Cert_FIS_C_Memo_Opin_Order_Apr_2017.pdf). According to the PCLOB

process involves three steps—(1) filtering, (2) scanning, and (3) ingesting. As this description shows, although the government has disclosed some information about Upstream surveillance in declassified documents and unclassified reports, most technical details of the Upstream surveillance process remain classified. *Wikimedia Found. v. Nat'l Sec. Agency*, 857 F.3d 193, 202 (4th Cir. 2017) (citing *Jewel v. Nat'l Sec. Agency*, 810 F.3d 622, 627 (9th Cir. 2015)).

## II.

With this statutory framework and definition of Upstream surveillance in mind, it is appropriate to turn to the procedural history of this case. On June 22, 2015, Wikimedia, along with eight other organizations,<sup>15</sup> filed the Amended Complaint in this suit, challenging the legality of the NSA's Upstream surveillance program. The Amended Complaint alleges that Upstream surveillance (i) exceeds the scope of the government's authority under § 702, (ii) violates Article III, (iii) violates the First Amendment, and (iv) violates the Fourth Amendment and requests

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702 Report, under the Upstream surveillance program that included “about” collection, “a communication between two third parties might be acquired because it contains a targeted email address in the body of the communication.” PCLOB 702 Report, at I 19. As of March 2017, however, the NSA ceased “about” collection entirely, which a FISC judge concluded “should substantially reduce the acquisition of non-pertinent information concerning U.S. persons pursuant to Section 702.” FISC Mem. Op. & Order, at 23, 25 (April 16, 2017).

<sup>15</sup> These original plaintiffs included the National Association of Criminal Defense Lawyers, Human Rights Watch, Amnesty International USA, Pen American Center, Global Fund for Women, the Nation magazine, the Rutherford Institute, and the Washington Office on Latin America.

(i) a declaration that Upstream surveillance violates the Constitution and § 702 and (ii) an order permanently enjoining the NSA from conducting Upstream surveillance. On August 6, 2015, defendants moved to dismiss the Amended Complaint, arguing that plaintiffs lacked Article III standing. On October 23, 2015, defendants' motion was granted on the ground that plaintiffs' allegations were too speculative to establish Article III standing. *Wikimedia Found. v. Nat'l Sec. Agency*, 143 F. Supp. 3d 344, 356 (D. Md. 2015), *aff'd in part, vacated in part, and remanded by*, 857 F.3d 193 (4th Cir. 2017).

Thereafter, plaintiffs appealed, and the Fourth Circuit affirmed in part, vacated in part, and remanded the case for further consideration. *Wikimedia Found.*, 857 F.3d at 200. Specifically, the Fourth Circuit vacated the finding that Wikimedia lacked standing, but affirmed the finding that the other plaintiffs lacked standing. *Id.* The Fourth Circuit concluded that Wikimedia had established standing to the Amended Complaint based on the "Wikimedia Allegation", namely the allegation "that the sheer volume of [Wikimedia's] communications makes it virtually certain that the NSA has intercepted, copied, and reviewed at least some of [Wikimedia's] communications[.]" "even if the NSA conducts Upstream surveillance on only a single [I]nternet [backbone] link." *Id.* at 202, 209 (internal quotation marks and citation omitted). Three factual allegations, accepted as true as required at the motion to dismiss stage, made the Wikimedia Allegation plausible: (i) "Wikimedia's communications almost certainly traverse every international [Internet] backbone link connecting the United States with the rest of the world[.]" (ii) "the NSA has confirmed that it

conducts Upstream surveillance at more than one point along the [I]nternet backbone[,]” and (iii) “the government, for technical reasons[,] ... must be copying and reviewing all the international text-based communications that travel across a given [Internet backbone] link upon which it has installed surveillance equipment.” *Id.* at 210–11 (internal quotation marks and citations omitted).

Importantly, the Fourth Circuit rejected the “Dragnet Allegation”, that is the allegation “that[,] in the course of conducting Upstream surveillance[,] the NSA is intercepting, copying, and reviewing substantially all text-based communications entering and leaving the United States, including” those of the nine plaintiffs. *Id.* at 202 (internal quotation marks and citation omitted). Plaintiffs alleged the following facts in support of the Dragnet Allegation: (i) “the NSA has a strong incentive to intercept communications at as many [Internet] backbone chokepoints as possible, and indeed must be doing so at many different [Internet] backbone chokepoints,” (ii) “the technical rules governing online communications make this conclusion especially true,” and (iii) “a *New York Times* article asserts that the NSA is temporarily copying and then sifting through the contents of what is apparently most e-mails and other text-based communications that cross the [U.S.] border.” *Id.* at 213 (internal quotation marks and citations omitted.) The Fourth Circuit concluded that the Dragnet Allegation failed to establish standing because it did “not contain enough well-pleaded facts entitled to the presumption of truth.” *Id.* at 200. As such, although Wikimedia pled sufficient facts to establish standing at the motion to dismiss stage, the other plaintiffs did not. *Id.* at 200.

Thus, Wikimedia is the only remaining plaintiff.

On remand, an Order issued on October 3, 2017 directing the parties to conduct a limited five-month period of jurisdictional discovery. *See* ECF Nos. 117, 123. Both sides took depositions and served requests for written discovery and production of documents. Defendants objected to 53 of Wikimedia's 84 discovery requests on the ground that responses to the requests would reveal classified information protected by the common law state secrets privilege and related statutory privileges. Thereafter, the DNI formally asserted the state secrets privilege and the statutory privilege set forth in 50 U.S.C. § 3024(i)(1).<sup>16</sup> Defendants stated that the information Wikimedia sought, if disclosed, reasonably could be expected to result in exceptionally grave damage to U.S. national security.<sup>17</sup> Wikimedia subsequently moved to compel

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<sup>16</sup> Defendants also submitted a classified declaration from George C. Barnes, the Deputy Director of the NSA. The classified declaration provided additional detail about the harm to national security that would be caused by disclosure of the information contained in Wikimedia's discovery requests.

<sup>17</sup> The DNI's and the NSA's assertions of privilege encompassed seven categories of information: (i) individuals or entities subject to Upstream surveillance; (ii) operational details of the Upstream collection process such as the technical details concerning methods, processes, and devices employed (including the design, operation, and capabilities of the devices); (iii) locations (and nature of the locations) at which Upstream surveillance is conducted; (iv) the specific types or categories of communications either subject to or acquired in the course of the Upstream collection process; (v) the scope and scale on which Upstream collection has or is now being conducted; (vi) the NSA's cryptanalytic capabilities or limitations; and (vii) additional categories of classified information encompassed within numerous FISC opinions and orders. *See* DNI Decl. ¶¶18, 21–47.

production of the documents. On August 20, 2018, an Order and Memorandum Opinion issued, concluding that defendants satisfied the procedural requirements necessary to invoke the state secrets privilege, that the information sought to be protected qualified as privileged under the state secrets doctrine, and that therefore, Wikimedia's motion to compel must be denied. *Wikimedia Found v. Nat'l Sec. Agency*, 335 F. Supp. 3d 772, 790 (D. Md. 2018). Accordingly, the parties continued jurisdictional discovery, limited to information not protected by the state secrets privilege.

Defendants now seek summary judgment on the ground that Wikimedia lacks Article III standing to contest the legality of the NSA's Upstream surveillance program, or alternatively, that if there is a genuine issue of material fact as to the three essential elements of the Wikimedia Allegation articulated in the Fourth Circuit's remand order, the state secrets doctrine operates to preclude further litigation of Wikimedia's standing and thus requires entry of judgment in defendants' favor.

### III.

Summary judgment is appropriate only where there are no genuine disputes of material fact. Rule 56, Fed. R. Civ. P. Accordingly, the material facts as to which no genuine dispute exists must first be identified. Defendants set out their statement of material facts in their brief in support of summary judgment, as required by the local rules. Plaintiff, in addition to responding to defendants' statement of material facts as required by the local rules, also offered their own separate statement of material facts in their brief in opposition to summary judgment.



Neither the local rules of the District of Maryland nor the Eastern District of Virginia require plaintiff, as the non-moving party, to set forth a statement of material facts. *See generally* D. Md. Local Rules; E.D. Va. Local Civ. R. 56(8). In the interest of completeness, however, and because each party has responded to the other party's statement of material facts, all facts, and disputes as to those facts, have been considered in deriving from the record the following undisputed material facts.

1. The Internet is a global collection of networks, large and small, interconnected by a set of routers.<sup>18</sup> Together, these large and small networks function as a single, large virtual network, on which any device connected to the network can communicate with any other connected device.
2. To communicate over the Internet, an individual user connects with the network of a local Internet Service Provider (“ISP”), either directly (typically for a monthly fee) or indirectly through an organization (*e.g.*, a place of business, an Internet café). In turn, the local ISP’s network connects to the networks of larger regional and national ISPs, the largest of which are called “Tier 1” telecommunication service providers (*e.g.*, AT&T, CenturyLink, Cogent, Verizon).
3. Tier 1 providers and other large carriers

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<sup>18</sup> Routers are specialized computers that ensure that Internet communications travel an appropriate path across the Internet. Routers serve a similar role for the Internet as switches (or switchboards) do on the telephone network.

maintain high-capacity terrestrial fiber-optic networks, known generally as Internet “backbone” networks, that use long-haul terrestrial cables to link large metropolitan areas across a nation or region. Data travel across these cables in the form of optical signals, or pulses of light.

4. The Internet backbone also includes transoceanic cables linking North and South America with each other and with Europe, Asia, the Middle East, and Africa. These undersea cables reach shore at points known as cable landing stations, from which they are linked to the terrestrial telecommunications network.
5. Tier 1 providers and other large carriers typically connect separate legs of their own networks using high-capacity switches. To allow users of different providers’ networks to communicate with one another, Tier 1 providers and other large carriers typically interconnect their networks using high-capacity routers.<sup>19</sup>
6. Generally speaking, to send a communication on the Internet, the transmitting device (*e.g.*, a personal computer, a cell phone) first converts the communication into one or more small bundles of data called “packets,” configured

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<sup>19</sup> Routers and switches perform similar functions, namely directing the transport of Internet communications across the network. Routers generally connect one communications service provider's network to a different communications service provider's network, whereas switches generally connect a single communication provider's network.

according to globally accepted protocols.<sup>20</sup>

7. When a communication is broken into separate packets, each packet includes (i) a “header,” which consists of the routing, addressing, and other technical information required to facilitate the packets' travel from its source to its intended destination, and (ii) a “payload,” which consists of a portion of the contents of the communication being transmitted.
8. A packet's header contains three relevant pieces of address and routing information: (i) the packet's source and destination Internet Protocol (“IP”) addresses; (ii) the source and destination ports; and (iii) protocol numbers.
9. IP addresses, which are included in packet headers, are unique numeric identifiers assigned to particular computers, devices, or systems connected to the Internet.<sup>21</sup> IP

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<sup>20</sup> Protocols can be thought of as electronic languages. Each protocol, or language, has its own rules and vocabulary. For example, instead of English and Spanish, there is Transmission Control Protocol (“TCP”) and User Datagram Protocol (“UDP”).

<sup>21</sup> There are circumstances, however, in which IP addresses do not uniquely identify individual Internet users. For example, residential Internet customers ordinarily get exactly one “dynamic” IP address at a time, which is assigned on a temporary basis by their ISP. Dynamic IP addresses may be assigned for a day, an hour, or some other period of time depending on the needs, resources, and business practices of a particular ISP, after which the dynamic IP addresses are assigned to other customers. Thus, although the IP addresses of business customers of ISPs almost never change, the IP addresses of individual ISP customers can change fairly often, with the same IP address subsequently being assigned to a different customer of the ISP. See Dr. Henning Schulzrinne Decl. ¶¶ 30, 33–34, ECF No. 162-2. As another example, the IP addresses in the packets that make

addresses are used to direct data back and forth between one computer (or other online device) and another online device. IP addresses may be analogized to the destination and return addresses on a mailing envelope.

10. The IP addresses of entities with a large, fixed presence on the Internet do not change and are publicly accessible.<sup>22</sup>
11. Port numbers, which are also included in packet headers, are used to identify communications of different kinds (*e.g.*, webpage requests, or email) so that servers hosting multiple communications services (*e.g.*, a website and an email service) can distinguish packets destined for one service from those meant for another. Port numbers for common applications, like web-browsing and email, are assigned in a common industry registry maintained by the IANA. Whereas IP

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up email messages sent or received by an email server on behalf of its users may have the IP address of the server as the source or destination IP address, not an IP address associated with the individual email user. In other words, the IP address in packets transmitting email messages might be the IP address of the email server (*e.g.*, Gmail, Yahoo), rather than the IP address of the individual user of the email address. Scott Bradner Decl. ¶¶244–46, ECF No. 168-2.

<sup>22</sup> Each Internet Service Provider or other large enterprise with a fixed presence on the Internet (*e.g.*, Amazon, Wikimedia) acquires blocks of “static” IP addresses assigned on a permanent basis from the appropriate regional Internet registry affiliated with the global Internet Assigned Numbers Authority (“IANA”). There are public databases that record, with very high accuracy, which address blocks are used by what entities.

addresses can be analogized to the street address on a letter, port numbers are roughly analogous to the apartment numbers at a multi-unit dwelling.

12. Protocol numbers, which are also included in packet headers, are used by receiving devices to determine the appropriate method of interpreting data (*e.g.*, HTTP, TCP/IP). A protocol defines the actions taken upon the transmission and/or receipt of a message or other transmission. Protocols are also assigned numbers maintained in a common industry registry maintained by the IANA.
13. After a communication has been broken into packets by the transmitting device, specialized computers called routers and switches ensure that the packets travel an appropriate path across the Internet to their destination IP address.
14. Each router or switch through which a packet transits scans the packet's header information, including its destination IP address, and determines which direction (path) the packet should follow next in order to reach its intended destination. The router or switch operates somewhat similarly to Google Maps, updating the fastest route to take between a user's starting point and his or her destination.
15. When packets transmitting a communication arrive at the receiving computer, smartphone, or other online device, the receiving device reassembles the packets into the original communication, such as a webpage or email.

16. Traffic “mirroring” is a technical term for a process by which a router or switch, in addition to determining where on the Internet each packet should be forwarded next, can also identify certain packets to be copied (“mirrored”) and divert the designated copies off-network for separate processing. In other words, traffic mirroring can create a copy of all communications, or a subset of all communications, passing through a router or switch without interrupting the flow of those communications.
17. Traffic mirroring is accomplished by programming routers and switches with access control lists (“ACLs”) to determine whether packets will be copied and collected at a certain link (the “interface”) between the router or switch and another device. The criteria used in the ACL can include a packet's source or destination IP address, the port number, the protocol numbers, or other information contained in a packet header.
18. The router or switch examines the header information of each packet it processes, and compares it to the ACL for each interface, to determine which interfaces the packet may or may not pass through without mirroring (copying).
19. Tier 1 providers and other smaller service providers employ traffic mirroring in the normal course of their operations for such purposes as monitoring traffic load, conducting quality-control processes, and rejecting unwanted traffic.

20. At any link on the Internet where surveillance may be conducted, traffic mirroring with ACLs can be used in several ways to make only certain packets available for inspection by a collecting entity.<sup>23</sup>
21. To conduct traffic mirroring, an interface (a fiber-optic link) would have to be established between the router or switch directing traffic at the selected location and the separate equipment used by the collecting entity (hereinafter, the “collector interface”).
22. After the collector interface is established, communications traffic passing through the carrier's router or switch to the collector's equipment can be filtered by “whitelisting” or “blacklisting” techniques. “Whitelisting” or “blacklisting” involves configuring an ACL to allow only packets meeting the ACL’s criteria to be copied and passed through the collector interface to the collector's equipment.
23. For example, the collector could configure an ACL containing a “whitelist” of specific IP addresses of interest. When the router or switch examines the header information of each

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<sup>23</sup> Plaintiff disputes this fact, as well as facts 22–24, to the extent the “collector” or the “collecting entity” is the NSA conducting Upstream surveillance. These facts, as stated, do not put forth that the “collector” or the “collecting entity” is the NSA. In fact, these facts simply establish that any entity, government or private, trying to collect Internet communications could, *hypothetically*, employ traffic mirroring in this manner. Plaintiff's argument that the NSA does not use traffic mirroring in this way when the NSA conducts Upstream surveillance is discussed at length *infra* Part V.C.

packet it processes, it would then, (i) as usual, forward a copy of the packet toward its intended destination, (ii) perhaps forward additional copies through other interfaces, per the carrier's routine business practices, and (iii) if, and only if, the packet header contains a source or destination IP address on the whitelist, create an additional copy of the packet, and forward it through the collector interface into the collector's possession and control. In other words, packets containing IP addresses on the whitelist would be copied and sent through to the collector's equipment. Packets not meeting the whitelist criteria would not be copied for, or made available to, the collector's equipment for any purpose.

24. Blacklisting, conversely, involves configuring an ACL to allow all packets to be copied to the collector interface *except* those matching the ACL's criteria. With a blacklist, the router or switch would examine each packet header and (i) as usual, forward a copy of the packet toward its intended destination, (ii) perhaps forward additional copies through other interfaces, per the carrier's routine business practices, and (iii) create an additional copy of every packet and forward it through the collector interface into the collector's possession and control, *except* for those packets with source or destination IP addresses on the blacklist. In other words, if the router or switch finds that a packet header contains a source or destination IP address on the blacklist, an additional copy of that packet is not created or forwarded through the collector interface.



25. Whitelisting and blacklisting techniques can also be used to limit mirroring to particular sources of traffic, such as only cables used by specific carriers, or only cables linked to specific countries or regions.
26. In addition, ACLs can be configured to whitelist or blacklist particular types of communication based on their port or protocol numbers, such as email communications or communications from accessing websites.
27. Wikimedia operates twelve free-knowledge projects on the Internet, including Wikipedia. Wikipedia, a free-access, free content encyclopedia, is one of the top ten most-visited websites in the world. In 2017, Wikipedia's website received visits from more than 1 billion unique devices each month.
28. Wikimedia engages in more than a trillion international Internet communications each year, with individuals in every country on the planet. This includes communications between foreign users and Wikimedia's U.S.-based servers, and communications between U.S. users and Wikimedia's foreign-based servers.
29. Wikimedia has identified three categories of its international Internet communications that it contends are subjected to Upstream surveillance collection by the NSA: (i) communications with its community members<sup>24</sup> ("Category 1"), (ii) internal "log" communications ("Category 2"), and (iii) the

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<sup>24</sup> Wikimedia community members are people who read or contribute to Wikimedia's twelve free-knowledge projects.

electronic communications of Wikimedia's staff ("Category 3").

30. Category 1 consists of communications with and among Wikimedia's community members, including requests from foreign and domestic users to view or download content from Wikimedia websites, and email communications sent from foreign users to Wikimedia servers.<sup>25</sup> All of these communications were directed to the public IP address ranges assigned to and used by Wikimedia.
31. Category 2 consists of internal log communications transmitted from Wikimedia's servers in the Netherlands to its servers in the United States. These communications are encrypted and received at one of the same public IP address ranges as Wikimedia's communications in Category 1.<sup>26</sup>
32. Category 3 consists of communications by Wikimedia's staff using various protocols, some of which are encrypted, some of which are not. These communications, like those in Categories 1 and 2, are sent and received from the public IP address ranges assigned to and used by Wikimedia.<sup>27</sup>

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<sup>25</sup> According to Wikimedia, the volume of the email communications in Category I, and the countries from which those emails are received, are unknown. Defs.' Ex. 4, Pl.'s Am Resps. & Objs. to ODNI Interrog. No. 19, Ex. I (hereinafter, "Technical Statistics Chart"), ECF No. 162-5.

<sup>26</sup> Technical Statistics Chart; Schulzrinne Decl. ¶¶83-84.

<sup>27</sup> Technical Statistics Chart; Schulzrinne Decl. ¶¶85-87.

33. The total volume of Wikimedia’s international Internet communications exceeds the number of cables transporting Internet communications between the U.S. and other countries. Moreover, Wikimedia's communications are broadly distributed, with users in every country in the world.
34. It is “virtually certain” that Wikimedia’s communications traverse every cable carrying public Internet traffic that connects the U.S. to other countries.
35. The government has described Upstream surveillance as involving three steps. First, “certain Internet transactions transiting the Internet backbone network(s) of certain electronic communication service provider(s) are filtered for the purpose of excluding wholly domestic communications.” Second, these Internet transactions “are then scanned to identify for acquisition those transactions [that contain communications] to or from ... persons targeted in accordance with the applicable NSA targeting procedures.” And third, “those transactions that pass through both the filtering and the scanning are ingested into Government databases.”<sup>28</sup>
36. Prior to April 2017, Upstream surveillance involved “about” collection (i.e., a communication containing a reference in the communication’s text to a selector tasked for acquisition under § 702). “About”

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<sup>28</sup> Pub. Decl. of Daniel R. Coats, Director of National Intelligence, ¶ 15, ECF No. 138-2.

communications were not necessarily sent to or from the user of a § 702 tasked-selector.

37. The statement—the “NSA will acquire a wholly domestic ‘about’ communication if the transaction containing the communication is routed through an international Internet link being monitored by NSA or is routed through a foreign server”—was accurate as of October 3, 2011.<sup>29</sup>

#### IV.

Summary judgment is appropriate when there is “no genuine issue as to any material fact” and based on those undisputed facts the moving party “is entitled to judgment as a matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). To serve as a bar to summary judgment, facts must be “material,”

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<sup>29</sup> R. Richards Dep. at 160:4-17; [Redacted], 2011 WL 10945618, at \*15. Defendants’ Rule 30(b)(6) witness confirmed the accuracy of this statement as of October 2011. Defendants argue that statements of fact in a judicial opinion, such as this statement from a FISC Opinion, are inadmissible hearsay, and thus, plaintiff cannot rely on such statements at summary judgment. Summary judgement evidence must either be in admissible form or capable of being rendered admissible at trial. *Humphreys & Partners Architects, LP v. Lessard Design, Inc.*, 790 F.3d 532, 538-39 (4th Cir. 2015); Fed. R. civ. P. 56(e)(2). Statements of fact in judicial opinions that are offered for the truth of the matter asserted are hearsay. *Nipper v. Snipes*, 7 F.3d 415, 417-18 (4th Cir. 1993); see also *Zeus Enter., Inc. v. Alphin Aircraft, Inc.*, 190 F.3d 238,242 (4th Cir. 1999); *Carter v. Burch*, 34 F.3d 257, 265 (4th Cir. 1994). Even though the 2011 FISC Opinion is inadmissible hearsay, defendants’ Rule 30(b)(6) witness testimony, confirming the accuracy of this specific statement as of October 3, 2011, is not hearsay. Thus, this statement is admissible, but solely this statement because it is as a statement of a party opponent.

which means that the disputed fact “might affect the outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Where a party “fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial,” there can be no genuine issue as to any material fact. *Celotex Corp.* 477 U.S. at 322.

Article III limits the jurisdiction of federal courts to actual “Cases” or “Controversies.” See U.S. Const. art. III, § 2, cl. 1. As the Supreme Court has made clear, one “essential and unchanging part of the case-or-controversy requirement” is that a plaintiff must establish Article III standing to sue. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). A plaintiff establishes Article III standing by showing that he, she, or it seeks relief from an injury that is “concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.” *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1147 (2013) (quoting *Monsanto Co. v. Geerston Seed Farms*, 561 U.S. 139, 149 (2010)). In other words, a plaintiff must establish (1) an injury-in-fact; (2) a casual connection between the injury and the alleged conduct; and (3) the redressability of the injury by a court.

To establish injury-in-fact, the alleged injury must be “real and immediate, not “conjectural or hypothetical.” *City of Lost Angeles v. Lyons*, 461 U.S. 95, 201 (1983). The Supreme Court has “repeatedly reiterated that ‘[a] threatened injury must be *certainly impending* to constitute injury in fact,’ and that ‘[a]llegations of *possible* future injury’ are not sufficient.” *Clapper*, 133 S. Ct. at 1147 (quoting

*Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)) (emphases in original). In some cases, injury-in-fact can also be established “based on a ‘substantial risk’ that the harm will occur, which may prompt plaintiffs to reasonably [sic] incur costs to mitigate or avoid that harm.”<sup>30</sup> *Id.* at 1150 n. 5. Importantly, the standing inquiry is “especially rigorous when reaching the

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<sup>30</sup> The parties disagree on whether the appropriate standard for determining injury-in-fact sufficient to establish standing is a “certainly impending” standard or a “substantial risk” standard in this case. The Supreme Court has not been clear as to whether the “substantial risk” standard applies and whether that standard is distinct from the “certainly impending” requirement in cases such as this that involve government surveillance. *See Clapper*, 133 S. Ct. at 1150 n. 5. But the Supreme Court has “found standing based on a ‘substantial risk’ that harm will occur” in some cases. *Id.*

The Fourth Circuit has indicated that injury-in-fact may be established under either the “certainly impending” or the “substantial risk” standard, and thus, standing should be analyzed under both standards in some cases. *See Beck v. McDonald*, 848 F.3d 262, 275 (4th Cir. 2017) (after determining that the threatened harm was not “certainly impending,” the Fourth Circuit stated “our inquiry on standing is not at an end, for we may also find standing based on a ‘substantial risk’ that the harm will occur, which in turn may prompt a party to reasonably [sic] incur costs to mitigate or avoid that harm”). Importantly, the “substantial risk” standard does not change “the common-sense notion that a threatened event can be ‘reasonabl[y] likel[y]’ to occur but still be insufficiently ‘imminent’ to constitute an injury-in-fact.” *Id.* at 276.

In this opinion, both standards are applied. Moreover, the injury-in-fact standard, whether “certainly impending,” “substantial risk,” or both, does not impact the outcome in this case because under whichever standard applies, litigation of any remaining dispute of material fact as to Wikimedia's Article III standing cannot be further litigated without violating the state secrets doctrine, as further discussed *infra* Part VI.

merits of the dispute would force [a court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional,” particularly “in the fields of intelligence gathering and foreign affairs.” *Clapper*, 133 S. Ct. at 1147.

Because standing is a threshold jurisdictional requirement, it may be attacked at any time, including at summary judgment. As the Supreme Court has made clear, each element of standing must be supported “in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.” *Defenders of Wildlife*, 540 U.S. at 561. Where, as here, standing is challenged at the summary judgment stage, “the party invoking federal jurisdiction bears the burden of establishing’ standing—and ... such a party ‘can no longer rest on ... mere allegations, but must set forth by affidavit or other evidence specific facts’” to establish standing. *Clapper*, 133 S. Ct. at 1148–49 (quoting *Defenders of Wildlife*, 504 U.S. at 561).

Thus, if a plaintiff cannot set forth, by affidavit or other evidence that will be in admissible form at trial, specific facts sufficient to show a genuine issue for trial on standing, then Rule 56(c) mandates entry of summary judgement against the plaintiff. *See Celotex Corp.*, 477 U.S. at 322.

## V.

At this stage of the litigation, Wikimedia must present specific facts, supported by admissible record evidence, that are sufficient to show a genuine issue for trial on Wikimedia’s Article III standing. In other words, Wikimedia must present specific facts which

show that defendants, through the Upstream surveillance program, have copied and collected Wikimedia's international Internet communications, or that such collection is certainly impending, or that there is a substantial risk that collection will occur such that Wikimedia must incur costs to avoid collection.<sup>31</sup>

Both parties have focused their discussion of Wikimedia's standing on the three prongs necessary to establish the Wikimedia Allegation,<sup>32</sup> which were enumerated in the Fourth Circuit's remand order in this case. *See Wikimedia Found.*, 857 F.3d at 210–11. The three prongs are: (A) Wikimedia's communications almost certainly traverse every international Internet backbone link connecting the United States with the rest of the world; (B) the NSA conducts Upstream surveillance at one or more points along the Internet backbone; and (C) the NSA, for technical reasons, must be copying and reviewing all the text-based communications that travel across a given Internet backbone link upon which it conducts Upstream surveillance. Together, these three prongs

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<sup>31</sup> *See Obama v. Klayman*, 800 F.3d 559, 562 (D.C. Cir. 2015) (“In other words, plaintiffs here must show *their own* metadata was collected by the government.”) (emphasis in original); *Halkin v. Helms*, 690 F.2d 977, 999–1000 (D.C. Cir. 1982) (“[T]he absence of proof of actual acquisition of appellants' communications is fatal to their watchlisting claims.”).

<sup>32</sup> The Wikimedia Allegation is the allegation that the sheer volume of Wikimedia's communications makes it virtually certain that the NSA has intercepted, copied, and reviewed at least some of Wikimedia's communications through the Upstream surveillance program, even if the NSA conducts Upstream surveillance on only a single Internet backbone link. *See supra* page 7.



would establish that the NSA has copied and collected some of Wikimedia's communications in the course of the NSA's Upstream surveillance program, thereby providing Wikimedia standing to sue here.

The sufficiency of the evidence with respect to each of these prongs is discussed in detail below. The summary judgment record contains specific facts which show no genuine dispute as to the veracity of the first two prongs of the Wikimedia Allegation. With respect to the third prong, however, the summary judgment factual record contains specific facts that establish, without a genuine dispute of material fact, that the NSA, in the course of Upstream surveillance, does not need to be copying any of Wikimedia's communications as a technological necessity. Thus, the summary judgment record does not contain the facts necessary for Wikimedia to establish standing at summary judgment via the Wikimedia Allegation.

A.

The first prong of the Wikimedia Allegation is that Wikimedia's communications almost certainly traverse every international Internet backbone link connecting the United States with the rest of the world.

Wikimedia primarily supports this contention through the declarations of Scott Bradner, plaintiff's Internet expert.<sup>33</sup> Mr. Bradner states that "it is virtually certain that Wikimedia's international communications traverse every circuit carrying public

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<sup>33</sup> Mr. Bradner worked at Harvard University from 1966 to 2016 in a variety of technical and educational roles, including service as Harvard University's Chief Technology Security Officer for a number of years.

Internet traffic on every international cable connecting the U.S. to other countries.” Bradner Decl. ¶6(d), ECF No. 168-2. Mr. Bradner supports this conclusion with evidence of the volume and global distribution of Wikimedia's communications and the relatively few international circuits connecting the U.S. to other countries. *Id.* at ¶¶ 346–47, 201–05, 209, 218, 220. Thus, Mr. Bradner concludes, to a virtual certainty, that every international fiber-optic cable that transports Internet communications between the U.S. and the rest of the world transports at least some of Wikimedia’s international communications.

Defendants have not disputed this fact. *See* Defs.’ Brief in Support of Motion for Summary Judgment, Dkt. 162 at 1 (referring to Wikimedia’s standing argument as a “one-legged stool” and taking issue with the other two prongs of Wikimedia’s standing argument, but not with the argument that Wikimedia’s communications traverse every international Internet backbone link).<sup>34</sup>

Thus, there is no genuine dispute between the parties in the summary judgment record that Wikimedia’s communications almost certainly traverse every international Internet backbone link connecting the United States with the rest of the world. Wikimedia has presented specific facts,

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<sup>34</sup> The government has not explicitly conceded this prong of the Wikimedia Allegation, that Wikimedia's communications traverse every international Internet backbone link connecting the United States with the rest of the world. But the government has indicated that even assuming *arguendo* that Wikimedia has presented sufficient facts to establish this first prong, Wikimedia still does not have standing in this case. *See also id.* at 21.

supported by the conclusion of Mr. Bradner, that establish the first prong of the Wikimedia Allegation.

B.

The second prong of the Wikimedia Allegation is that the NSA conducts Upstream surveillance at one or more international Internet backbone links, all of which, as established in the first prong, some of Wikimedia's communications traverse.

Wikimedia primarily relies upon a sentence in a redacted 2011 FISC Opinion and on language describing the Internet backbone in the PCLOB 702 Report to establish this prong. The sentence in the 2011 FISC Opinion states: the "NSA will acquire a wholly domestic 'about' communication if the transaction containing the communication is routed through an international Internet link being monitored by NSA or is routed through a foreign server." [Redacted], 2011 WL 10945618, at \*15. Defendants' Rule 30(b)(6) witness confirmed the accuracy of this statement as of October 2011.<sup>35</sup> *See* R. Richards Dep. at 160:4–17. Thus, as a statement of a party opponent, this statement is admitted as part of the summary judgment record.

Based on this admission, plaintiff contends that Upstream surveillance involves monitoring "international Internet link[s]." Defendants, however, assert that the meaning of the term "international Internet link" is protected by the state secrets privilege and cannot be confirmed or denied by

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<sup>35</sup> *See supra* note 29 for further detail as to why the statement in the 2011 FISC Opinion is not inadmissible hearsay in the context of this litigation as a result of defendants' Rule 30(b)(6) testimony regarding the statement.

defendants. Defendants’ Rule 30(b)(6) witness testified that “unlike the other words you had me go through in terms of definitions ... [which were] what a teleco[m] expert would” provide, the “NSA has an understanding of this term [international Internet link] that is specific to how [the FISC Judge] described it, but it’s classified to provide any further information.” R. Richards Dep. at 160:19–161:22. Thus, the differences between the term “international Internet link” and the term “circuits,” which is a colloquial term used in the telecom industry and is used to describe where along the Internet backbone Upstream collection occurs in the PCLOB 702 Report,<sup>36</sup> cannot be known without violation of the state secrets privilege.<sup>37</sup> See PCLOB 702 Report, at 35–37. Moreover, that this statement was accurate on October 3, 2011 says nothing of this statement’s accuracy either in 2015, when this suit was filed, or today.<sup>38</sup>

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<sup>36</sup> It is worth noting that the PCLOB 702 Report’s reference to “circuits” does not suggest that the NSA is conducting surveillance on more than one circuit. To be sure, the PCLOB 702 Report does use the term “circuits,” but it does not do so to refer to the number of sites the NSA is monitoring. Instead, the PCLOB 702 Report uses the term “circuits” in the context of defining the “Internet backbone.” Specifically, the PCLOB 702 Report explains that the “Internet backbone” consists of “circuits that are used to facilitate Internet communications[.]” PCLOB 702 Report at 36–37.

<sup>37</sup> The state secrets privilege’s applicability to this case is discussed in significantly greater depth *infra* Part VI.

<sup>38</sup> The statement from the 2011 FISC Opinion pertains to the Upstream surveillance program’s collection of “about” communications. As of April 2017, Upstream surveillance no longer involves any “about” collection. Thus, at least the

Rather than belabor the squabble between the parties about the meaning of this particular term from a 2011 FISC Opinion, a different, admissible record document sheds significantly more light on this prong of the Wikimedia Allegation. The Public Declaration of Daniel R. Coats, Director of National Intelligence (“DNI”), states that the United States Intelligence Community “has publicly acknowledged that Upstream surveillance is conducted on one or more points on the Internet backbone” and that the United States Intelligence Community “has publicly acknowledged that ... NSA is monitoring at least one circuit carrying international Internet communications.” Pub. Decl. of Daniel R. Coats, DNI, ¶¶ 30, 37, ECF No. 138-2.<sup>39</sup> In other words, the DNI, who oversees the United States Intelligence Community, has admitted, in the course of this litigation, that the NSA conducts Upstream surveillance on at least one point on the Internet backbone and, to the extent the terms Internet backbone and international Internet circuit are not interchangeable, on at least one circuit carrying international Internet communications.<sup>40</sup>

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conclusion of this conditional statement is no longer accurate today.

<sup>39</sup> Neither party has cited to these specific paragraphs of the Public Declaration of the DNI in their briefs. Nonetheless, the Public Declaration of the DNI is clearly part of the evidentiary record in this matter, as defendants have cited to other paragraphs of this declaration in their statement of undisputed material facts. Moreover, as the “oversee[r] of the United States Intelligence Community,” the DNI is in a position to make such statements from personal knowledge.

<sup>40</sup> In this context, the terms Internet backbone and international Internet circuits both refer on some level to the

Accordingly, the undisputed summary judgment record adequately establishes that the NSA monitors at least one circuit carrying international Internet communications in the course of Upstream surveillance and that Wikimedia's communications traverse every circuit carrying international Internet communications from the United States to the rest of the world. Thus, Wikimedia has established the first two prongs of the Wikimedia Allegation with the support of admissible record evidence and without a genuine dispute as to any material fact.

C.

With respect to the third prong, however, the summary judgment factual record contains specific facts that establish, without a genuine dispute of material fact, that it is *not* a technological necessity that the NSA has copied or collected some of Wikimedia's communications over the one circuit that the NSA admits monitoring to conduct Upstream surveillance.<sup>41</sup> Accordingly, the summary judgment

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transoceanic fiber-optic cables that transport Internet communications and connect the U.S. to the rest of the world.

<sup>41</sup> Importantly, to establish standing, Wikimedia need only prove that the NSA has copied or scanned some of its communications as part of the Upstream surveillance program, or that such collection is certainly impending, or that there is a substantial risk that collection will occur such that Wikimedia must incur costs to avoid collection. Wikimedia has chosen to prove that it is a technological necessity that the NSA has copied or scanned some of its communications only because the government's assertion of the state secrets privilege prevents Wikimedia from posing the more direct question of whether the NSA has actually copied or scanned any of Wikimedia's communications as part of the Upstream surveillance program.

record does not contain the facts necessary for Wikimedia to establish standing at summary judgment via the Wikimedia Allegation.

To address this prong of the Wikimedia Allegation, both parties have submitted extensive expert reports. The government's expert, Dr. Henning Schulzrinne,<sup>42</sup> has provided expert testimony that details a method of collecting Internet communications, which could, *hypothetically*, avoid collecting any of Wikimedia's communications. Dr. Schulzrinne Decl. ¶¶77–88. Thus, Dr. Schulzrinne concludes that the NSA, via Upstream surveillance, does not *have* to be collecting any of Wikimedia's communications "as a matter of technological necessity." Dr. Schulzrinne 2d Decl. ¶ 2. Importantly, Dr. Schulzrinne does not provide testimony about the actual operational details of Upstream surveillance because the actual operational details of Upstream surveillance are classified and protected by the state secrets privilege, and thus, Dr. Schulzrinne does not know any of the classified operational details. *Id.* at ¶3–4.

On the other side, Wikimedia's expert, Scott Bradner, has provided expert testimony in which he opines, based on a combination of technical and practical factors, that the NSA "most likely" copies all communications transported across an international Internet circuit *before* filtering any of the communications. Bradner Decl. ¶ 282. As a result, Mr. Bradner concludes that "even if the NSA were

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*See Wikimedia Found v. Nat'l Sec. Agency*, 335 F. Supp. 3d 772, 788-90 (D. Md. 2018).

<sup>42</sup> Dr. Henning Schulzrinne has been a professor of computer science at Columbia University since 1996 and holds a Ph.D. and a Master's Degree in Electrical Engineering.

monitoring only a single circuit under [U]pstream collection, it would be copying and reviewing at least some of Wikimedia's communications.” *Id.* at ¶ 353.

Each expert unsurprisingly takes issue with the other’s findings. Dr. Schulzrinne claims that Mr. Bradner has provided “no support, and certainly none based in Internet technology and engineering, for concluding that the NSA ‘almost certainly’ (Bradner Decl. ¶ 6(a)) copies and scans all communications traversing any circuit it monitors, including Wikimedia's.” Dr. Schulzrinne 2d Decl. ¶5. And Mr. Bradner claims that Dr. Schulzrinne’s conclusion that the NSA does not have to be collecting any of Wikimedia’s communications as a matter of technological necessity “is simply implausible as a practical matter given everything that is known about [U]pstream collection.” Bradner Decl.¶362. For the reasons that follow, this dispute does not present a triable issue of fact.

To begin with, it is necessary to address the practical grounds on which Mr. Bradner reaches his conclusions. Mr. Bradner contends that the NSA could not accomplish its stated goal of “*comprehensively acquir[ing]* communications that are sent to or from its targets” through Upstream surveillance without first copying all international communications transported over the circuit(s) that the NSA is monitoring. *Id.* at ¶ 333 (quoting PCLOB 702 Report, at 10, 123, 143 (emphasis added)); *Id.* at ¶335. To accomplish this goal, Mr. Bradner opines that the NSA is “most likely” copying all of the communications traveling across a circuit before later filtering those communications based on the NSA’s targeted selectors. *Id.* at ¶¶ 282, 289. As the basis for this opinion, Mr. Bradner claims (i) that any other



method would require the NSA to share sensitive information about its targets and/or filtering criteria with an assisting provider, which the NSA would prefer not to do, (ii) that any other method would require the NSA to place an NSA-operated device into the heart of an ISP's network, which the NSA would prefer not to do, and (iii) that the NSA has no operational incentive to reduce the number of communications it scans for selectors. *Id.* at ¶¶283–88.

None of Mr. Bradner's bases for this opinion, however, have a non-speculative foundation in technology. Instead, speculative assumptions about the NSA's surveillance practices and priorities and the NSA's resources and capabilities form the basis for Mr. Bradner's opinion in this regard.<sup>43</sup> *See* Dr. Schulzrinne 2d Decl. ¶ 73. Simply put, Mr. Bradner does not know what the NSA prioritizes in the Upstream surveillance program because that information is classified, and therefore Mr. Bradner

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<sup>43</sup> *See, e.g., Obama v. Klayman*, 800 F.3d 559,567 (D.C. Cir. 2015) (rejecting a plaintiff's claim that the NSA's collection must be comprehensive to be effective because "there are various competing interests that may constrain the government's pursuit of effective surveillance. Plaintiffs' inference fails to account for the possibility that legal constraints, technical challenges, budget limitations, or other interests prevented NSA from collecting metadata from Verizon Wireless."). Wikimedia has gone significantly further than the plaintiffs in *Klayman* to address the technological issues pertinent to the effectiveness of a less comprehensive surveillance system, but Mr. Bradner still takes significant speculative leaps about the NSA's practical and operational decision-making to reach these particular aspects of his conclusions. These specific conclusions require speculative leaps which are too significant to accept as the foundational basis for an expert's opinion.

has no knowledge or information about it. As a result, Mr. Bradner's opinions as to these specific propositions are inadmissible pursuant to Rule 702, Fed. R. Evid., and the standards articulated in *Daubert v. Merrell Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).<sup>44</sup>

Moreover, even if Mr. Bradner's opinions on these specific propositions were admissible, any conclusions drawn from those opinions would be barred by the state secrets doctrine, as further discussed *infra* Part VI. No matter how intuitively appealing Mr. Bradner's opinions about the NSA's operational priorities may seem, courts have consistently recognized that "judicial intuition" about such

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<sup>44</sup> Rule 702 provides that an expert may offer opinion testimony if "the expert's scientific, technical, or other specialized knowledge" will be helpful to understand the evidence or to determine a fact in issue, the proffered opinion is "based on sufficient facts or data," and it is "the product of reliable principles and methods ... reliably applied ... to the facts of the case." Fed. R. Evid. 702(a)–(d). *Daubert* explained that to meet the test of admissibility under Rule 702, an expert's testimony must rest on a reliable foundation, meaning it "must be based on scientific, technical, or other specialized *knowledge* and not belief or speculation." *Oglesby v. Gen. Motors Corp.*, 190 F.3d 244, 250 (4th Cir. 1999) (emphasis in original); *see also Nease v. Ford Motor Co.*, 848 F.3d 219, 229, 231 (4th Cir. 2017). Here, the critical propositions that form the basis for Mr. Bradner's opinion that the NSA is "most likely" copying all communications before any filtering do not meet this requirement as they are based on Mr. Bradner's speculation as to the NSA's operational priorities and capabilities, not on any technical requirements for the collection of Internet communications. Although the NSA has made some public disclosures about Upstream surveillance, Mr. Bradner's interpretations of single sentences within the public disclosures stretches those disclosures far beyond a natural reading of them, and again, is not based on any knowledge, technical or otherwise.

propositions "is no substitute for [the] documented risks and threats posed by the potential disclosure of national security information." *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007). Importantly, defendants cannot effectively defend themselves against Mr. Bradner's speculations without disclosing information about the operational details of the NSA's Upstream surveillance program. But defendants have thoroughly documented the risks of such a disclosure in the classified declaration, explaining that to reveal such facts regarding the operational details of the Upstream surveillance collection process, even considering the public disclosures made to date, would provide insight into the structure and operations of the Upstream surveillance program and in so doing, undermine the effectiveness of this important intelligence method. Thus, even if Mr. Bradner's conclusions, built off assumptions about the NSA's operational goals from the NSA's limited public disclosures, were admissible as expert opinions, the state secrets doctrine would bar any further litigation of this prong of Wikimedia's standing argument, as further discussed *infra* Part VI.

Analysis of the third prong of the Wikimedia Allegation, however, does not end with dismissal of Mr. Bradner's non-technical assumptions. Each expert has also presented technical arguments for and against the proposition that the NSA must be collecting at least some of Wikimedia's communications at the circuit(s) monitored pursuant to the Upstream surveillance program.

Dr. Schulzrinne explains how the NSA, using the

technique of “traffic mirroring” in a specific manner,<sup>45</sup> could conduct Upstream surveillance on an international Internet circuit “without intercepting, copying, reviewing, or otherwise interacting with [the] communications of Wikimedia.” Dr. Schulzrinne Decl. ¶ 77. To begin with, Wikimedia has been allocated a number of static IP addresses. *Id.* at ¶ 80. A “static” IP address is an IP address that is assigned on a *permanent* basis from the appropriate regional Internet registry. *See id.* at ¶32–33. Static IP addresses are generally assigned to large enterprises on the Internet so that users around the world have consistent access to their websites. Public databases record, with very high accuracy, which IP address blocks are used by what entities. *Id.* Thus, any member of the public can ascertain all of the IP addresses assigned to Wikimedia.

Through a process of “blacklisting” Wikimedia’s IP addresses, the NSA could conduct Upstream surveillance without receiving access to any of Wikimedia’s communications. *Id.* at ¶ 82. To do so, the NSA could blacklist all of Wikimedia’s IP addresses using an access control list, a list employed in the traffic mirroring process that determines which packets carrying Internet communications will be copied and collected at a certain circuit on the Internet backbone. By blacklisting Wikimedia’s IP addresses, all Internet communications *except* those containing Wikimedia’s blacklisted IP addresses would be copied

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<sup>45</sup> Traffic mirroring, as defined in the statement of material facts in the summary judgment record, is a technical term for a process by which all communications passing through a router or switch can be copied without interrupting the flow of communications.

and collected by the NSA. Importantly, this hypothetical does not propose that the NSA is copying all Internet communications other than Wikimedia's, but rather states that, as a technical matter, the NSA *could* blacklist certain high-frequency, low-interest IP addresses to minimize the collection of communications of little interest to the NSA and that Wikimedia's IP addresses *could* be high-frequency, low-interest IP addresses to the NSA. Thus, strictly considering the technological limitations of copying Internet communication in transit, it is possible that the NSA has not copied and collected any of Wikimedia's communications despite monitoring an international Internet circuit that transmits some of Wikimedia's communications.<sup>46</sup>

In response, Mr. Bradner finds this hypothetical "simply implausible" as a practical matter given everything that is known about Upstream surveillance, although Mr. Bradner does admit that selective collection is technologically possible. Bradner Decl. ¶ 362, 272(b), 280–81, 299, 325, 366. The foundation for Mr. Bradner's response is that the NSA has disclosed to the public that Upstream surveillance operates by identifying "selectors," the specific means by which the targets communicate,

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<sup>46</sup> In addition to blacklisting Wikimedia's IP addresses, Dr. Schulzrinne proposes several other whitelisting or blacklisting options which would prevent the NSA from collecting Wikimedia's international Internet communications. Dr. Schulzrinne Decl. ¶ 77–88. For example, the NSA could blacklist the ports assigned to HTTP and HTTPS communications so as not to collect any web communications that involve accessing websites. *Id.* at ¶ 79.

such as email addresses or telephone numbers.<sup>47</sup> Because the NSA cannot know in advance which communications contain selectors, Mr. Bradner contends, the NSA must first copy all communications before scanning any of them for selectors. Bradner Decl. ¶ 333, 301.

Despite Mr. Bradner's arguments to the contrary, the traffic mirroring hypothetical proposed by Dr. Schulzrinne does not contradict the government's public disclosures about Upstream surveillance. Importantly, the government has described Upstream surveillance as involving three steps—(1) filtering, (2) scanning, and (3) ingesting.<sup>48</sup> The whitelisting and blacklisting process of traffic mirroring proposed by Dr. Schulzrinne would occur at the first step in the NSA's collection process, the filtering, prior to any copying or scanning. Thus, under Dr. Schulzrinne's hypothetical, the first step, filtering, would involve a combination of whitelisting and blacklisting to exclude wholly domestic communications *and* other low interest communications, and Wikimedia's communications may qualify as low interest communications that the NSA filters out.<sup>49</sup> *Second,*

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<sup>47</sup> NSA Director of Civil Liberties and Privacy Office Report, *NSA's Implementation of FISA Section 702 4* (2014), available at <https://www.nsa.gov/Portals/70/documents/news-features/press-room/statements/NSAimplementationofFISA702I6Apr2014.pdf>.

<sup>48</sup> See Material Fact 35; Pub. Decl. of Daniel R. Coats, Director of National Intelligence, ¶ 15, ECF No. 138-2.

<sup>49</sup> It is noted that the government has not disclosed that anything other than wholly domestic communications are filtered out at the first step in the Upstream collection process. Given the government's limited disclosures about the technical details of how Upstream surveillance operates, however, this disclosure does not mean that the government does not, or could

and only after filtering, the NSA would scan the remaining communications for “selectors,” which could result in the collection of both communications to or from a targeted selector and about a targeted selector. *See* Dr. Schulzrinne 2d Del. ¶50–52. This second step described in the governments public disclosures is the step on which Mr. Brander focuses. Given the distinction between the first two steps, Dr. Schulzrinne’s hypothetical is consistent with government’s public disclosures about Upstream surveillance. Moreover, the hypothetical, regardless of whether it is actually how the NSA conducts Upstream surveillance, does show that there is a technological method by which the NSA could conduct Upstream surveillance on a circuit transporting International internet communications without copying, collecting, or otherwise reviewing any of Wikimedia’s communications that traverse that path.

But this does not end the analysis, for there is a technological hurdle that remains. Even if the NSA used the whitelisting and blacklisting techniques proposed by Dr. Schulzrinne to filter the communications it collected via Upstream surveillance, Mr. Bradner maintains that there are three scenarios in which Wikimedia’s communications would still be copied and scanned by the NSA. Bradner Decl. ¶367(b), 370. In these three specific

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not, engage in additional filtering at the first step in the Upstream surveillance collection process. Whether or not the government actually engages in additional filtering at the first step in the Upstream surveillance collection process is a fact protected by the state secrets privilege. *See Wikimedia Found v. Nat’l Sec. Agency*, 335 F. Supp. 3d 772, 789–90 (D. Md. 2018); Pub. Decl. of Daniel R. Coats, DNI, ¶ 18(B), 18(D), ECF No. 138-2.

scenarios—namely (i) communications contained within a multi-communication transaction,<sup>50</sup> (ii) emails to or from Wikimedia involving a person located abroad who is using an email service located in the U.S.,<sup>51</sup> or (iii) a person located abroad who

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<sup>50</sup> A “multi-communication transaction” (MCT) is “an Internet transaction that contain[s] multiple discrete communications.” NSA Response to Plaintiff’s Interrogatory No. 8 (Dec. 22, 2017). When an email user logs into their email service to check his or her email, the group of all unread email messages is transmitted together as a single communication from the email service to the subscribing user’s inbox. This transmission of multiple emails in a single communication might be considered an MCT. Bradner Decl. ¶¶ 67, 132, 317. In transit, an MCT of this type would contain the IP address of the email service as the sender and the IP address of the user as the recipient. If an email to or from Wikimedia were contained within the batch of emails sent as an MCT, the Wikimedia email would be transmitted to the user’s inbox without Wikimedia’s IP address in the individual packet headers of the MCT. Dr. Schulzrinne 2d Decl. ¶ 78. Thus, this specific type of Wikimedia communication could be transmitted from an email service to a user of the email service without Wikimedia’s IP address being the source or destination IP address. And, as a result, blacklisting Wikimedia’s IP addresses would not prevent the NSA’s collection of such an email from an international Internet circuit which the NSA is monitoring.

<sup>51</sup> This scenario is similar to the first MCT scenario. If (i) an email user sent an email to Wikimedia or received an email from Wikimedia, (ii) that email user was abroad, and (iii) that email user utilized a U.S.-based email service, the communication between the email user and the email service would not include Wikimedia’s IP address in the packet headers and would need to traverse an international Internet circuit between the U.S.-based email service and the user located abroad. Bradner Decl. ¶ 367(b)(2); Dr. Schulzrinne 2d Decl. ¶ 81. Thus, this specific type of Wikimedia communication could be transmitted from an email service to a user of the email service without Wikimedia’s IP address being the source or destination IP address. And as a result, blacklisting Wikimedia’s IP addresses would not prevent



accesses Wikimedia’s websites through a U.S.-based Virtual Private Network (VPN),<sup>52</sup> Wikimedia’s IP address would not appear as the source or destination IP address on the packet header traversing the international Internet circuit into or out of the U.S. See Bradner Decl. ¶367(b)(1)– (3); Dr. Schulzrinne 2d Decl. ¶ 77–87. Thus, these communications would not be blocked by the NSA’s hypothetical blacklist of Wikimedia’s IP addresses because the communications would not contain Wikimedia’s IP address in the packet header, despite involving a Wikimedia communication.

Dr. Schulzrinne admits that each of these scenarios is “theoretically possible” but “could come to pass only in the uncertain event that particular conditions are met.” Dr. Schulzrinne 2d Decl. ¶ 77. For communications in each of these three scenarios to be

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the NSA’s collection of such an email from an international Internet circuit which the NSA is monitoring.

<sup>52</sup> When a user communicates via a Virtual Private Network (VPN), all of the user’s communications are encrypted and first routed through the VPN server before being directed to their ultimate destination. Dr. Schulzrinne 2d Decl. ¶ 57. As a result, first, each communication’s packet is assigned the VPN server’s address as its destination IP address, not the IP address of the ultimate destination. *Id.* Then, once the communication has reached the VPN server (destination one), the communication travels from the VPN server to the ultimate destination (destination two), with the VPN server IP address as the source IP address, rather than the individual user’s IP address. Therefore, if a person is located abroad and accesses Wikimedia’s website while using a U.S.-based VPN and the first leg communication between the VPN user and the VPN server traverses an international Internet circuit that the NSA is monitoring, the NSA could collect that communication even if the NSA has blacklisted Wikimedia’s IP addresses. Bradner Decl. ¶ 367(b)(3).

collected by the NSA through Upstream surveillance, at least four conditions would have to be met,<sup>53</sup> none of which Wikimedia has established as to any of their communications in this case. Specifically, for Wikimedia communications to exist in either of the first two scenarios, an email user in a foreign location must be downloading emails from a server located in the United States (such that the communication would traverse an international Internet circuit monitored by the NSA) *and* the email user must be sending email to and/or receiving email from Wikimedia. *Id.* at ¶¶ 78, 81. Wikimedia has not presented evidence of any such subset of its communications.<sup>54</sup> For Wikimedia's communications to exist in the third scenario, a user of a Virtual Private Network (VPN) that is based in the United States must use that VPN while abroad to visit one of Wikimedia's websites, and the NSA must monitor the international Internet circuit that transmits that communication from the user abroad to the domestic VPN. Again, Wikimedia has not presented evidence of any such subset of its communications. As a result, satisfaction of the chain of conditions necessary to establish that the NSA collected Wikimedia's communications in one of these three circumstances is

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<sup>53</sup> Dr. Schulzrinne 2d Decl. ¶ 78, 81, 83.

<sup>54</sup> It is worth noting that Wikimedia has acknowledged that it does not know the volume of its international email communications, or the countries from which the emails are received. *See* Technical Statistics Chart. In addition to the total volume and location of all of Wikimedia's international email communications being unknown, this particular subset of Wikimedia's international email communications is also unknown—in volume, in geographic diversity, or even whether such communications exist.

too speculative to establish standing. *See Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1148, 1150 (2013) (holding that a speculative chain consisting of five contingencies was insufficient to establish standing). Thus, although it is possible that such communications exist,<sup>55</sup> the summary judgment record does not contain any evidence that such communications actually exist, a requirement at this stage of the litigation. *See Clapper*, 133 S. Ct. at 1148-49.

In sum, the undisputed summary judgment record does not establish that the NSA has copied any of Wikimedia's international Internet communications in the course of Upstream surveillance, or that such collection is certainly impending, or that there is a substantial risk that collection will occur such that Wikimedia must incur costs to avoid collection. Specifically, the summary judgment record establishes that it is not a technological necessity that the NSA must copy all of the text-based Internet communications traversing a circuit that the NSA monitors while conducting Upstream surveillance. The NSA could, *hypothetically*, utilize a process of whitelisting and blacklisting to filter out low-interest Internet communications, including Wikimedia's

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<sup>55</sup> It is worth noting that if such communications exist, they are likely to be far fewer in number than the trillions of international Wikimedia communications every year that traverse every International circuit connecting the U.S. to the rest of the world. Thus, a finding that such communications exist could trigger a re-evaluation of the first prong of Wikimedia's standing argument, *i.e.* that Wikimedia's subject international Internet communications traverse every international Internet backbone link connecting the United States with the rest of the world.

communications, prior to scanning the Internet communications for targeted selectors. At most, there is a genuine dispute of material fact as to whether the NSA can conduct Upstream surveillance without copying Wikimedia's communications, if any, that (i) are contained within a multi-communication transaction, (ii) are emails to or from Wikimedia involving a person located abroad using an email service located in the U.S., or (iii) involve a person located abroad accessing Wikimedia's websites through a U.S.-based Virtual Private Network (VPN) *and* that traverse an NSA-monitored circuit. To the extent there is a genuine issue of material fact with respect to the NSA's collection of this currently unidentified subset of Wikimedia's international communications, that issue cannot be further litigated given the state secrets doctrine, as further discussed *infra* Part VI.

## VI.

Even assuming *arguendo* that, there is a genuine dispute of material fact as to the third prong of the Wikimedia Allegation, the question remains as to how the matter should proceed consistent with Supreme Court and Fourth Circuit precedent regarding the state secrets doctrine. Wikimedia's standing cannot be fairly litigated any further without disclosure of state secrets absolutely protected by the United States' privilege. For Wikimedia to litigate the standing issue further, and for defendants to defend adequately in any further litigation, would require the disclosure of protected state secrets, namely details about the Upstream surveillance program's operations. For the reasons that follow, therefore, the standing issue cannot be tried, or otherwise further litigated, without risking or requiring harmful disclosures of privileged

state secrets, an outcome prohibited under binding Supreme Court and Fourth Circuit precedent. Thus, the case must be dismissed, and judgment must be entered in favor of defendants.

A.

It is necessary first to review the well-settled Supreme Court and Fourth Circuit precedent concerning the state secrets doctrine. Settled Supreme Court and Fourth Circuit precedent make clear that “[u]nder the state secrets doctrine, the United States may prevent the disclosure of information in a judicial proceeding if ‘there is a reasonable danger’ that such disclosure ‘will expose... matters which, in the interest of national security should not be divulged.’” *Abilt v. CIA*, 848 F.3d 305, 310–11 (4th Cir. 2017) (quoting *El-Masri v. United States*, 479 F.3d 296, 302 (4th Cir. 2007)) (quoting *United States v. Reynolds*, 345 U.S. 1, 10 (1953)). In this regard, the Fourth Circuit has recognized that the state secrets doctrine “performs a function of constitutional significance, because it allows the executive branch to protect information whose secrecy is necessary to its military and foreign-affairs responsibilities.” *Id.* at 312 (quoting *El-Masri*, 479 F.3d at 303).

The Fourth Circuit has mandated a three-step analysis for resolution of the state secrets question:

First, “the court must ascertain that the procedural requirements for invoking the state secrets privilege have been satisfied.” Second, “the court must decide whether the information sought to be protected qualifies as privileged under the state secrets doctrine.” Third, if the “information is

determined to be privileged, the ultimate question to be resolved is how the matter should proceed in light of the successful privilege claim.”

*Abilt*, 848 F.3d at 311 (quoting *El-Masri*, 479 F.3d at 304). Previously, an Order and Memorandum Opinion issued in this case, which concluded that defendants satisfied the procedural requirements necessary to invoke the state secrets privilege, that the information sought to be protected qualified as privileged under the state secrets doctrine, and that therefore, Wikimedia’s motion to compel certain information in discovery had to be denied. *Wikimedia Found. v. Nat’l Sec. Agency*, 335 F. Supp. 3d 772, 790 (D. Md. 2018). The seven categories of information determined to be privileged under the state secrets doctrine in relation to plaintiffs motion to compel discovery are the same categories of information at issue for plaintiff to establish standing via further litigation of this case.<sup>56</sup> Thus, as already established in the previous Memorandum Opinion and Order, the first two steps of the state secrets analysis have been resolved, and the step that remains is “how the matter should proceed in light of the successful privilege claim.” *Abilt*, 848 F.3d at 311.

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<sup>56</sup> The seven categories of information privileged pursuant to the state secrets doctrine are: (i) individuals or entities subject to Upstream surveillance activities, (ii) operational details of the Upstream collection process, (iii) locations at which Upstream surveillance is conducted, (iv) categories of Internet-based communications subject to Upstream surveillance activities, (v) the scope and scale on which Upstream surveillance is or has been conducted, (vi) the NSA 's cryptanalytic capabilities, and (vii) additional categories of classified information contained in FISC opinions, orders and submissions.

## B.

How the matter should proceed turns on the centrality of the privileged information to the issue at hand. Whether the NSA has copied and collected any of Wikimedia’s international Internet communications, or such collection is certainly impending, or there is a substantial risk that collection will occur such that Wikimedia must incur costs to avoid collection, is the threshold issue for Wikimedia to establish standing in this litigation. Where, as here, the privileged information is so central to the subject matter of the litigation, dismissal is the appropriate, and only available, course of action.

As the Fourth Circuit has made quite clear, “both Supreme Court precedent and our own cases provide that when a judge has satisfied himself [or herself] that the dangers asserted by the government are substantial and real, he [or she] need not-indeed, should not-probe further.” *Sterling v. Tenet*, 416 F.3d 338,345 (4th Cir. 2005). Moreover, Fourth Circuit precedent establishes that where “circumstances make clear that sensitive military secrets will be so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matters, dismissal is the appropriate remedy.” *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 538-39 (E.D. Va. 2006) (quoting *Sterling*, 416 F.3d at 348), *aff’d*, 479 F.3d 296 (4th Cir. 2007).<sup>57</sup>

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<sup>57</sup> Importantly, “state secrets and military secrets are equally valid bases for invocation of the evidentiary privilege.” *Sterling*, 416 F.3d at 343 (internal quotation marks and alterations omitted).

As such, “[i]f a proceeding involving state secrets can be fairly litigated without resort to the privileged information, it may continue.” *El-Masri*, 479 F.3d at 306. On the other hand, “a proceeding in which the state secrets privilege is successfully interposed must be dismissed if the circumstances make clear that privileged information will be so central to the litigation that any attempt to proceed will threaten that information's disclosure.” *Id.* at 308 (citations omitted).<sup>58</sup> Such a decision is never taken lightly, as “dismissal is appropriate [o]nly when no amount of effort and care on the part of the court and the parties will safeguard privileged material.” *Sterling*, 416 F.3d at 348 (quoting *Fitzgerald v. Penthouse Int’l, Ltd.*, 776 F.2d 1236, 1244 (4th Cir. 1985)) (alteration in original). Nonetheless, “dismissal follows inevitably when the sum and substance of the case involves state secrets.” *Id.* at 347. In this regard, the Fourth Circuit has identified three examples of circumstances in which the privileged information is so central to the litigation that dismissal is required. First, “dismissal is required if the plaintiff cannot prove the *prima facie* elements of his or her claim without privileged evidence.” *Abilt*, 848 F.3d at 313–14 (citing *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 281 (4th Cir. 1980) (en banc) (per curiam)). Second, “even if the plaintiff can prove a *prima facie* case without

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<sup>58</sup> See also *Sterling*, 416 F.3d at 347–48 (“We have long recognized that when ‘the very subject of [the] litigation is itself a state secret,’ which provides ‘no way [that] case could be tried without compromising sensitive military secrets,’ a district court may properly dismiss the plaintiff's case.” (quoting *Fitzgerald*, 776 F.2d at 1243) (alterations in original)); *Bowles v. United States*, 950 F.2d 154, 156 (4th Cir. 1991) (per curiam) (“If the case cannot be tried without compromising sensitive foreign policy secrets, the case must be dismissed.”).



resort to privileged information, the case should be dismissed if “the defendants could not properly defend themselves without using privileged evidence.” *Id.* at 314 (quoting *El-Masri*, 479 F.3d at 309). Third, “dismissal is appropriate where further litigation would present an unjustifiable risk of disclosure” of state secrets. *Id.* (citing *El-Masri*, 479 F.3d at 308).

### C.

Given these principles and given “the delicate balance to be struck in applying the state secrets doctrine,” it is appropriate to analyze the litigation at hand, namely the centrality of state secrets to Wikimedia’s standing. *El-Masri*, 479 F.3d at 308. To establish standing, Wikimedia must prove (1) injury-in-fact, (2) causation, and (3) redressability. Through an extensive jurisdictional discovery process, Wikimedia has established that the NSA monitors at least one circuit carrying international Internet communications in the course of Upstream surveillance and that Wikimedia's communications traverse every circuit carrying international Internet communications from the United States to the rest of the world. Importantly, this extensive jurisdictional discovery process has resulted in the compilation of a voluminous record, including hundreds of pages of expert reports, government disclosures and declassified documents regarding Upstream surveillance, Rule 30(b)(6) testimony from an NSA representative, and extensive interrogatory responses from the parties. Thus, Wikimedia has been granted the opportunity to establish its standing without resort to privileged information, and Wikimedia has made significant progress on that front.

Nonetheless, the summary judgment record does

not establish that the NSA has copied or collected any of Wikimedia's communications via Upstream surveillance conducted on an NSA-monitored circuit, that such collection is certainly impending, or that there is a substantial risk that collection will occur such that Wikimedia must incur costs to avoid collection. Wikimedia has been unable to make this showing because it is not true, as a technological necessity, that the NSA must be copying every text-based communication that traverses a circuit that the NSA monitors. Indeed, Dr. Schulzrinne has convincingly demonstrated that there are technologically feasible methods by which the NSA could hypothetically operate Upstream surveillance that would result in the NSA not copying or collecting any of Wikimedia's communications. Thus, the undisputed summary judgment record establishes that Wikimedia does not have Article III standing sufficient to survive summary judgment.

Even if Wikimedia could establish a *prima facie* case of its standing based solely on the public, unclassified record, which it has not been able to do thus far in this case, the state secrets doctrine still requires dismissal because the defendants cannot properly defend themselves without using privileged evidence. The Fourth Circuit “ha[s] consistently upheld dismissal when the defendants could not properly defend themselves without using privileged information.” *Abilt v. CIA*, 848 F.3d 305, 316 (4th Cir. 2017). As in *El-Masri*, “virtually any conceivable response to [Wikimedia's] allegations [that the NSA has copied and collected some of Wikimedia's international Internet communications] would disclose privileged information.” *El-Masri*, 479 F.3d at 310. Defendants have provided a detailed and

persuasive explanation, in more than 60 pages of classified declarations, that disclosure of the entities subject to Upstream surveillance activity and the operational details of the Upstream collection process would (i) undermine ongoing intelligence operations, (ii) deprive the NSA of existing intelligence operations, and significantly, (iii) provide foreign adversaries with the tools necessary both to evade U.S. intelligence operations and to conduct their own operations against the United States and its allies. *Wikimedia Found. v. Nat'l Sec. Agency*, 335 F. Supp. 3d 772, 789 (D. Md. 2018). Accordingly, defendants could not properly defend themselves in any further litigation of Wikimedia's standing, and thus, the case must be dismissed.

Moreover, if the issue of Wikimedia's standing were further adjudicated, “the whole object of the [adjudication]... [would be] to establish a fact that is a state secret,” presenting an unjustifiable risk of disclosing privileged information. *Sterling*, 416 F.3d at 348. Courts have concluded that where, as here, the information sought to be disclosed involves the identity of parties whose communications have been acquired, this information is properly privileged. *See Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1203–04 (9th Cir. 2007) (finding that the fact of a plaintiff's surveillance by the NSA was covered by the state secrets privilege); *Halkin v. Helms*, 598 F.2d 1, 9 (D.C. Cir. 1978) (upholding assertion of state secrets privilege with respect to “the identity of particular individuals whose communications have been acquired”). Accordingly, because the privileged information, namely the operational details of the Upstream collection process and whether any of Wikimedia's international Internet communications

have been copied or collected by the NSA, is so central to the litigation of Wikimedia’s standing, the case must be dismissed, and judgment must be entered in favor of defendants.

## VII.

To avoid the conclusion that the case must be dismissed, Wikimedia revives its argument that 50 U.S.C. § 1806(f) displaces the state secrets doctrine in cases challenging electronic surveillance pursuant to FISA and provides for *in camera* review of the materials related to the NSA’s Upstream surveillance program. This argument, however, has already been considered and rejected in this litigation. See *Wikimedia Found. v. Nat’l Sec. Agency*, 335 F. Supp. 3d 772, 786 (D. Md. 2018). Specifically, the “§ 1806(f) procedures do not apply where, as here, a plaintiff has not yet established that it has been the subject of electronic surveillance” as required by the statute. *Id.* at 780. Nonetheless, plaintiff raises two additional arguments as to why *in camera* review pursuant to § 1806(f) is appropriate in this case: (i) plaintiff has now established a genuine dispute of material fact concerning its status as an “aggrieved person”<sup>59</sup> before invoking FISA’s procedures and (ii) the Ninth Circuit recently held that § 1806(f) displaces the state secrets privilege in an affirmative legal challenge to electronic surveillance pursuant to FISA. See *Fazaga v. Fed. Bureau of Investigation*, 916 F.3d 1202 (9th Cir. 2019).

First, plaintiff has not established a genuine

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<sup>59</sup> For the purposes of FISA, an “aggrieved person” is “a person who is the target of an electronic surveillance or any other person whose communications or activities were subject to electronic surveillance.” 50 U.S.C. § 1801(k).

dispute of material fact concerning its status as an aggrieved person, *i.e.*, that plaintiff's communications have been the subject of electronic surveillance, as discussed *supra* Part V.C. As previously explained, "the text of § 1806(f) points persuasively to the conclusion that Congress intended § 1806(f) procedures to apply only after it became clear from the factual record that the movant was the subject of electronic surveillance." *Wikimedia Found.*, 335 F. Supp. 3d at 781. To be sure, "affirmative government acknowledgement of surveillance of a specific target is not the only means by which a plaintiff can establish evidence of his or her 'aggrieved person' status." *Id.* at 784. But here, despite the extensive jurisdictional discovery undertaken in this case, plaintiff has been unable to make a factual showing that Wikimedia was the subject of electronic surveillance using admissible record evidence. Thus, the § 1806(f) *in camera* review procedures remain inapplicable to this case.

In addition, no binding authority establishes that § 1806(f)'s review procedures displace the state secrets doctrine even if a plaintiff survived summary judgment on the issue of whether plaintiff has been the target of electronic surveillance, which again is not the case here. Specifically, in *ACLU Foundation of Southern California v. Barr*, 952 F.2d 457 (D.C. Cir. 1991), the D.C. Circuit reasoned that "legitimate concerns about compromising ongoing foreign intelligence investigations" are more properly considered at the summary judgment stage, not upon the pleadings. *Id.* at 469. In doing so, the D.C. Circuit only considered what a party must show to establish his or her "aggrieved person" status and therefore invoke § 1806(f) review. Simply put, the D.C. Circuit did not consider whether or when § 1806(f) *in camera*

review is inappropriate or unnecessary because of the state secrets doctrine.

Moreover, the Ninth Circuit's opinion in *Fazaga* does not hold that § 1806(f) displaces the state secrets doctrine in this case, despite plaintiff's arguments to the contrary. The Ninth Circuit reasoned in *Fazaga* that § 1806(f)'s procedures displace a dismissal remedy for the *Reynolds* state secrets doctrine *only where § 1806(f)'s procedures apply*.<sup>60</sup> *Fazaga*, 916 F.3d at 1234. Specifically, the Ninth Circuit held that for

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<sup>60</sup> *Fazaga* addressed a challenge to an allegedly unlawful FBI counter-terrorism investigation involving electronic surveillance. *Id.* at 1210-11. Specifically, in that case, “several sources” confirmed the identity of a confidential FBI informant and disclosed that that specific confidential informant “created audio and visual recordings” for the FBI. *Id.* at 1214. The district court dismissed all but one of plaintiff's claims at the pleading stage without further discovery based on the government's assertion of the state secrets privilege. *Id.* at 1211. The Ninth Circuit reversed, concluding that § 1806(f)'s procedures are to be used when “aggrieved persons” challenge the legality of electronic surveillance and that the district court erred by dismissing the case without reviewing the evidence. *Id.* at 1238, 1252. In remanding for further proceedings, the *Fazaga* court held that “[t]he complaint's allegations are sufficient *if proven* to establish that Plaintiffs are ‘aggrieved persons.’” *Id.* at 1216 (emphasis added). Thus, the Ninth Circuit's decision reasoned that at the pleading stage of the litigation, where plaintiffs have alleged sufficient facts, assumed to be true at that stage of the litigation, to establish they are “aggrieved persons” as required for application of Section 1806(f), dismissal on the basis of the state secrets doctrine was inappropriate. This holding says nothing, however, about the relationship between § 1806(f) and the state secrets doctrine dismissal remedy where, as here, a plaintiff has not established that he, she, or it is an “aggrieved person” using admissible record evidence, after a lengthy jurisdictional review process, at the summary judgment stage of the litigation.

FISA’s § 1806(f) procedures to apply, “[p]laintiffs must satisfy the definition of an ‘aggrieved person.’” *Id.* at 1238. In this case, as previously discussed at length, Wikimedia has not established it is an “aggrieved person” as defined in § 1801(k). *See Wikimedia Found. v. Nat’l Sec. Agency*, 335 F. Supp. 3d 772, 780, 786 (D. Md. 2018). Thus, § 1806(f) does not apply to this case, and dismissal on state secrets grounds is appropriate, as discussed *supra* Part VI.

Notably, the only court to address this issue post-*Fazaga* held that “where the very issue of standing implicates state secrets,” the holding in *Fazaga* and § 1806(f) do not foreclose “dismissing [the case] on state secrets grounds” at the summary judgment stage of the litigation.<sup>61</sup> *Jewel v. Nat’l Sec. Agency*, No. C 08-04373, at \*24 (N.D. Cal. April 25, 2019), *appeal docketed*, No. 19-16066 (9th Cir. May 21, 2019). Accordingly, because plaintiff has not established it is an “aggrieved person” as defined in the statute, and hence § 1806(f) does not apply, and because the issue of standing in this case necessarily implicates state

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<sup>61</sup> To be sure, the district court in California did review “classified evidence submitted by Defendants in response to Plaintiffs’ discovery requests” pursuant to the procedures of § 1806(f) of FISA prior to its summary judgment ruling dismissing the case. *Id.* at \*24–25. That court did not, however, consider the question of whether plaintiffs were “aggrieved persons” prior to undertaking § 1806(f)’s procedures for in camera review. Nevertheless, that court still found that where, as here, “the answer to the question of whether a particular plaintiff was subjected to surveillance – *i.e.*, is an ‘aggrieved person’ under Section 1806(f) – is the very information over which the Government seeks to assert the state secrets privilege,” dismissal of the case and entry of judgment in favor of the government is the appropriate action at summary judgment. *Id.* at \*23, \*25.

secrets, dismissal of the case is appropriate.

### VIII.

To avoid dismissal of the litigation on state secrets grounds, Wikimedia has raised several additional standing arguments separate and apart from the Wikimedia Allegation—namely (i) Upstream surveillance has impaired Wikimedia’s communications with its community members, (ii) Upstream surveillance has required Wikimedia to take costly protective measures, and (iii) Wikimedia has third-party standing to assert the rights of its users. Wikimedia’s arguments fail as to each of these theories of standing for the reasons discussed below.

First, Wikimedia argues it has standing because Upstream surveillance has impaired Wikimedia’s communications with its community members, as evidenced by a drop in the readership of certain Wikipedia pages. In *Clapper* and *Laird*, however, the Supreme Court unequivocally held that “[a]llegations of a subjective ‘chill’ are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.” *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1152 (2013) (quoting *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972)). To avoid the conclusion that any drop in readership is the result of a “subjective chill,” Wikimedia relies upon a statistical analysis performed by Dr. Jonathon Penny, which concludes it is “highly likely” that “public awareness of NSA surveillance programs, including Upstream surveillance,... ha[s] had a large-scale chilling effect on Wikipedia users” since June 2013. Dr. Jonathon Penney Decl. ¶10–11. But Dr. Penney’s conclusion that Wikipedia’s readership has suffered an actual chill as the result of Upstream surveillance is



undermined for two principal reasons. First, Dr. Penney’s data only covers a 32-month period which ends in August 2014, before this lawsuit was even filed. Thus, Dr. Penney’s evidence, even if reliable, does not say anything about any ongoing harm suffered by Wikimedia that is traceable to Upstream surveillance. Second, these alleged readership effects were from public awareness of “media coverage of NSA surveillance” generally, not Upstream surveillance specifically. *Id.* at 126. Thus, Dr. Penney’s findings do not demonstrate an ongoing and sustained drop in Wikimedia’s readership stemming from the NSA’s Upstream surveillance program.

Moreover, “a ‘chilling effect aris[ing] merely from the individual’s knowledge that a governmental agency was engaged in certain activities or from 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’” is insufficient to establish standing.<sup>62</sup> *Clapper*, 133 S. Ct. at 115 (quoting *Laird*, 408 U.S. at 11). This is exactly the situation here—Wikimedia claims that this decreased readership is a result of individual’s fear that the

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<sup>62</sup> It is worth noting that the Fourth Circuit and the Supreme Court have explained that “standing requirements are somewhat relaxed in First Amendment cases.” *Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013) (citing *Secretary of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 956 (1984)). Even though the standing requirements are somewhat relaxed in the First Amendment context, subjective and speculative fears of government surveillance, such as in this case, do not establish Article III standing at summary judgment, as the Supreme Court specifically held in *Clapper* and *Laird*. See *Clapper*, 133 S. Ct. at 1151–52; *Laird*, 408 U.S. at 10–15.

government might be monitoring their Internet activity and might use that information at some later date. Moreover, the Supreme Court has specifically found that a claimed reluctance by third parties to communicate with a plaintiff, due to their subjective fears of surveillance, is not fairly traceable to the alleged surveillance, and is thus foreclosed as a basis for standing. *Clapper*, 133 S. Ct. at 1152 n.7. Accordingly, Wikimedia cannot establish standing under this theory given the Supreme Court’s holdings in *Clapper* and *Laird*.

Second, Wikimedia argues it has standing because Upstream surveillance has required Wikimedia to take costly protective measures—namely, transitioning its Internet communications into encrypted formats such as HTTPS and IPsec, acquiring new technical infrastructure, and hiring a full-time engineer to manage the protective measures. The Supreme Court has already foreclosed this alternative theory of standing where, as here, a plaintiff has failed to establish that their communications have been collected by the government, or that such collection is certainly impending. *Clapper*, 133 S. Ct. at 1151. Applicable here is the Supreme Court’s statement in *Clapper* that a plaintiff “cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending.” *Id.*

Wikimedia attempts to distinguish this case from *Clapper* by arguing that the harm Wikimedia faces from Upstream surveillance is well-established not some “hypothetical future harm.” As discussed at length *supra* in Part V, however, the summary judgment record does not establish that Wikimedia’s

communications have been collected by the NSA during Upstream surveillance, or that such collection is certainly impending, or that there is a substantial risk that collection will occur such that Wikimedia must incur costs to avoid collection. Thus, any harm to Wikimedia from the Upstream surveillance program remains a purely hypothetical harm insufficient to establish standing. As the Supreme Court has sensibly observed, to find otherwise “would be tantamount to accepting a repackaged version of [plaintiff’s] first failed theory of standing,” namely the Wikimedia Allegation. *Id.* (citing *Am. Civil Liberties Union v. Nat’l Sec. Agency*, 493 F.3d 644, 655–56 (6th Cir. 2007)). Accordingly, Wikimedia’s alleged expenditures to protect its communications from Upstream surveillance collection do not establish its standing.<sup>63</sup>

Third, Wikimedia argues it has third party standing to assert the rights of its users. In the Fourth Circuit, a plaintiff must demonstrate “(1) an injury-in-fact; (2) a close relationship between [itself] and the

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<sup>63</sup> Moreover, without evidence that the alleged injuries from implementing these protective measures would be redressed by the injunctive relief plaintiff seeks, these alleged injuries cannot confer standing to sue. *See Clapper*, 568 U.S. at 409; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Given the number of other reasons that plaintiff has admitted influenced its decision to implement these protective measures, including protecting against individual computer hackers and keeping their company policies up-to-date and transparent, injunctive relief enjoining the NSA from conducting the Upstream surveillance program would not redress any alleged injury from these protective expenditures. In fact, Wikimedia began the process of switching to HTTPS as early as 2011, years before any disclosures about the NSA’s Upstream surveillance program. *See* ECF No. 178-8.

person whose right [it] seeks to assert; and (3) a hindrance to the third party's ability to protect his or her own interests" to "overcome the prudential limitation on third-party standing."<sup>64</sup> *Freilich v. Upper Chesapeake Health Inc.*, 313 F.3d 205,215 (4th Cir. 2002) (citing *Powers v. Ohio*, 499 U.S. 400, 410–11 (1991)). Wikimedia has met none of these requirements. As discussed at length *supra* in Part V, Wikimedia has been unable to establish injury-in-fact in this case. In addition, Wikimedia has not presented admissible evidence that establishes a “close relationship” between Wikimedia and its largely unidentified contributors.<sup>65</sup> In fact, Wikimedia has only presented declarations from one single contributor who has edited Wikimedia’s web projects while abroad, and this single contributor has stated that her “workload as a medical student” makes it “impossible” for her to bring a lawsuit as a plaintiff.<sup>66</sup> Such “normal burdens of litigation,” however, are insufficient to satisfy the third requirement that an obstacle exists that prevents the third party from

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<sup>64</sup> As the Supreme Court has appropriately warned, “[f]ederal courts must hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of the rights of third persons not parties to the litigation.” *Singleton v. Wulff*, 428 U.S. 106,113 (1976).

<sup>65</sup> Close relationships that have established third-party standing in the past include lawyer-client and doctor-patient. See *Department of Labor v. Triplett*, 494 U.S. 715 (1990) (lawyer-client); *Singleton v. Wulff*, 428 U.S. 106 (1976) (doctor-patient). Wikimedia’s relationship with its unidentified contributors clearly does not rise to the level of those protected, close relationships.

<sup>66</sup> Temple-Wood Decl. ¶ 26, ECF No. 168-10.

bringing the lawsuit herself or himself.<sup>67</sup> See *Lawyers Ass'n v. Reno*, 199 F.3d 1352, 1364 (D.C. Cir. 2000). Thus, Wikimedia has also failed to satisfy the third requirement to establish third-party standing. Accordingly, Wikimedia's third-party standing argument clearly fails.

For the reasons stated above, Wikimedia's three additional standing arguments clearly fail because Wikimedia has not established an injury-in-fact using admissible record evidence and Wikimedia has not satisfied the strict requirements to proceed on the basis of third-party standing.

## IX.

In sum, Wikimedia has failed to present specific facts which show that defendants, through the Upstream surveillance program, have copied and collected Wikimedia's international Internet communications, that such collection is certainly impending, or that there is a substantial risk that collection will occur such that Wikimedia must incur costs to avoid collection. More specifically, the summary judgment record establishes that it is not a technological necessity that the NSA must copy all of

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<sup>67</sup> Thus, Ms. Temple-Wood, a contributor to Wikimedia's free-knowledge projects, also states that "serving as a plaintiff in a lawsuit would threaten the anonymity [upon which Wikimedia] users depend." Temple-Wood Decl. ¶ 27, ECF No. 168-10. Although privacy and anonymity are valid concerns, in this case a putative plaintiff would not need to reveal the contents of their communications with Wikimedia in order to serve as a plaintiff; they would only need to disclose the form in which the communications were sent (*i.e.*, sending an email or accessing or editing a web project), and the location from which the communications were sent.

the text-based Internet communications traversing a circuit that the NSA monitors while conducting Upstream surveillance. Thus, there is no genuine dispute of material fact that the NSA could conduct Upstream surveillance without collecting any of Wikimedia's communications, and Wikimedia has been unable to present specific facts that establish otherwise, largely because the necessary facts are protected by the state secrets privilege.

Moreover, even if Wikimedia had established a genuine issue of material fact as to whether the NSA has copied or collected any of its international Internet communications, which Wikimedia has not done on this record, further litigation of this matter is precluded by the state secrets doctrine, which has been properly invoked by defendants. The extensive jurisdictional discovery process in this case has made clear that the very issue of standing implicates state secrets and that despite plaintiff's valiant efforts, establishing standing solely on the basis of the public, unclassified record is not possible in this case. Pursuant to Supreme Court and Fourth Circuit precedent, at this stage of the litigation, namely summary judgment post-jurisdictional discovery, dismissal and entry of judgment in favor of defendants is the appropriate, and only available, remedy because the issue of standing in this case necessarily implicates state secrets.

It is important to acknowledge the unfortunate burden that this decision places on Wikimedia. *See Abilt*, 848 F.3d at 317; *Sterling*, 416 F.3d at 348; *El-Masri*, 479 F.3d at 313 ("As we have observed in the past, the successful interposition of the state secrets privilege imposes a heavy burden on the party against whom the privilege is asserted."). Wikimedia suffers

dismissal of its claim “not through any fault of [its] own, but because [its] personal interest in pursuing [its] civil claim is subordinated to the collective interest in national security.” *El-Masri*, 479 F.3d at 313; *see also Abilt*, 848 F.3d at 318; *Fitzgerald*, 776 F.2d at 1238 n.3 (“When the state secrets privilege is validly asserted, the result is unfairness to individual litigants-through the loss of important evidence or dismissal of a case-in order to protect a greater public value.”). It is appropriate, however, “in limited circumstances like these, [that] the fundamental principle of access to court must bow to the fact that a nation without sound intelligence is a nation at risk.” *Sterling*, 416 F.3d at 348.

Plaintiff contends that a holding which finds plaintiff does not have standing and precludes further litigation of this matter because of defendants’ invocation of the state secrets doctrine leads to the result that “the Executive Branch alone controls who can and cannot challenge unlawful surveillance.”<sup>68</sup> This contention is incorrect; the Supreme Court addressed and rejected a similar argument in *Clapper*. There, the Supreme Court explained that Section 702 surveillance orders are not insulated from judicial review because (i) the FISC reviews the government’s certifications, targeting procedures, and minimization procedures for Section 702 surveillance, including whether the targeting and minimization procedures comport with the Fourth Amendment, (ii) criminal defendants prosecuted on the basis of information derived from Section 702 surveillance are given notice of that surveillance and can challenge its

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<sup>68</sup> Plaintiff’s Br. in Op. to Defs.’ Motion for Summary Judgment, ECF No. 168, at 2.

validity, and (iii) electronic communications service providers directed to assist the government in surveillance may challenge the directive before the FISC. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1154 (2013). Even if those other avenues for judicial review were not available, the Supreme Court has made clear that “[t]he assumption that if [plaintiff has] no standing to sue, no one would have standing, is not a reason to find standing.” *Id.* (quoting *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 489 (1982)).

Moreover, since this litigation began in 2015, FISA Section 702, pursuant to which the NSA Upstream surveillance program operates, was reauthorized by Congress. FISA Section 702 was set to expire on December 31, 2017, but Congress voted in January 2018 to extend FISA Section 702 for an additional six years (the “FISA Amendment Reauthorization Act of 2017”).<sup>69</sup> This reauthorization process sparked significant public debate, and the FISA Amendment Reauthorization Act of 2017 enacted a number of reforms to address the public’s civil liberties concerns.<sup>70</sup>

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<sup>69</sup> FISA Amendments Reauthorization Act of 2017, PL 115-118, January 19, 2018, 132 Stat 3.

<sup>70</sup> For example, the FISA Amendment Reauthorization Act of 2017 added a requirement that the DNI adopt procedures consistent with the requirements of the Fourth Amendment for querying information collected pursuant to Section 702 authority and made these querying procedures subject to FISC review. *See id.* at Sec. 101 Querying Procedures Required. The FISA Amendment Reauthorization Act of 2017 also restricted the use of U.S. person information obtained under Section 702 as evidence in a criminal proceeding and amended the mandatory



Thus, rather than the executive branch alone controlling who can and cannot challenge unlawful surveillance, the judicial branch provides for review and oversight via the limited avenues outlined by the Supreme Court in *Clapper*, including the significant role of the FISC, and the legislative branch provides for review and oversight via the FISA reauthorization process and the executive branch's ongoing reporting requirements to Congress. These avenues are sufficient to meet Constitutional requirements while at the same time precluding the unnecessary disclosure of state secrets.

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For the reasons set forth above, this case must be dismissed, and judgment must be entered for defendants.

An appropriate order will issue separately.

The Clerk is directed to provide a copy of this Opinion to all counsel of record.

Alexandria, Virginia

December 13, 2019

/s/ T.S. Ellis, III

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reporting requirements to require the release of information on the breakdown of U.S. and non-U.S. person targets of electronic surveillance. *See id.* at Sec. 102. These represent only a few of a number of reforms enacted by the FISA Amendment Reauthorization Act of 2017. These reforms, combined with the short period of reauthorization, demonstrate the legislative branch's focused oversight of the executive branch's Section 702 authority.

T. S. Ellis, III  
United States District Judge

**APPENDIX C**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

WIKIMEDIA  
FOUNDATION,

Plaintiff,

v.

NATIONAL SECURITY  
AGENCY/ CENTRAL  
SECURITY SERVICE,  
*et al.*,

Defendants.

Case No. 1:15-cv-662

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**ORDER**

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For the reasons stated in the accompanying Memorandum Opinion,

It is hereby ORDERED that defendants' motion for summary judgment (Dkt. 161) is GRANTED.

Accordingly, it is further ORDERED that this matter is DISMISSED without prejudice.

The Clerk is directed to enter Rule 58 judgment on behalf of defendants and against plaintiff and place this matter among the ended causes.

The Clerk is further directed to send a copy of this Order to all counsel of record.

Alexandria, Virginia

December 13, 2019

/s/ T. S. Ellis, III

T. S. Ellis, III

United States District Judge

## APPENDIX D

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

WIKIMEDIA  
FOUNDATION,

Plaintiff,

v.

NATIONAL SECURITY  
AGENCY/CENTRAL  
SECURITY SERVICE,

*et al.*,

Defendants.

Case No. 1:15-cv-662

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### MEMORANDUM OPINION

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At issue in this First and Fourth Amendment suit is plaintiff's motion to compel defendants to respond to discovery requests regarding defendant National Security Agency's ("NSA") Upstream surveillance program. Specifically, plaintiff served 84 discovery requests on defendants in an effort to establish that at least one of plaintiff's communications has been intercepted, copied, and reviewed by defendants. Defendants have objected to 53 of these requests on the basis of the common law state secrets privilege and other statutory privileges, arguing that the information plaintiff seeks, if disclosed, reasonably could be expected to result in exceptionally grave

damage to U.S. national security. Plaintiff now moves for an order compelling defendants to produce any information responsive to plaintiffs requests, contending that the Foreign Intelligence Surveillance Act (“FISA”)<sup>1</sup> displaces the common law state secrets privilege and establishes procedures for the *ex parte* and *in camera* review of sensitive national security information. These issues have been fully briefed and argued and are now ripe for disposition.

## I.

A brief summary of the statutory framework pertinent to defendants’ electronic surveillance efforts provides context necessary for resolution of the question presented in this case. In 1978, Congress enacted FISA in response to growing concerns about the Executive Branch’s use of electronic surveillance. Specifically, Congress sought through FISA to accommodate U.S. national security interests in obtaining intelligence about foreign powers while also providing meaningful checks on the Executive Branch’s ability to conduct that surveillance. In this respect, FISA created a “secure framework by which the Executive Branch may conduct legitimate electronic surveillance for foreign intelligence purposes within the context of this Nation’s commitment to privacy and individual rights.” S. Rep. No. 604, pt. 1, 95th Cong. 1st Sess. 15 (1977), reprinted in U.S.Code Cong. & Admin.News 1978, pp. 3904, 3916.

A central component of this framework is the U.S. Foreign Intelligence Surveillance Court (“FISC”). FISC, a tribunal composed of eleven federal district

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<sup>1</sup> 50 U.S.C. § 1801, *et seq.*

judges designated by the Chief Justice of the U.S. Supreme Court, is charged with the review of applications for electronic surveillance. *See* 50 U.S.C. § 1803(a). FISA provides that, with limited exceptions, the Executive Branch cannot conduct surveillance of a foreign power or its agents absent prior FISC authorization. To obtain FISC authorization for electronic surveillance, the Attorney General must personally approve an application for surveillance, which must (i) comport with FISA’s procedural requirements and (ii) establish probable cause to believe that the target of electronic surveillance is a foreign power or an agent of a foreign power and that each of the facilities at which electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power. *Id.* § 1805.

FISA also establishes rules governing the use of information obtained through electronic surveillance. *See id.* § 1806. Specifically, if the Government, including any State or political subdivision, intends to “enter into evidence or otherwise use or disclose” at any proceeding information obtained through electronic surveillance against an “aggrieved person”—that is, any person who has been the subject of electronic surveillance—the Government must first “notify the aggrieved person and the court or other authority” of its intent to so disclose or use the information. *Id.* §§ 1806(c), (d). The person against whom the evidence is to be introduced may then move to suppress the evidence obtained through electronic surveillance on the grounds that (i) “the information was unlawfully acquired” or (ii) “the surveillance was not made in conformity with an order of authorization or approval.” *Id.* § 1806(e). FISA establishes specific

procedures that courts must follow in the event (i) that the government notices its intent to use electronic surveillance information, (ii) that an aggrieved person files a motion to suppress or (iii) that an aggrieved person files “any motion ... pursuant to any other statute or rule of the United States ... to discover, obtain, or suppress” information obtained from electronic surveillance. *Id.* § 1806(f). Specifically, the court

shall, notwithstanding any other law, if the Attorney General files an affidavit under oath that disclosure ... would harm the national security of the United States, review in camera and ex parte the application, order, and such other materials relating to the surveillance as may be necessary...”

*Id.*

On the basis of its *ex parte* and *in camera* review of the materials at issue, the court must determine “whether the surveillance of the aggrieved person was lawfully authorized and conducted.” *Id.* FISA permits courts making this determination to disclose to the aggrieved person portions of the application, order, or other materials “only where such disclosure is necessary to make an accurate determination of the legality of the surveillance.” *Id.* If, in the end, the court determines that the surveillance was not lawfully authorized or conducted, the court must suppress the unlawfully obtained evidence or otherwise grant the motion of the aggrieved person. *Id.* § 1806(g). If, on the other hand, the surveillance was lawfully authorized and conducted, the court “shall deny the motion of the aggrieved person except to the extent that due process requires discovery or disclosure.” *Id.*



In addition to mandating specific procedures governing the use of information obtained through electronic surveillance, FISA establishes additional checks on the Executive's use of electronic surveillance. Two such checks come by way of criminal sanctions and a civil cause of action. Specifically, FISA imposes criminal penalties on any person who intentionally "engages in electronic surveillance under color of law except as authorized by [FISA]" or "discloses or uses information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through electronic surveillance not authorized by [FISA.]" *Id.* § 1809(a)(1)-(2). FISA also provides a civil cause of action to any "aggrieved person ... who has been subjected to an electronic surveillance or about whom information obtained by electronic surveillance of such person has been disclosed or used in violation of section 1809 ... against any person who committed such violation...." *Id.* § 1810.

In 2008, thirty years after FISA's enactment, Congress passed the FISA Amendments Act ("FAA"), which establishes additional procedures and requirements for the authorization of surveillance targeting persons located outside the United States. *See* 50 U.S.C. § 1881a-g. Specifically, § 702 of the FAA<sup>2</sup> provides that the Attorney General and the Director of National Intelligence may jointly authorize, for up to one year, the "targeting of [non-U.S.] persons reasonably believed to be located outside the United States to acquire foreign intelligence information" if the FISC approves "a written certification" submitted by the government

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<sup>2</sup> 50 U.S.C. § 1881a.

attesting, *inter alia*, (i) that a significant purpose of the acquisition is to obtain foreign intelligence information and (ii) that the acquisition will be conducted “in a manner consistent with the [F]ourth [A]mendment” and the targeting and minimization procedures required by statute. 50 U.S.C. § 1881a(b),(g). To approve such a certification, the FISC must determine that the government’s targeting procedures are reasonably designed:

(i) to ensure that acquisition "is limited to targeting persons reasonably believed to be located outside the United States," *id.* § 1881a(i)(2)(B)(i);

(ii) to prevent the intentional acquisition of wholly domestic communications, *id.* § 1881a(i)(2)(B)(ii);

(iii) to “minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign-intelligence information,” *id.* § 1801(h)(1); *see id.* § 1881a(i)(2)(C); and

(iv) to ensure that the procedures “are consistent with ... the [F]ourth [A]mendment,” *id.* § 1881a(i)(3)(A).

Unlike FISA, these FAA procedures do not require the FISC to determine that probable cause exists to believe that the target of electronic surveillance is a foreign power and that each of the facilities at which electronic surveillance is directed is being used or is about to be used by a foreign power.

The recent release of public reports and declassification of FISC opinions have revealed additional details regarding the collection of communications under § 702. For example, the government has disclosed that it conducts § 702 surveillance through two programs—PRISM and Upstream surveillance. See Privacy and Civil Liberties Oversight Board, *Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act 7* (2014) (“PCLOB Report”). The program at issue here, Upstream surveillance, involves collection of communications of persons reasonably believed to be outside of the United States “with the compelled assistance ... of the providers that control the telecommunications backbone over which [telephone and Internet] communications transit.” *Id.* at 35. In this respect, “[t]he government ‘tasks’ certain ‘selectors,’ such as telephone numbers or email addresses, that are associated with targeted persons, and it sends these selectors to electronic communications service providers to begin acquisition.” *Id.* at 7. The providers then assist the government in the collection of the communications associated with those selectors. See *id.*

## II.

With this statutory framework in mind, it is appropriate to turn to the facts and procedural history in this case. Plaintiff Wikimedia Foundation, a non-profit organization based in San Francisco, California, operates several “wiki”-based projects and provides the contents of those projects to individuals around the world free of charge. Defendant National Security Agency/Central Security Service (“NSA”) is the U.S. government agency responsible for conducting the

surveillance at issue in this case. Defendant Office of the Director of National Intelligence (“ODNI”) is the agency responsible for directing the activities of the U.S. intelligence community, including the NSA, and defendant Department of Justice (“DOJ”) is one of the government agencies responsible for overseeing electronic surveillance. Several individual defendants are also named in their official capacities, including the Director of the NSA and the Chief of the Central Security Service, the Director of National Intelligence, and the Attorney General of the United States.

On June 22, 2015, plaintiff, along with eight other organizations,<sup>3</sup> filed the Amended Complaint in this suit, challenging the legality of defendants’ Upstream surveillance program pursuant to § 702 of the FAA. The Amended Complaint alleges that this program violates (i) the Administrative Procedure Act (“APA”), (ii) the Fourth Amendment to the Constitution, (iii) the First Amendment to the Constitution, and (iv) Article III of the Constitution. The Amended Complaint seeks (i) a declaration that Upstream surveillance violates the APA and the Constitution and (ii) an injunction permanently enjoining defendants from continuing Upstream surveillance.

On August 6, 2015, defendants filed a Motion to Dismiss pursuant to Rule 12(b)(1), Fed. R. Civ. P., arguing that none of the plaintiff organizations plausibly alleged that they were injured by the interception, copying and review of online

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<sup>3</sup> These original plaintiffs included the National Association of Criminal Defense Lawyers, Human Rights Watch, Amnesty International USA, Pen American Center, Global Fund for Women, the Nation magazine, the Rutherford Institute, and the Washington Office on Latin America.

communications via the Upstream surveillance program and thus plaintiffs lacked Article III standing to contest the legality of the program. Subsequently, on October 23, 2015, an Order and a Memorandum Opinion issued, concluding that the allegations in the Amended Complaint were too speculative to establish Article III standing and granting defendants' motion to dismiss as to all plaintiffs. *See Wikimedia Found., et al., v. Nat'l Sec. Agency*, 143 F. Supp. 3d 344, 356-57 (D. Md. 2015), *aff'd in part, vacated in part, and remanded by* 857 F.3d 193 (4th Cir. 2017). Thereafter, plaintiffs appealed and the Fourth Circuit issued an opinion affirming in part, vacating in part, and remanding the case to the district court for further consideration. *See Wikimedia Found., et al., v. Nat'l Sec. Agency*, 857 F.3d 193 (4th Cir. 2017). Specifically, the Fourth Circuit concluded that although the eight other organizations had failed to allege injuries sufficient to satisfy the requirements of Article III standing, Wikimedia Foundation had alleged facts "sufficient to make plausible the conclusion that the NSA is intercepting, copying, and reviewing at least some of Wikimedia's communications." *Wikimedia Found, et al.*, 857 F.3d at 210.

Shortly after the Fourth Circuit remanded the case to the district court for further proceedings, the parties submitted briefs on how to proceed in the case. Defendants indicated their intent to continue to challenge plaintiffs Article III standing and argued that any discovery should be bifurcated to allow for resolution of the standing question prior to resolution of the merits. Plaintiff opposed defendants' proposed discovery plan, contending that the jurisdictional facts at issue here are so intertwined with the merits

as to require simultaneous discovery and summary judgment briefing on both questions. On October 3, 2017, an Order issued, directing the parties to conduct a limited five-month period of jurisdictional discovery prior to full discovery on the merits. *See Wikimedia Found. v. Nat'l Sec. Agency*, 1:15-cv-662 (D. Md. Oct. 3, 2017) (Order).

The parties then proceeded to engage in the limited discovery as directed. Plaintiff served 84 requests for admission, interrogatories, and requests for production on defendants, seeking what plaintiff describes as three broad categories of information: (i) direct evidence that Wikimedia has been surveilled, (ii) definition of key terms used in describing Upstream surveillance to the public, and (iii) evidence concerning the scope and breadth of Upstream surveillance.<sup>4</sup> Defendants responded to several of these discovery requests by producing 500 pages of unclassified documents, but objected to 53 of plaintiff's requests on the basis of privilege. In particular, defendants asserted that the information sought by plaintiff was protected by the common law state secrets privilege and other statutory privileges regarding the protection of national security information. In this respect, defendants submitted the unclassified declaration of Daniel Coats, the Director of National Intelligence, formally invoking the state secrets privilege on the basis of his personal consideration of the risks associated with disclosure of the information plaintiff seeks. Defendants also submitted a classified declaration of George C.

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<sup>4</sup> That these interrogatories covered both standing and merits matters is neither inappropriate nor unexpected, as these matters may well be inextricably entwined.

Barnes, the Deputy Director of the NSA, providing additional detail concerning the harm to national security that would be caused by disclosure of the information contained in plaintiff's discovery requests.

Subsequently, on March 26, 2018, plaintiff filed the Motion to Compel at issue here pursuant to Rule 37(a)(3), Fed. R. Civ. P. Plaintiff contends that where, as here, a party moves to discover material relating to electronic surveillance, the court must follow FISA's § 1806(f) procedures and conduct an *ex parte* and *in camera* review of the materials relating to electronic surveillance. Plaintiff argues that these procedures apply despite defendants' assertion of state secrets privilege because in enacting FISA, Congress intended to displace the common law state secrets privilege. And even assuming the state secrets privilege was not displaced by FISA, plaintiff argues that the privilege does not bar disclosure of the information at issue here given the amount of information concerning Upstream surveillance already in the public record.

Defendants oppose plaintiff's motion, arguing (i) that § 1806(f) does not apply where, as here, plaintiff has not yet established that it is the target of electronic surveillance and (ii) that even assuming § 1806(f) does apply here, there is no clear statement indicating Congress's intent to displace the common law state secrets privilege through enactment of FISA. Finally, defendants contend that the government's assessment of the national security risks associated with disclosure of the information concerning plaintiff's discovery requests is entitled to deference and that plaintiff's arguments to the contrary are baseless.

### III.

A threshold question that must be addressed is whether the *ex parte* and *in camera* review procedures established in § 1806(f) apply where, as here, a plaintiff is seeking classified discovery to establish that the plaintiff's communications were unlawfully seized and searched. Analysis of this question properly begins with the terms of that statute. Section 1806(f) provides, in pertinent part:

Whenever a court or other authority is notified pursuant to subsection (c) or (d) of this section, or whenever a motion is made pursuant to subsection (e) of this section, or whenever any motion or request is made by an aggrieved person pursuant to any other statute or rule of the United States ... to discover or obtain applications or orders or other materials relating to electronic surveillance ... the United States district court ... shall, notwithstanding any other law, if the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States, review *in camera* and *ex parte* the application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted. In making this determination, the court may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other



materials relating to the surveillance only where such disclosure is necessary to make an accurate determination of the legality of the surveillance.

50 U.S.C. § 1806(f). The statute further defines “aggrieved person” as “a person who is the target of an electronic surveillance or any other person whose communications or activities were subject to electronic surveillance.” *Id.* § 1801(k).

This statutory text points persuasively to the conclusion that § 1806(f) procedures do not apply where, as here, a plaintiff has not yet established that it has been the subject of electronic surveillance. Specifically, the text of § 1806(f) identifies only three circumstances in which its procedures apply: (i) when the government notifies the court that it plans to introduce evidence obtained through electronic surveillance, (ii) when an aggrieved person moves to suppress information obtained through electronic surveillance, and (iii) when an aggrieved person makes “any motion or request ... pursuant to any other statute or rule of the United States ... to discover or obtain ... materials relating to electronic surveillance.” *Id.* Here, (i) and (ii) are clearly not met. The government has not noticed its intent to use or disclose information obtained through electronic surveillance, and plaintiff has not filed a motion to suppress any such information. Accordingly, the only possible § 1806(f) situation applicable here is (iii), the third circumstance that may trigger § 1806(f). But importantly, § 1806(f) provides that this third situation applies only when the motion or request at

issue “is made by an *aggrieved person*[.]”<sup>5</sup> namely “a person who is the target of an electronic surveillance or any other person whose communications or activities were subject to electronic surveillance.”<sup>6</sup> In this regard, the text of § 1806(f) makes clear that a party’s status as an “aggrieved person,” or the subject of surveillance, is a precondition to the application of § 1806(f)’s procedures; unless and until a party has adduced evidence that it has been the subject of electronic surveillance, a party’s motion cannot trigger § 1806(f)’s *ex parte* and *in camera* review procedures.

This interpretation of the text is confirmed by the nature of § 1806(f)’s procedures once invoked. Specifically, § 1806(f)’s procedures require courts to engage in *ex parte* and *in camera* review of orders or other materials relating to surveillance to determine whether the surveillance at issue “was lawfully authorized and conducted.” *Id.* § 1806(f). A determination that surveillance was lawfully authorized and conducted cannot occur unless a determination has previously been made that the surveillance at issue did, in fact, occur. Put differently, it is impossible to determine the lawfulness of surveillance if no surveillance has actually occurred. Thus, the text of § 1806(f) points persuasively to the conclusion that Congress intended § 1806(f) procedures to apply only after it became clear from the factual record that the movant was the subject of electronic surveillance.

Had Congress instead intended § 1806(f) to be a

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.* § 1801(k).

vehicle for parties to determine whether they were the target of electronic surveillance, one would expect to see language requiring courts to review materials relating to electronic surveillance to determine whether “electronic surveillance occurred,” or requiring the government to affirm or deny the existence of any surveillance. Indeed, Congress has used precisely this language elsewhere in the U.S. Code. Specifically 18 U.S.C. § 3504, which was enacted eight years prior to FISA in 1970, provides that where a party claims evidence is admissible because the evidence is the product of an unlawful act, such as warrantless wiretapping, “the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act[.]” 18 U.S.C. § 3504. This provision demonstrates that Congress knew how to draft language requiring the government to affirm or deny the existence of some fact when Congress sought to do so. But importantly, § 1806(f) does not adopt this or similar language requiring an affirmation or denial of the fact of surveillance upon motion by an aggrieved person; rather, § 1806(f) provides that, upon a motion made by an aggrieved party, the court will determine whether the surveillance “was lawfully authorized and conducted.” To assign meaning to this textual variation demands that § 1806(f) be interpreted to require *ex parte* and *in camera* review of the lawfulness of surveillance only after the individual has adduced evidence that he has been the target of electronic surveillance. *Cf. Lorillard v. Pons*, 434 U.S. 575, 584 (1978) (finding that Congress did not intend to apply the standards from one statute to a later-enacted statute where significant differences existed in the text of the two statutes).

Consideration of the other circumstances in which

§ 1806(f) procedures apply further bolsters the conclusion reached here. It is axiomatic that where, as here, “general words follow specific words in a statutory enumeration, the general words are usually construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.” *Yates v. United States*, 135 S.Ct. 1074 (2015) (quoting *Washington State Dept. of Social & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371,384 (2003) (internal quotation marks omitted)). In *Bergay v. United States*, 553 U.S. 137, 142-43 (2008), the Supreme Court relied on this principle to determine whether specific crimes were covered by the statutory phrase “any crime ... that ... is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another[.]” The Supreme Court reasoned that the enumeration of specific crimes—that is, burglary, arson, extortion, and use of explosives—indicated that the broadly worded “otherwise involves” provision covered “only similar crimes, rather than every crime that ‘presents a serious potential risk of physical injury to another.’” *Id.* at 142.

The statutory provision at issue here—§ 1806(f)—is structured in precisely the same way as the provision at issue in *Bergay*. Specifically, like the provision at issue in *Bergay*, § 1806(f) enumerates two specific situations covered by its procedures—namely, when the government provides notice pursuant to § 1806(c)-(d) and when a person against whom evidence is to be introduced moves to suppress that evidence pursuant to § 1806(e)—followed by a broadly-worded more general provision that also triggers § 1806(f)—namely, “whenever any motion or request is made by

an aggrieved person pursuant to any other statute or rule of the United States ... to discover or obtain applications or orders or other materials relating to electronic surveillance....” *Id.* As in *Bergay*, this broadly-worded, more general provision must be interpreted in light of the specifically enumerated provisions listed before it. And importantly, in each of these two specific situations, there is clear evidence that electronic surveillance has occurred; the only question is whether the evidence derived from the electronic surveillance may properly be disclosed.<sup>7</sup> Thus, to “avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words” and to avoid “giving unintended breadth to the Acts of Congress[,]” it is necessary to interpret the final provision of §1806(f) as similarly requiring evidence of the fact of electronic surveillance. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995).

Support for the conclusion reached here is found not solely in the text of § 1806(f) itself, but also in the caption of § 1806 and the general structure of the provision. Although “headings are not commanding,” the Supreme Court has recognized that headings can

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<sup>7</sup> This common thread uniting the situations in which § 1806(f) applies is further highlighted by the legislative history of this provision. Specifically, the Senate Report notes additional examples of instances in which § 1806(f)’s procedures apply, including “whenever an individual makes a motion pursuant to ... 18 U.S.C. § 3504 to discover, obtain, or suppress evidence or information obtained or derived from electronic surveillance....” S. Rep. 95-701, 63, 1978 U.S.C.C.A.N. 3973, 4032. In this respect, the Senate Report explained that a defendant could “quer[y] the government under 18 U.S.C. § 3504,” “discover[] that he has been intercepted by electronic surveillance” and then move to suppress or to discover or obtain information related to that surveillance.

“supply cues” that Congress did not intend a particular meaning of the statute. *Yates v. United States*, 135 S. Ct. 1074, 1083 (2015). Section 1806’s heading—use of information—suggests that Congress did not intend § 1806(f) to apply in situations where, as here, it is yet unclear whether electronic surveillance even occurred. Rather, the heading suggests that Congress intended the provisions of § 1806 to apply where evidence already establishes the fact of surveillance, and the central dispute is instead how, and whether, information obtained via that electronic surveillance can be used or disclosed in a proceeding.

Finally, as the Supreme Court has recognized, “[i]t is axiomatic that statutes in derogation of the common law should be narrowly construed[.]” *Badaracco v. C.I.R.*, 464 U.S. 386, 403 n.3 (1984). In this case, as plaintiff notes, § 1806(f) seems on its face to conflict with traditional principles of common law, namely the common law state secrets privilege. Specifically, the mandatory *ex parte* and *in camera* review procedures established in § 1806(f), in situations in which these procedures apply, likely displace the common law process whereby courts review the government’s assertion of the state secrets privilege to avoid disclosure of information potentially harmful to national security. Given this, traditional principles of statutory interpretation counsel that FISA must be narrowly construed so as to avoid excessive displacement inconsistent with Congress’s intent. To interpret the text of § 1806(f) broadly, as plaintiff here suggests, to encompass not just motions raised by parties who have adduced evidence that they are “aggrieved persons,” but also motions by parties who simply allege that they are “aggrieved persons,” would

do precisely this, namely displace the common law to an extent neither contemplated nor intended by Congress.

In an attempt to avoid this conclusion, plaintiff contends that the allegations contained in the complaint are sufficient to establish that plaintiff is an “aggrieved person” within the meaning of § 1806(f). Specifically, defendant cites to the Fourth Circuit’s determination that plaintiff’s complaint alleges sufficient facts “to make plausible the conclusion that the NSA is intercepting, copying, and reviewing at least some of [plaintiff’s] communications” and contends that this plausibility determination is sufficient standing alone to require invocation of § 1806(f)’s procedures. *Wikimedia Found., et al.*, 857 F.3d at 211. But the Fourth Circuit concluded that plaintiff had sufficiently alleged injury-in-fact for the purposes of surviving a motion to dismiss; the Fourth Circuit never considered the requisite showing of “aggrieved person” status to trigger the earlier procedures outlined in § 1806(f). *Id.* at 207-11. As such, the Fourth Circuit’s determination in *Wikimedia* does not answer the question raised here—namely what showing is required prior to invocation of § 1806(f) procedures.

Notably, the only circuit authority to consider this latter question—what a party must show to establish his or her “aggrieved person” status and invoke § 1806(f)—recognized that a party may not trigger § 1806(f) procedures unless and until the party has adduced evidence of its “aggrieved person” status. Specifically, in *ACLU Foundation of Southern California v. Barr*, 952 F.2d 457 (D.C. Cir. 1991), the D.C. Circuit reversed the district court’s dismissal of the plaintiffs’ First Amendment claim based on the

government's surveillance of plaintiffs' communications. In denying the motion to dismiss, the D.C. Circuit reasoned that "legitimate concerns about compromising ongoing foreign intelligence investigations" are more properly considered at the summary judgment stage, not upon the pleadings. *Id.* at 469. In this respect, the D.C. Circuit explained that plaintiffs challenging alleged unlawful electronic surveillance must survive summary judgment—that is, they must adduce evidence sufficient to prove the existence of a genuine dispute about the fact of ongoing surveillance before the court applies § 1806(f) procedures. *Id.* The D.C. Circuit recognized that "in the usual case some discovery is permitted before the court rules on a motion for summary judgment," but importantly, the D.C. Circuit noted that "normal rules regarding discovery must be harmonized with FISA and its procedures, notably 1806(f)." *Id.* In this regard, The D.C. Circuit further explained that:

even plaintiffs who defeat summary judgment motions would not be entitled to obtain any of the materials relating to the authorization of the surveillance or the evidence derived from it unless the district court, in an *ex parte*, *in camera* proceeding, first determined that the surveillance was not "lawfully authorized and conducted."

*Id.* This analysis in *Barr* makes clear that the D.C. Circuit contemplated the conclusion reached here, namely that in order to trigger § 1806(f) procedures, a plaintiff must first adduce evidence sufficient at least to create a genuine dispute as to whether the plaintiff has been the target of electronic surveillance in the past or whether electronic surveillance is ongoing.



Plaintiff next argues that to require a plaintiff to adduce evidence of surveillance to demonstrate his or her “aggrieved person” status would necessarily mean that a plaintiff could not do so unless the government affirmatively acknowledges the fact of surveillance. And to require the government affirmatively to acknowledge the fact of surveillance prior to invocation of § 1806(f) procedures, plaintiffs contend, would be inconsistent with other provisions in the statute, namely the civil cause of action established in § 1810.

This argument fails to persuade because it mischaracterizes both (i) the requirements for establishing “aggrieved person” status and (ii) the nature of the civil remedy established in § 1810. To begin with, affirmative government acknowledgement of surveillance of a specific target is not the only means by which a plaintiff can establish evidence of his or her “aggrieved person” status. Indeed, courts have recognized that plaintiffs can “rely on many non-classified materials, including present and future public disclosures of the government or [telecommunications providers] on the alleged NSA programs” to establish that they have been the target of electronic surveillance. *Hepting v. AT&T Corp., et al.*, 439 F. Supp. 2d 974, 998 (N.D. Cal. 2006). Thus, to require a plaintiff to adduce evidence of surveillance to demonstrate his or her “aggrieved person” status does not necessarily require that the government affirmatively acknowledge the fact of surveillance.

And even assuming, *arguendo*, that affirmative government acknowledgment was the only means by which a plaintiff could prove his or her “aggrieved person” status, this requirement would not be

inconsistent with the remedy established in § 1810. That section provides a civil remedy to “[a]n aggrieved person ... who has been subjected to an electronic surveillance or about whom information obtained by electronic surveillance of such person has been disclosed or used in violation of section 1809.” 50 U.S.C. § 1810. Plaintiff argues that to require government acknowledgement of surveillance prior to invocation of § 1806(f) procedures would render § 1810 a nullity because plaintiff’s access to the remedy against the government would be dependent entirely on cooperation by the government. This argument is unpersuasive; courts have made clear that § 1810 is not actually a remedy against the government because § 1810 does not contain an explicit waiver of sovereign immunity. *See Al-Haramain Islamic Found, Inc. v. Obama*, 705 F.3d 845, 854 (9th Cir. 2012).<sup>8</sup> Instead, § 1810 provides a remedy against intelligence agents who engage in unlawful electronic surveillance or who disclose information obtained from unlawful surveillance in their personal, not official, capacities. In this respect, the civil cause of action in § 1810 is premised upon the individual agent’s “violation of section 1809[,]” which establishes criminal penalties for unlawful surveillance. *Al-Haramain*, 705 F.3d at 854 (quoting 50 U.S.C. 1810).<sup>9</sup> There is no reason to believe that the

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<sup>8</sup> *See also Whitaker v. Barksdale Air Force Base*, 2015 WL 574697, \*7 (W.D. La. Feb. 11, 2015) (agreeing with the “extensive analysis” in *Al-Haramain*).

<sup>9</sup> *See also* H.R. Conf. Rep. No. 95-1720 (noting that the cause of action in § 1810 is afforded “to any aggrieved person about whom information has been disclosed or used in violation of the criminal penalty provisions” and that “civil liability of

government would be unwilling to cooperate in acknowledging that an individual agent conducted unlawful surveillance in his individual capacity. Indeed, to the extent that § 1810 is intended to track an individual agent’s criminal liability, the government will necessarily acknowledge, and indeed prove, the fact of surveillance through a criminal prosecution of that individual agent.

Finally, plaintiff cites to one case in which a district court found that the plaintiffs “alleged enough to plead ‘aggrieved person’ status so as to proceed to the next step in proceedings under FISA sections 1806(f) and 1810.” *In re NSA Telecommunications Records Litig.*, 595 F.Supp.2d 1077, 1085-86 (N.D. Cal. 2009). But in reaching this conclusion—namely that the allegations in plaintiff’s complaint were sufficient to invoke § 1806(f) procedures—the court did not conduct an in-depth analysis of the text or indeed even of the legislative history of FISA. Instead, the *In re NSA Telecommunications Records Litigation* court imported a standard from the Ninth Circuit’s analysis of claims pursuant 18 U.S.C. § 3504.<sup>10</sup> Section 3504 provides, in relevant part, that “upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act ... , the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act.” 18 U.S.C. § 3504. In *United States v. Aller*, 482 F.2d 1016 (9th Cir. 1974), the Ninth Circuit concluded that § 3504’s requirement to affirm or deny the occurrence of the alleged unlawful act is triggered where the party

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intelligence agents under this act should coincide with the criminal liability.”).

<sup>10</sup>18 U.S.C. 3504

aggrieved makes a “prima facie showing that good cause exists to believe” the individual was subject to illegal surveillance. *Id.* at 1026.

Plaintiff’s reliance on *In re NSA Telecommunications Records Litigation* and its application of the § 3504 standard in the FISA context is unpersuasive because § 3504 is different from § 1806(f) in significant ways. Notably, although both § 1806(f) and § 3504 use the term “aggrieved,” § 1806(f), unlike § 3504, incorporates a statutory definition of an “aggrieved person,” which specifies that an “aggrieved person” is “a person who is the target of an electronic surveillance” or “whose communications or activities were subject to surveillance[.]” 50 U.S.C. § 1801(k). As such, while a party can claim to be aggrieved for the purposes of § 3504 through a “mere assertion”<sup>11</sup> that unlawful surveillance has occurred, § 1806(f) requires that the person has actually been a target of electronic surveillance or has been subject to surveillance before that individual can trigger the *ex parte* and *in camera* review procedures outlined in § 1806(f).

Moreover, the reasoning in support of the low burden in the § 3504 context does not apply here. Specifically, in analyzing § 3504, courts have reasoned that the government’s obligation to affirm or deny the occurrence of unlawful surveillance is triggered by the mere assertion of unlawful wiretapping because “requiring the government to affirm or deny the existence of illegal surveillance of witnesses imposes only a minimal additional burden upon the government.” *Vielghth*, 502 F.2d at 1259 n.4 (citing *In*

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<sup>11</sup> *United States v. Vielghth*, 502 F.2d 1257, 1258 (9th Cir. 1974) (quoting *In re Evans*, 452 F.2d 1239, 1247 (1971)).

*re Evans*, 452 F.2d at 1247). But this reasoning is inapplicable here because § 1806(f) requires much more than a simple affirmation or denial by the government. Section 1806(f) procedures, once triggered, require the court to review *ex parte* and *in camera* all of the relevant materials relating to electronic surveillance—in this case, potentially 10,000 pages of documents—to determine the lawfulness of the surveillance. The reasoning justifying the low burden in § 3504 is thus inapplicable here where a much higher burden is associated with the applicable procedures. Given that the *In re NSA Telecommunications Record Litigation* court, in interpreting the requirements of § 1806(f), relied on a standard imported from 18 U.S.C. § 3504, which, for the reasons described above, is inapplicable here, plaintiff’s reliance on *In Re NSA Telecommunications Records litigation* is unpersuasive and does not alter the conclusion reached here.<sup>12</sup>

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<sup>12</sup> It is also worth noting that despite the *In re NSA Telecommunications Records litigation* court’s determination that the plaintiffs there had sufficiently alleged their aggrieved person status, the court nonetheless declined to follow the mandatory § 1806(f) procedures. 595 F.Supp.2d at 1086-90. Specifically, the court ordered the government to produce responsive materials, but has yet to make a finding as to the lawfulness of any surveillance and has not provided the plaintiffs access to any discovery materials. *Id*

Plaintiff also cites to *Jewel v. NSA*, a Northern District of California case in which the district court issued several orders, directing the government to produce materials for *ex parte* and *in camera* review. But the *Jewel* court appeared not to address the requisite showing of “aggrieved person” status, and as such, that case did not directly address the issues addressed here. Indeed, the *Jewel* court has not yet issued an order as to the

In sum, when interpreted in light of traditional principles of statutory interpretation, the text of § 1806(f) makes clear that § 1806(f) procedures do not apply where, as here, the plaintiff has merely plausibly alleged that it has been the target of surveillance and has not yet adduced evidence establishing this fact of surveillance. Accordingly, it is not appropriate at this time to engage in *ex parte* and *in camera* review of the materials responsive to plaintiff's interrogatories or to those plaintiff describes in its motion to compel.

#### IV.

Given that § 1806(f) procedures do not apply here, it is unnecessary to consider the question whether § 1806(f) displaces the state secrets privilege in situations in which § 1806(f) does apply. As such, the only remaining question is whether the government's invocation of the state secrets privilege defeats plaintiff's motion to compel.

#### A.

It is necessary first to review the well-settled Supreme Court and Fourth Circuit precedents governing the assertion of the state secrets privilege. Supreme Court and Fourth Circuit precedent make clear that “[u]nder the state secrets doctrine, the United States may prevent the disclosure of

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lawfulness of any alleged surveillance in that case and has recently issued an order requesting additional briefing on how plaintiffs can “establish they may be aggrieved persons without access to (classified) information” and “the current legal standard for asserting standing in these circumstances.” *Jewel v. NSA*, No. 08-cv-4373, at \*I (N.D. Cal. July 5, 2018). As such, it is clear that the *Jewel* court has not yet definitively resolved the issues addressed here.

information in a judicial proceeding if ‘there is a reasonable danger’ that such disclosure ‘will expose ... matters which, in the interest of national security should not be divulged.’” *Abilt v. CIA*, 848 F.3d 305, 310-11 (4th Cir. 2017) (quoting *El-Masri v. United States*, 419 F.3d 296, 302 (4th Cir. 2007) (quoting *United States v. Reynolds*, 345 U.S. 1, 10 (1953))). In this regard, the Fourth Circuit has recognized that the state secrets privilege “performs a function of constitutional significance, because it allows the executive branch to protect information whose secrecy is necessary to its military and foreign-affairs responsibilities.” *Id.* at 312 (quoting *El-Masri*, 479 F.3d at 303).

The Fourth Circuit has mandated a three-step analysis for resolution of a state secrets question:

First, “the court must ascertain that the procedural requirements for invoking the state secrets privilege have been satisfied.” Second, “the court must decide whether the information sought to be protected qualifies as privileged under the state secrets doctrine.” Third, if the “information is determined to be privileged, the ultimate question to be resolved is how the matter should proceed in light of the successful privilege claim.”

*Albit*, 848 F.3d at 311 (quoting *El-Masri*, 479 F.3d at 304).

With respect to the first step in this analysis, the Supreme Court has specified three procedural requirements for invocation of the state secrets privilege: (i) the state secrets privilege must be asserted by the United States government; it “can

neither be claimed nor waived by a private party,” (ii) “[t]here must be a formal claim of privilege, lodged by the head of the department which has control over the matter,” and (iii) the department head’s formal claim of the state secrets privilege must be made only “after actual personal consideration by that officer.” *Reynolds*, 345 U.S. at 7-8 (footnotes omitted). If these procedural requirements are satisfied, the court may proceed to the second step of the analysis.

This second step of the analysis requires courts to “determine whether the information that the United States seeks to shield is a state secret, and thus privileged from disclosure.” *El-Masri*, 479 F.3d at 304. In this respect, courts must “assure [themselves] that an appropriate balance is struck between protecting national security matters and preserving an open court system.” *Albit*, 848 F.3d at 311-12 (quoting *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007)). That is, courts assessing a claim of state secrets privilege must simultaneously accord “utmost deference”<sup>13</sup> to the Executive Branch’s assessment of the risk to national security posed by the disclosure of information while also “critically examin[ing] instances of [the privilege’s] invocation” so as “not to accept at face value the government’s claim or justification of privilege.”<sup>14</sup>

The Supreme Court has balanced these competing concerns by requiring courts to determine “from all

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<sup>13</sup> *Albit*, 848 F.3d at 312 (quoting *United States v. Nixon*, 418 U.S. 683, 710 (1974), *superseded by statute on other grounds as recognized by Bourjaily v. United States*, 483 U.S. 171, 177-79 (1987)).

<sup>14</sup> *Id.* at 312 (quoting *Al-Haramain*, 507 F.3d at 1203; *Ellsberg v. Mitchell*, 709 F.2d 51, 58 (D.C. Cir. 1983)).



the circumstances of the case, [whether] there is a reasonable danger that compulsion of the evidence will expose ... matters which, in the interest of national security, should not be divulged.” *Reynolds*, 345 U.S. at 10. The government bears the burden of satisfying “the reviewing court that the *Reynolds* reasonable-danger standard is met.” *Albit*, 848 F.3d at 312 (quoting *El-Masri*, 479 F.3d at 305). In this regard, the Fourth Circuit has recognized that the explanation proffered by the department head who formally invokes the privilege is “frequently ... sufficient to carry the Executive's burden.” *Id.* (quoting *El-Masri*, 469 F.3d at 305). In the end, if the government carries its burden and shows that there is a reasonable danger that disclosure of information will expose matters that should not be divulged, “court[s] [are] obliged to honor the Executive's assertion of the privilege[.]” *Id.* (quoting *El-Masri*, 479 F.3d at 305).

If the procedural requirements for invocation of the state secrets privilege are satisfied and the court determines that the information sought to be disclosed is properly privileged, the final step in the analysis is to assess how the matter should proceed. Here, again, Fourth Circuit and Supreme Court precedent is clear: if the state secrets privilege has been successfully invoked, “the claim of privilege will be accepted without requiring further disclosure.” *Id.* (quoting *Reynolds*, 345 U.S. at 9).

## B.

With these principles in mind, it is appropriate now to consider the assertion of the state secrets privilege in this case. To begin with, the procedural requirements for invocation of the state secrets

privilege have been satisfied.<sup>15</sup> Defendants, the NSA, ODNI, and the DOJ, are U.S. government agencies and thus can properly claim the state secrets privilege. The claim of privilege was lodged by Daniel Coats (“Coats”), the Director of National Intelligence (“DNI”), who is the head of the U.S. Intelligence Community and in this regard, is tasked with the protection of intelligence sources and methods from unauthorized disclosure. *See* Coats Decl. ¶ 1.<sup>16</sup> Finally, Coats invoked the privilege formally after personally considering the nature of plaintiff’s discovery requests and determining that disclosure of the information requested reasonably could be expected to cause exceptionally grave damage, and at the very least, serious damage, to U.S. national security. *See* Coats Decl. ¶¶ 6, 16, 24, 28, 32, 35, 39, 43. Accordingly, it is clear that defendants have satisfied the procedural requirements for invocation of the state secrets privilege.

The government has similarly satisfied its burden with respect to the second step of the state secrets privilege analysis as careful review of the public Coats declaration and the classified Barnes declaration reveals that “there is a reasonable danger that compulsion of the evidence will expose ... matters which, in the interest of national security, should not be divulged.” *Reynolds*, 345 U.S. at 10. Specifically, through public and classified declarations defendants have identified seven categories of information covered by plaintiff’s discovery requests, including: (i)

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<sup>15</sup> Indeed, Wikimedia does not appear to dispute this point.

<sup>16</sup> *See also* 50 U.S.C. § 3024(i)(1) (providing that “[t]he Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure.”).

entities subject to Upstream surveillance activities, (ii) operational details of the Upstream collection process, (iii) locations at which Upstream surveillance is conducted, (iv) categories of Internet-based communications subject to Upstream surveillance activities, (v) the scope and scale on which Upstream surveillance is or has been conducted, (vi) NSA's cryptanalytic capabilities, and (vii) additional categories in contained in FISC opinions and submissions. Moreover, defendants have provided detailed descriptions, in more than 60 pages of classified declarations, explaining that disclosure of these categories of information would undermine ongoing intelligence operations, deprive the NSA of existing intelligence methods, and significantly, provide foreign adversaries with the tools necessary both to evade U.S. intelligence operations and to conduct their own operations against the United States and its allies. In sum, it is clear that there is a reasonable, and indeed likely, danger that disclosure of this information will expose matters which should not be divulged in the interest of national security, and as such, this information falls squarely within the ambit of the state secrets privilege. *See, e.g., Albit*, 848 F.3d at 314 (concluding that “[t]here is little doubt that there is a reasonable danger that if information ... regarding ... the sources and methods used by the CIA [and] the targets of CIA intelligence collection and operations ... were revealed, that disclosure would threaten the national security of the United States”).<sup>17</sup>

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<sup>17</sup> *See also, e.g., Sterling v. Tenet*, 416 F.3d 338, 342 (4th Cir. 2005) (“There is no question that information that would result in ... disclosure of intelligence-gathering methods or capabilities ... falls squarely within the definition of state secrets.” (quoting

In an attempt to avoid this conclusion, plaintiff contends that to acknowledge the fact that plaintiff has been subject to surveillance would not, in fact, threaten national security. This argument plainly fails because courts have concluded that where, as here, the information sought to be disclosed involves the identity of parties whose communications have been acquired, this information is properly privileged. See *Al-Haramain*, 507 F.3d at 1203-04 (finding that the fact of a plaintiff's surveillance by the NSA was covered by the state secrets privilege); *Halkin v. Helms*, 598 F.2d 1, 9 (D.C. Cir. 1978) (upholding assertion of state secrets privilege with respect to "the identity of particular individuals whose communications have been acquired").

Plaintiff contends that, contrary to surveillance of a particular individual with limited communications, plaintiff's communications are so ubiquitous that to reveal surveillance of its communications would not provide information regarding the structure of the Upstream surveillance program or its specific targets. Although this proposition may appear to have some force, courts have consistently recognized that "judicial intuition" about a proposition such as this "is no substitute for documented risks and threats posed by the potential disclosure of national security information." *Al-Haramain*, 507 F.3d at 1203. And defendants have thoroughly documented those risks in the classified declaration here, explaining that to

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*Molerio v. FBI*, 749 F.2d 815, 820-21 (D.C. Cir. 1984) (internal quotation marks omitted)); *Jewel v. NSA*, 2015 WL 545925, at \*5 (N.D. Cal. Feb. 10, 2015) (finding "[d]isclosure of this classified information would risk informing adversaries of the specific nature and operational details of the Upstream collection process").

reveal the fact of surveillance of an organization such as plaintiff, even considering plaintiff's voluminous online communications, would provide insight into the structure and operations of the Upstream surveillance program and in so doing, undermine the effectiveness of this intelligence method.

Finally, plaintiff argues that there cannot be a reasonable danger of undermining national security because much of the information plaintiff seeks is already contained in publicly-accessible documents. But importantly, the information disclosed in these public documents is plainly different from the information that plaintiff seeks. For example, plaintiff's requests for admissions 13 through 15 ask defendants to admit that the NSA is conducting Upstream surveillance via "multiple INTERNET BACKBONE CIRCUITS," "multiple international Internet link[s]," and "multiple INTERNET BACKBONE 'chokepoints.'" Plaintiff contends that these facts have already been acknowledged by the NSA, as reflected in the PCLOB Report and certain unclassified portions of FISC opinions. Specifically, plaintiff contends that the PCLOB report's reference to "circuits" suggests the NSA is conducting surveillance on more than one circuit. To be sure, the PCLOB report does use the term "circuits," but it does not do so to refer to the number of sites the NSA is monitoring. Instead, the PCLOB report uses the term "circuits" in the context of defining the "Internet backbone." Specifically, the PCLOB report explains that the "Internet backbone" consists of "circuits that are used to facilitate Internet communications[.]" PCLOB Rep. at 36. Similarly, the redacted FISC Opinion cited by plaintiff does not, as plaintiff contends, confirm that the NSA is monitoring

multiple international Internet links; instead, the redacted October 3, 2011 FISC Opinion states that “the government readily concedes that NSA will acquire a wholly domestic ‘about’ communication if the transaction containing the communication is routed through an international Internet link being monitored by the NSA ....” 2011 WL 10945618, at \*15 (FISC Oct. 3, 2011). Nothing in this statement confirms that the NSA is monitoring multiple internet links.<sup>18</sup> Ultimately, plaintiff’s argument fails because although the government has declassified certain information about the Upstream surveillance program, the government has not yet released the precise information at issue here. Accordingly, this information is still properly subject to the state secrets privilege.

In sum, a careful review of defendants’ public and classified declarations reveals (i) that defendants have satisfied the procedural requirements necessary to invoke the state secrets privilege and (ii) that the information sought to be protected qualifies as privileged under the state secrets doctrine. Given that defendants have satisfied the requirements of the state secrets privilege, “the claim of privilege will be accepted without requiring further disclosure.” *Albit*, 848 F.3d at 31 (quoting *Reynolds*, 345 U.S. at 9). Accordingly, plaintiff’s motion to compel must be

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<sup>18</sup> Plaintiff similarly argues that the fact that the NSA reviews the type of Internet communications in which plaintiff engages, namely HTTP and HTTPS Internet protocols, is available in the public record. But contrary to plaintiff’s suggestion, the use of the general phrase “web activity” in an unclassified portion of the June 1, 2011 FISC Opinion does not confirm that the NSA is monitoring any specific Internet protocol, namely either HTTP or HTTPS.

denied.<sup>19</sup>

An appropriate Order will issue.

Alexandria, Virginia

August 20, 2018

/s/ T. S. Ellis, III

T. S. Ellis, III

United States District Judge

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<sup>19</sup> It is worth emphasizing the narrow scope of this decision, namely (i) that FISA § 1806 is not triggered in this case and that this provision and the associated FISA procedures do not operate here to displace the common law state secrets privilege and (ii) that the government has satisfied the well-settled procedural requirements necessary to invoke the privilege. Neither addressed nor resolved here is whether this long-ago judicially created privilege has, or should have, any continuing vitality today. That is not a question within the province of a district court.

**APPENDIX E**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

WIKIMEDIA  
FOUNDATION,

Plaintiff,

v.

NATIONAL SECURITY  
AGENCY/ CENTRAL  
SECURITY SERVICE,

*et al.*,

Defendants.

Case No. 1:15-cv-662

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**ORDER**

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This matter came before the court on plaintiff's Motion to Compel Discovery Responses and Deposition Testimony.

For the reasons stated in the accompanying Memorandum Opinion of even date,

It is hereby ORDERED that the motion is DENIED.

The Clerk is directed to provide a copy of this Order to all counsel of record.



Alexandria, Virginia

August 20, 2018

/s/ T. S. Ellis, III

T. S. Ellis, III

United States District Judge

**APPENDIX F**

PUBLISHED

UNITED STATES COURT OF APPEALS FOR THE  
FOURTH CIRCUIT

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No. 15-2560

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WIKIMEDIA FOUNDATION; NATIONAL  
ASSOCIATION OF CRIMINAL DEFENSE  
ATTORNEYS; HUMAN RIGHTS WATCH; PEN  
AMERICAN CENTER; GLOBAL FUND FOR  
WOMEN; THE NATION MAGAZINE; THE  
RUTHERFORD INSTITUTE; WASHINGTON  
OFFICE ON LATIN AMERICA; AMNESTY  
INTERNATIONAL USA,

Plaintiffs–Appellants,

v.

NATIONAL SECURITY AGENCY/CENTRAL  
SECURITY SERVICE; ADMIRAL MICHAEL S.  
ROGERS, in his official capacity as Director of the  
National Security Agency and Chief of the Central  
Security Service; OFFICE OF THE DIRECTOR OF  
NATIONAL INTELLIGENCE; DANIEL R. COATS,  
in his official capacity as Director of National  
Intelligence; DEPARTMENT OF JUSTICE;  
JEFFERSON B. SESSIONS III, in his official  
capacity as Attorney General of the United States,

Defendants–Appellees.

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COMPUTER SCIENTISTS AND TECHNOLOGISTS;  
REPORTERS COMMITTEE FOR FREEDOM OF

THE PRESS; THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION; AMERICAN SOCIETY OF NEWS EDITORS; ASSOCIATION OF ALTERNATIVE NEWSMEDIA; FIRST AMENDMENT COALITION; FIRST LOOK MEDIA, INC.; FREE PRESS; FREEDOM OF THE PRESS FOUNDATION; GATEHOUSE MEDIA; INTERNATIONAL DOCUMENTARY ASSOCIATION; INVESTIGATIVE REPORTERS AND EDITORS, INCORPORATED; INVESTIGATIVE REPORTING WORKSHOP AT AMERICAN UNIVERSITY; THE MEDIA CONSORTIUM; NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION; NORTH JERSEY MEDIA GROUP, INCORPORATED; ONLINE NEWS ASSOCIATION; RADIO TELEVISION DIGITAL NEWS ASSOCIATION; REPORTERS WITHOUT BORDERS; TULLY CENTER FOR FREE SPEECH; UNITED STATES JUSTICE FOUNDATION; FREE SPEECH DEFENSE AND EDUCATION FUND; FREE SPEECH COALITION; WESTERN JOURNALISM CENTER; GUN OWNERS OF AMERICA, INC.; GUN OWNERS FOUNDATION; DOWNSIZE DC FOUNDATION; DOWNSIZEDC.ORG; CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND; INSTITUTE ON THE CONSTITUTION; POLICY ANALYSIS CENTER; LAW PROFESSORS; ELECTRONIC FRONTIER FOUNDATION; FIRST AMENDMENT LEGAL SCHOLARS,

Amici Supporting Appellants.

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Appeal from the United States District Court for the District of Maryland, at Baltimore. T. S. Ellis, III, Senior District Judge. (1:15-cv-00662-TSE)

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Argued: December 8, 2016      Decided: May 23, 2017

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Before MOTZ and DIAZ, Circuit Judges, and DAVIS, Senior Circuit Judge.

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Affirmed in part, vacated in part, and remanded by published opinion. Judge Diaz wrote the opinion, in which Judge Motz joined and in which Senior Judge Davis joined in part. Senior Judge Davis wrote a separate opinion dissenting in part.

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**ARGUED:** Patrick Christopher Toomey, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, New York, New York, for Appellants. Catherine H. Dorsey, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees. **ON BRIEF:** Jameel Jaffer, Alexander Abdo, Ashley Gorski, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, New York, New York; Deborah A. Jeon, David R. Rocah, AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MARYLAND, Baltimore, Maryland; Charles S. Sims, David A. Munkittrick, PROSKAUER ROSE LLP, New York, New York, for Appellants. Benjamin C. Mizer, Principal Deputy Assistant Attorney General, Douglas N. Letter, H. Thomas Byron III, Michael Shih, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE,

Washington, D.C.; Rod J. Rosenstein, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Baltimore, Maryland, for Appellees. Jennifer Stisa Granick, Director of Civil Liberties, Center for Internet and Society, STANFORD LAW SCHOOL, Stanford, California; Matthew J. Craig, SHAPIRO ARATO LLP, New York, New York, for Amicus Computer Scientists and Technologists. Margot E. Kaminski, Assistant Professor of Law, Moritz College of Law, THE OHIO STATE UNIVERSITY, Columbus, Ohio; Chelsea J. Crawford, Joshua R. Treem, BROWN, GOLDSTEIN & LEVY, LLP, Baltimore, Maryland, for Amicus First Amendment Legal Scholars. J. Joshua Wheeler, Thomas Jefferson Center for the Protection of Free Expression and First Amendment Clinic, THE UNIVERSITY OF VIRGINIA SCHOOL OF LAW, Charlottesville, Virginia; Bruce D. Brown, Gregg P. Leslie, Hannah Bloch-Wehba, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, Washington, D.C.; Peter Scheer, FIRST AMENDMENT COALITION, San Rafael, California; Lynn Oberlander, General Counsel, Media Operations, FIRST LOOK MEDIA, INC., New York, New York; Matthew F. Wood, FREE PRESS, Washington, D.C.; Polly Grunfeld Sack, SVP, General Counsel and Secretary, GATEHOUSE MEDIA, LLC, Pittsford, New York; Jennifer A. Borg, General Counsel, NORTH JERSEY MEDIA GROUP, INCORPORATED, Woodland Park, New Jersey, for Amici Reporters Committee for Freedom of the Press, The Thomas Jefferson Center for the Protection of Free Expression, American Society of News Editors, Association of Alternative Newsmedia, First Amendment Coalition, First Look Media, Inc., Free

Press, Freedom of the Press Foundation, Gatehouse Media, International Documentary Association, Investigative Reporters and Editors, Incorporated, Investigative Reporting Workshop at American University, The Media Consortium, National Press Photographers Association, North Jersey Media Group, Incorporated, Online News Association, Radio Television Digital News Association, Reporters Without Borders, and Tully Center for Free Speech. Kevin M. Goldberg, FLETCHER, HEALD & HILDRETH, PLC, Arlington, Virginia, for Amici American Society of News Editors and Association of Alternative Newsmedia. Marcia Hofmann, ZEITGEIST LAW PC, San Francisco, California, for Amicus Freedom of the Press Foundation. Mickey H. Osterreicher, Buffalo, New York, for Amicus National Press Photographers Association. Laura R. Handman, Alison Schary, Washington, D.C., Thomas R. Burke, DAVIS WRIGHT TREMAINE LLP, San Francisco, California, for Amicus Online News Association. Kathleen A. Kirby, WILEY REIN LLP, Washington, D.C., for Amicus Radio Television Digital News Association. Michael Connelly, UNITED STATES JUSTICE FOUNDATION, Ramona, California, for Amicus United States Justice Foundation. Robert J. Olson, Herbert W. Titus, William J. Olson, Jeremiah L. Morgan, WILLIAM J. OLSON, P.C., Vienna, Virginia, for Amici United States Justice Foundation, Free Speech Defense and Education Fund, Free Speech Coalition, Western Journalism Center, Gun Owners of America, Inc., Gun Owners Foundation, Downsize DC Foundation, DownsizeDC.org, Conservative Legal Defense and Education Fund, Institute on the Constitution, and Policy Analysis Center. Adam Steinman, Professor of Law,

UNIVERSITY OF ALABAMA SCHOOL OF LAW,  
Tuscaloosa, Alabama, for Amicus Law Professors.  
Sophia Cope, Mark Rumold, Andrew Crocker, Jaime  
Williams, ELECTRONIC FRONTIER  
FOUNDATION, San Francisco, California, for Amicus  
Electronic Frontier Foundation.

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DIAZ, Circuit Judge:

The Wikimedia Foundation and eight other organizations appeal the dismissal of their complaint challenging Upstream surveillance, an electronic surveillance program operated by the National Security Agency (the “NSA”). The district court, relying on the discussion of speculative injury from *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013), held that the allegations in the complaint were too speculative to establish Article III standing. We conclude that Clapper’s analysis of speculative injury does not control this case, since the central allegations here are not speculative. Accordingly, as for Wikimedia, we vacate and remand because it makes allegations sufficient to survive a facial challenge to standing. As for the other Plaintiffs, we affirm because the complaint does not contain enough well-pleaded facts entitled to the presumption of truth to establish their standing.

I.

A.

Before diving into the details of Plaintiffs’ complaint, we provide an overview of the Foreign Intelligence Surveillance Act (“FISA”), 50 U.S.C. § 1801 *et seq.*, the statute from which the government derives its authority to conduct Upstream surveillance.

Congress enacted FISA in 1978 to regulate electronic surveillance undertaken to gather foreign intelligence information. David S. Kris & J. Douglas Wilson, *National Security Investigations and Prosecutions* § 3:8 (2d ed.), Westlaw (database updated Aug. 2016) (hereinafter Kris & Wilson); *see*



*also* 50 U.S.C. § 1801 (defining electronic surveillance). FISA created two specialized courts—the Foreign Intelligence Surveillance Court (the “FISC”), from which the government generally must obtain authorization before conducting electronic surveillance, and the Foreign Intelligence Surveillance Court of Review, which has jurisdiction to review the denial of a FISA application for electronic surveillance. Kris & Wilson § 5:1. As originally enacted, FISA required the government to demonstrate probable cause to believe that the target of its surveillance was “a foreign power or an agent of a foreign power,” and that the facility or place at which surveillance would be directed was “being used, or is about to be used, by a foreign power or an agent of a foreign power.” 50 U.S.C. § 1805(a)(2); see also Kris & Wilson § 7:2.

“Until 2008, FISA applied only to investigative conduct inside the United States.” Kris & Wilson § 4:2. That changed through the FISA Amendments Act of 2008, which authorized the government to acquire foreign-intelligence information by targeting for up to one year non-U.S. persons reasonably believed to be abroad. See 50 U.S.C. § 1881a. FISA Section 702, 50 U.S.C. § 1881a, sets forth the process for obtaining that authority.

Generally, the Attorney General and the Director of National Intelligence initiate the process by submitting a “certification” regarding the proposed surveillance to the FISC for approval. *Id.* § 1881a(g)(1)(A). That certification must attest, *inter alia*, that:

- (1) procedures are in place “that . . . are reasonably designed” to ensure that an

acquisition is “limited to targeting persons reasonably believed to be located outside” the United States; (2) minimization procedures adequately restrict the acquisition, retention, and dissemination of nonpublic information about unconsenting U.S. persons . . .; (3) guidelines have been adopted to ensure compliance with targeting limits and the Fourth Amendment; and (4) the procedures and guidelines . . . comport with the Fourth Amendment.

*Clapper*, 133 S. Ct. at 1145 (quoting 50 U.S.C. § 1881a(g)(2)).

The FISC reviews the certification to ensure that it contains the statutorily required elements and has targeting and minimization procedures that are both consistent with the Fourth Amendment and are “reasonably designed” to meet certain requirements. *Id.* In particular, the FISC must find that the targeting procedures are “reasonably designed” to: (i) ensure that acquisition “is limited to targeting persons reasonably believed to be located outside the United States,” and (ii) “prevent the intentional acquisition of” wholly domestic communications. 50 U.S.C. § 1881a(i)(2)(B). The FISC must also find that the minimization procedures are “reasonably designed in light of the purpose and technique of the particular surveillance, to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information.” *Id.* § 1801(h)(1); *see id.* § 1881a(i)(2)(C) (referring to § 1801(h)).

Section 702 prohibits the intentional targeting of “any person known at the time of acquisition to be located in the United States,” *id.* § 1881a(b), but allows the government to intercept communications between a U.S. person inside the country and a foreigner abroad targeted by intelligence officials, see *id.* § 1881a(a)–(b); see also Kris & Wilson § 17:5. Furthermore, surveillance under Section 702 may be conducted for purposes other than counterterrorism—the statute defines “foreign intelligence information” to mean, among other things, information that relates to “the conduct of the foreign affairs of the United States,” 50 U.S.C. § 1801(e)(2)(B)—and the government need not identify “the specific facilities, places, premises, or property at which” it will direct surveillance, *id.* § 1881a(g)(4).

The absence of particularity and probable cause requirements in Section 702 surveillance allows the government to monitor the communications of thousands of individuals and groups under a single FISC Order. See Office of the Director of National Intelligence, *Calendar Year 2014 Statistical Transparency Report 1–2* (2015) (stating that in 2014 the government used its authority pursuant to Section 702 to target an estimated 92,707 persons, groups, and entities under one FISC Order).<sup>1</sup> Furthermore, the minimization procedures allow the government to retain communications—including those of U.S. persons—if the government concludes that they contain “foreign intelligence” information. See Kris & Wilson §§ 9:5, 17:5.

The government has acknowledged that it

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<sup>1</sup> Plaintiffs’ complaint incorporates this document.

conducts two forms of surveillance under Section 702—PRISM and Upstream. *See* Privacy and Civil Liberties Oversight Board, *Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act* 7 (2014) (hereinafter PCLOB Report).<sup>2</sup> Only Upstream is at issue here. Though the government has disclosed some information about Upstream, most technical details of the surveillance process remain classified. *See Jewel v. Nat’l Sec. Agency*, 810 F.3d 622, 627 (9th Cir. 2015).

## B.

In June 2015, Plaintiffs—educational, legal, human rights, and media organizations—filed their first amended complaint wherein they ask for, among other things, a declaration that Upstream surveillance violates the First and Fourth Amendments, an order permanently enjoining the NSA from conducting Upstream surveillance, and an order directing the NSA “to purge all records of Plaintiffs’ communications in their possession obtained pursuant to Upstream surveillance.” J.A. 84.

Plaintiffs make two central allegations. First, in what we refer to as the Wikimedia Allegation, Wikimedia alleges that “the sheer volume of [its] communications makes it virtually certain that the NSA has intercepted, copied, and reviewed at least some of [its] communications.”<sup>3</sup> J.A. 46. Second, in what we refer to as the Dagnet Allegation, all nine

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<sup>2</sup> Plaintiffs’ complaint incorporates this report.

<sup>3</sup> Though all nine Plaintiffs made this allegation, only Wikimedia pursues it on appeal.

Plaintiffs allege that in the course of conducting Upstream surveillance the NSA is “intercepting, copying, and reviewing substantially all” text-based communications entering and leaving the United States, including their own. J.A. 46. After setting forth supporting background relevant to each, we describe the Wikimedia and Dragnet Allegations.

1.

Plaintiffs allege that “Upstream surveillance involves the NSA’s seizing and searching the [I]nternet communications of U.S. citizens and residents en masse as those communications travel across the [I]nternet ‘backbone’ in the United States.” J.A. 40. “The [I]nternet backbone is the network of high-capacity cables, switches, and routers [administered by telecommunications-service providers] that facilitates both domestic and international communication via the [I]nternet.” J.A. 40. It includes “the approximately 49 international submarine cables that carry [I]nternet communications into and out of the United States and that land at approximately 43 different points within the country.” J.A. 42.

The NSA performs Upstream surveillance by first identifying a target and then identifying “selectors” for that target. Selectors are the specific means by which the target communicates, such as e-mail addresses or telephone numbers. Selectors cannot be keywords (e.g., “bomb”) or names of targeted individuals (e.g., “Bin Laden”).

The NSA then “tasks” selectors for collection and sends them to telecommunications-service providers. Those providers must assist the government in intercepting communications to, from, or “about” the

selectors. “About” communications are those that contain a tasked selector in their content, but are not to or from the target. “For instance, a communication between two third parties might be acquired because it contains a targeted email address in the body of the communication.” PCLOB Report at 119.

We note an important distinction between Internet transactions and Internet *communications*. While Upstream surveillance “is intended to acquire Internet communications, it does so through the acquisition of Internet *transactions*.” PCLOB Report at 39. An example illustrates the point. When an individual sends an email on the Internet, the message is broken up into one or more “data packets” which are transmitted across the Internet backbone to their destination and, upon arrival, reassembled by the recipient’s computer to reconstruct the communication. The individual data packets generated by a single email can take “different routes [across the backbone] to their common destination.” PCLOB Report at 125. Relatedly, when two people communicate, the data packets from the target can take a different path along the backbone than the data packets to the target. “The government describes an Internet ‘transaction’ as ‘a complement of packets traversing the Internet that together may be understood by a device on the Internet and, where applicable, rendered in an intelligible form to the user of that device.’” *Redacted*, 2011 WL 10945618, at \*9 n.23 (FISA Ct. Oct. 3, 2011) (quoting a government submission to the FISC).<sup>4</sup> An Internet transaction can

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<sup>4</sup> Plaintiffs’ complaint incorporates this FISC opinion.

comprise one or many discrete communications.

“To identify and acquire Internet transactions associated with the Section 702-tasked selectors on the Internet backbone, Internet transactions are first filtered to eliminate potential domestic transactions, and then are screened to capture only transactions containing a tasked selector. Unless transactions pass both these screens, they are not ingested into government databases.” PCLOB Report at 37. “If a single discrete communication within [a multi-communication transaction] is to, from, or about a Section 702-tasked selector, and at least one end of the transaction is foreign, the NSA will acquire the entire [multi-communication transaction].” PCLOB Report at 39. Once acquired, communications are subject to FISC-approved minimization procedures. The NSA’s minimization procedures, for example, limit the types of queries that analysts can conduct across data sets of Section 702-acquired information.

Plaintiffs allege that Upstream surveillance works in practice as follows. First, the NSA copies “substantially all international text-based communications—and many domestic ones—flowing across certain high-capacity cables, switches, and routers” by “[u]sing surveillance devices installed at key access points along the [I]nternet backbone.” J.A. 43. Second, it “attempts to filter out and discard some wholly domestic communications,” though that effort “is incomplete.” J.A. 43. Third, it reviews the full content of the copied communications for targeted selectors, including IP addresses. J.A. 43. Finally, it “retains [and with few restrictions analyzes] all communications that contain selectors associated with its targets, as well as those that happen to be bundled with them in transit.” J.A. 44.

2.

Wikimedia asserts that the NSA is intercepting, copying, and reviewing at least some of its communications in the course of Upstream surveillance, “even if the NSA conducts Upstream surveillance on only a single [I]nternet backbone link.” J.A. 49. Wikimedia, “the operator of one of the most-visited websites in the world,” alleges that it “engages in more than one trillion international communications each year, with individuals who are located in virtually every country on earth.” J.A. 56. According to Wikimedia, Upstream surveillance implicates three categories of its communications: (1) communications with its community members; (2) internal “log” communications, which include users’ IP addresses and the URLs of webpages sought by users; and (3) communications between its staff and individuals around the world. J.A. 55–56.

Wikimedia further alleges that “[g]iven the relatively small number of international chokepoints,”<sup>5</sup> the volume of its communications, and the geographical diversity of the people with whom it communicates, its “communications almost certainly traverse every international backbone link connecting the United States with the rest of the world.” J.A. 47–48. And, Wikimedia alleges, “in order for the NSA to reliably obtain communications to, from, or about its targets in the way it has described, the government must be copying and reviewing all the international text-based communications that travel across a given

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<sup>5</sup> By “chokepoint,” Wikimedia refers to the 49 international submarine cables and the “limited number” of terrestrial cables that carry Internet communications into and out of the United States. J.A. 47–48.



link.” J.A. 48.

That last allegation is so, says Wikimedia, because “as a technical matter, the government cannot know beforehand which communications will contain selectors associated with its targets, and therefore it must copy and review all international text-based communications transiting [a] circuit in order to identify those of interest.” J.A. 48. That is because data packets that constitute a communication “travel independently of one another, intermingled with packets of other communications in the stream of data,” and “the packets of interest cannot be segregated from other, unrelated packets in advance.” J.A. 49. Thus, the NSA must “copy all such packets traversing a given backbone link, so that it can reassemble and review the transiting communications.” J.A. 49.

Tying these allegations together, Wikimedia asserts that if the NSA is monitoring a single [I]nternet backbone link, then the NSA is intercepting, copying, and reviewing at least some of Wikimedia’s communications. According to Wikimedia, “the NSA has confirmed that it conducts Upstream surveillance at more than one point along the [I]nternet backbone.” J.A. 49. In addition to the PCLOB Report’s confirmation of the program’s existence, Wikimedia points to a purported NSA slide which shows that a single telecommunications-service provider is facilitating Upstream surveillance at “seven major international chokepoints in the United States” and a purported NSA document which states that the NSA is expending significant resources to “create collection/processing capabilities at many of the chokepoints operated by U.S. providers.” J.A. 50–51.

Wikimedia has “an acute privacy interest in its communications” because its “mission and existence depend on its ability to ensure that readers and editors can explore and contribute to [its websites] privately when they choose to do so.” J.A. 59–60. It has, in response to Upstream surveillance, taken burdensome steps to protect “the privacy of its communications and the confidentiality of the information it thereby receives.” J.A. 60–61. Among other things, Wikimedia has “self-censor[ed] communications or forgo[ne] electronic communications altogether.” J.A. 64.

Finally, the first amended complaint alleges that “even if one assumes a 0.00000001% chance . . . of the NSA copying and reviewing any particular communication, the odds of the government copying and reviewing at least one of the Plaintiffs’ communications in a one-year period would be greater than 99.9999999999%.” J.A. 46–47. This is an extension of the allegation that Wikimedia engages in more than one trillion international communications each year.

### 3.

In the Dragnet Allegation, Plaintiffs say that “given the way the government has described Upstream surveillance, it has a strong incentive to intercept communications at as many backbone chokepoints as possible.” J.A. 49. Thus, “[i]f the government’s aim is to ‘comprehensively’ and ‘reliably’ obtain communications to, from, and about targets scattered around the world, it must conduct Upstream surveillance at many different backbone chokepoints.” J.A. 50.

Plaintiffs allege that the nature of online

communication, including that data packets to a target can take different routes than data packets from a target, makes this conclusion “especially true.” J.A. 50. They also incorporate into their complaint a *New York Times* article asserting that the NSA “is temporarily copying and then sifting through the contents of what is apparently most e-mails and other text-based communications that cross the border.” J.A. 51.

Furthermore, Plaintiffs often communicate with individuals whom the NSA is likely to target through Upstream surveillance, and “[a] significant amount of the information that [they] exchange over the [I]nternet is ‘foreign intelligence information.’” J.A. 52. “Because of ongoing government surveillance, including Upstream surveillance, Plaintiffs have had to take burdensome and sometimes costly measures to” protect “the confidentiality of their sensitive information.” J.A. 52. Upstream surveillance compels them to censor their own communications and, in some instances, to forgo electronic communications altogether.

Finally, Joshua Dratel, a member of Plaintiff National Association of Criminal Defense Lawyers, also challenges Upstream surveillance. One of Dratel’s clients “has received notice of [Section 702 surveillance], and [Dratel] previously represented a client in another case where officials have told Congress that the government used [Section 702 surveillance] in the course of its investigation.” J.A. 68–69.

### C.

The government moved to dismiss for lack of standing and submitted evidence, including

declarations by Robert Lee and Alan Salzberg. The Lee Declaration challenges Plaintiffs’ assertion that, as a technical matter, the NSA must be copying all data packets that traverse a given backbone link. The Salzberg Declaration attacks Plaintiffs’ probability calculation that there’s a greater than 99.9999999999% chance that the NSA is copying and reviewing their communications.

The district court, relying on *Clapper*, held that Plaintiffs had failed to establish standing because their allegations “depend on suppositions and speculation, with no basis in fact, about how the NSA implements Upstream surveillance.” J.A. 190. The court characterized the government’s motion as a facial challenge, and thus did not consider either declaration. Because so much of the district court’s opinion depends on *Clapper*, we summarize that case first.

1.

In *Clapper*, plaintiffs (including six of the nine Plaintiffs here, but not including Dratel or Wikimedia) lodged a facial challenge to Section 702 on the day that the law went into effect, seeking declaratory and injunctive relief. 133 S. Ct. at 1145–46. They alleged that their work required them to “engage in sensitive and sometimes privileged telephone and e-mail communications with . . . individuals located abroad” who were “likely targets of surveillance under” Section 702. *Id.* at 1145. Plaintiffs had two separate theories of Article III standing: (1) there was an “objectively reasonable likelihood” that their communications would be intercepted in the future pursuant to Section 702 surveillance, and (2) they were forced to undertake

costly and burdensome measures to avoid a substantial risk of surveillance. *Id.* at 1146. They did not, however, have “actual knowledge of the Government’s [Section 702] targeting practices.” *Id.* at 1148.

The Supreme Court held that neither injury established standing at the summary judgment stage. The theory of standing based on interception of communications “relie[d] on a highly attenuated chain of possibilities, [which did] not satisfy the requirement that threatened injury must be certainly impending.” *Id.* at 1147–48. The Court broke the speculative chain into five parts:

(1) the Government will decide to target the communications of non-U.S. persons with whom [plaintiffs] communicate; (2) in doing so, the Government will choose to invoke its authority under [Section 702] rather than utilizing another method of surveillance; (3) the Article III judges who serve on the [FISC] will conclude that the Government’s proposed surveillance procedures satisfy [Section 702’s] many safeguards and are consistent with the Fourth Amendment; (4) the Government will succeed in intercepting the communications of [plaintiffs’] contacts; and (5) [plaintiffs] will be parties to the particular communications that the Government intercepts.

*Id.* at 1148.

“[A]t the summary judgment stage,” the Court noted, plaintiffs “can no longer rest on mere allegations [to establish standing], but must set forth by affidavit or other evidence specific facts.” *Id.* at 1148–49 (alteration and internal quotation marks

omitted). The *Clapper* plaintiffs, however, had no “specific facts demonstrating that the communications of their foreign contacts w[ould] be targeted.” *Id.* at 1149.

The assertion of harm based on measures taken to avoid surveillance also didn’t suffice. Because “the harm [plaintiffs] s[ought] to avoid [wa]s not certainly impending,” the Court explained, they couldn’t “manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm.” *Id.* at 1151. In other words, plaintiffs had failed to show that “[a]ny ongoing injuries” they were suffering were “fairly traceable” to Section 702 surveillance. *Id.* The Court suggested, however, that a lawyer who represented a target of Section 702 surveillance might have standing. *Id.* at 1154.

2.

Applying these principles, the district court in this case reasoned that while

more is known about the nature and capabilities of NSA surveillance than was known at the time of *Clapper*, . . . no more is known about whether Upstream surveillance *actually* intercepts all or substantially all international text-based Internet communications, including plaintiffs’ communications. . . . Indeed, plaintiffs’ reliance on the government’s capacity and motivation to collect substantially all international text-based Internet communications is precisely the sort of speculative reasoning foreclosed by *Clapper*.

J.A. 192. The court supported that conclusion with

two observations relevant here: (1) it is unclear whether the NSA is “using [its] surveillance equipment to its full potential” to intercept “all communications passing through” chokepoints upon which the NSA has installed surveillance equipment, and (2) “the fact that all NSA surveillance practices must survive FISC review . . . suggests that the NSA is not using its surveillance equipment to its full potential.” J.A. 190–91.

The district court also rejected the argument that *Clapper* “does not control here because plaintiffs are different from the *Clapper* plaintiffs.” J.A. 194. The court focused on Dratel and Wikimedia. With respect to Dratel, the court concluded that the allegations failed to “plausibly establish that the information gathered from the two instances of Section 702 surveillance was the product of Upstream surveillance,” and that it “appears substantially more likely that PRISM collection was used in [those] cases.” J.A. 195.

As for Wikimedia, the court found that “the statistical analysis on which the argument rests [(i.e., the probability calculation that there’s a greater than 99.9999999999% chance that the NSA is copying and reviewing Wikimedia’s communications)] is incomplete and riddled with assumptions,” and that “[l]ogically antecedent to plaintiffs’ flawed statistical analysis are plaintiffs’ speculative claims about Upstream surveillance based on limited knowledge of Upstream surveillance’s technical features and ‘strategic imperatives.’”<sup>6</sup> See J.A. 197–99.

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<sup>6</sup> The “speculative claims” that the court referred to all relate to Wikimedia’s allegation that the NSA is “using Upstream surveillance to copy all or substantially all communications

From the district court’s dismissal of their complaint for lack of standing, Plaintiffs appeal.

## II.

We review the district court’s decision de novo, *Columbia Gas Transmission Corp. v. Drain*, 237 F.3d 366, 369 (4th Cir. 2001), and proceed as follows. First, we lay out the framework for deciding whether a plaintiff has established standing at the motion-to-dismiss stage. Then, we review the Wikimedia and Dagnet Allegations to see whether either establishes standing. We conclude that the Wikimedia Allegation does and the Dagnet Allegation does not.

### A.

#### 1.

Article III of the Constitution limits the jurisdiction of federal courts to “Cases” and “Controversies.” U.S. Const. art. III, § 2. “The doctrine of standing gives meaning to these constitutional limits by ‘identify[ing] those disputes which are appropriately resolved through the judicial process.’” *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (alteration in original) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). To establish standing, a plaintiff must show: (1) an injury in fact; (2) a sufficient causal connection between the injury and the conduct complained of; and (3) a likelihood that the injury will be redressed by a favorable decision. *Id.*

“To establish injury in fact, a plaintiff must show that he or she suffered ‘an invasion of a legally protected interest’ that is ‘concrete and particularized’

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passing through” chokepoints which the NSA surveils. J.A. 199.



and ‘actual or imminent, not conjectural or hypothetical.’” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (quoting *Lujan*, 504 U.S. at 560). “For an injury to be particularized, it must affect the plaintiff in a personal and individual way.” *Id.* (internal quotation marks omitted). “The fact that an injury may be suffered by a large number of people does not of itself make that injury a nonjusticiable generalized grievance.” *Id.* at 1548 n.7. The purpose of the imminence requirement “is to ensure that the alleged injury is not too speculative for Article III purposes.” *Clapper*, 133 S. Ct. at 1147. The “threatened injury must be *certainly impending* to constitute injury in fact, and . . . [a]llegations of *possible* future injury are not sufficient.” *Id.* (second alteration in original) (internal quotation marks omitted).

“[E]ach element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.” *Lujan*, 504 U.S. at 561. “A defendant may challenge [standing at the motion-to-dismiss stage] in one of two ways: facially or factually.” *Beck v. McDonald*, 848 F.3d 262, 270 (4th Cir. 2017). In a facial challenge, the defendant contends that the complaint “fails to allege facts upon which [standing] can be based,” and the plaintiff “is afforded the same procedural protection” that exists on a motion to dismiss. *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). In a factual challenge, the defendant contends “that the jurisdictional allegations of the complaint [are] not true.” *Id.* In that event, a trial court may look beyond the complaint “and in an evidentiary hearing determine if there are facts to support the jurisdictional allegations.” *Id.*

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, ‘to state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). We accept as true all well-pleaded facts in a complaint and construe them in the light most favorable to the plaintiff. *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 422 (4th Cir. 2015). Indeed, a court cannot “favor[] its perception of the relevant events over the narrative offered by the complaint,” thereby “recasting ‘plausibility’ into ‘probability.’” *Id.* at 430. However, legal conclusions pleaded as factual allegations, “unwarranted inferences,” “unreasonable conclusions,” and “naked assertions devoid of further factual enhancement” are not entitled to the presumption of truth. *Id.* at 422.

2.

The Third Circuit recently applied many of these principles in *Schuchardt v. President of the United States*, where it held that, “at least as a facial matter,” a complaint challenging PRISM surveillance—the other form of publicly acknowledged Section 702 surveillance—“plausibly stated an injury in fact” sufficient to establish standing. 839 F.3d 336, 338 (3d Cir. 2016). Under PRISM surveillance, the government purportedly obtains “user communications exchanged using services provided by several large U.S. companies” directly from those companies’ servers. *Id.* at 340.

Schuchardt’s central allegation was that the NSA is “intercepting, monitoring and storing the content of all or substantially all of the e-mail sent by American citizens, [and thus] his own online communications

had been seized in the dragnet.” *Id.* at 341 (emphasis omitted). In support of that allegation, Schuchardt stated that he used online services targeted by PRISM surveillance and incorporated into his complaint “excerpts of the classified materials” made public through newspaper articles and filings in other cases. *Id.* at 341. The complaint and its exhibits described the “technical means through which PRISM purportedly achieves a nationwide email dragnet” and were “replete with details confirming PRISM’s operational scope and capabilities.” *Id.* at 350.

For example, a slide from a purported NSA presentation “identif[ied] company names and the dates they began cooperating with” the NSA, while another exhibit “indicate[d] . . . that the degree of access those providers granted enables the Government to query their facilities at will for ‘real-time interception of an individual’s [I]nternet activity.’” *Id.* at 349–50 (citations omitted). Another purported NSA slide “confirm[ed] that—consistent with a dragnet capturing ‘all or substantially all of the e-mail sent by American citizens’—the scale of the data collected by PRISM is so vast that the Government reported difficulty processing it according ‘to the norms’ to which [it has] become accustomed.” *Id.* at 350 (alteration in original) (citations omitted).

The Third Circuit bifurcated its analysis. First, it found Schuchardt’s allegations sufficiently particularized to satisfy the injury-in-fact requirement. *Id.* at 345–46. Though PRISM surveillance is “universal in scope,” the harm that Schuchardt alleged was “unmistakably personal”—“he ha[d] a constitutional right to maintain the privacy of his personal communications, online or

otherwise.” *Id.* Moreover, “the fact that [many others] may share a similar interest d[id] not change [the injury’s] individualized nature because Schuchardt’s allegations ma[de] clear that he [wa]s among the persons” targeted by PRISM. *Id.* at 346 (internal quotation marks omitted).

Second, the court credited Schuchardt’s allegations as true for the purpose of resolving the facial challenge to his complaint. *Id.* at 346–50. The level of detail in the complaint—sufficient to describe “the technical means through which PRISM purportedly” functions and to “confirm[] PRISM’s operational scope and capabilities”—made his allegation about “the Government’s virtual dragnet” plausible. *Id.* at 349–50. In doing so, the Third Circuit made clear that Schuchardt’s reliance on exhibits was not disfavored, and that “[d]espite *Clapper*’s observation that the standing inquiry is ‘especially rigorous’ in matters touching on ‘intelligence gathering and foreign affairs,’” it knew of no instance where a court had “imposed a heightened pleading standard for cases implicating national security,” and thus “assume[d] without deciding that” one did not apply. *Id.* at 348 n.8, 348–49 (quoting *Clapper*, 133 S. Ct. at 1147).

We find the Third Circuit’s approach persuasive and bifurcate our analyses of the Wikimedia and Dragnet Allegations in similar fashion.

## B.

### 1.

As a reminder, the Wikimedia Allegation is that the NSA is intercepting, copying, and reviewing at least some of Wikimedia’s communications in the course of Upstream surveillance, “even if the NSA

conducts Upstream surveillance on only a single [I]nternet backbone link.” J.A. 49.

We conclude that this allegation satisfies the three elements of Article III standing. We begin with injury in fact. *See Spokeo*, 136 S. Ct. at 1548 (defining injury in fact as the invasion of a legally protected interest that is concrete and particularized and actual or imminent). The allegation that the NSA is intercepting and copying communications suffices to show an invasion of a legally protected interest—the “Fourth Amendment right to be free from unreasonable searches and seizures.” *Schuchardt*, 839 F.3d at 353; *see also Am. Civil Liberties Union v. Clapper*, 785 F.3d 787, 801 (2d Cir. 2015) (holding at motion-to-dismiss stage that complaint challenging NSA’s bulk telephone metadata collection program established standing to assert a Fourth Amendment violation where alleged injury was “collection, and maintenance in a government database, of records relating to” plaintiffs).

The injury is also concrete and particularized, despite “[t]he fact that [it is] suffered by a large number of people,” because Wikimedia says that the NSA is seizing its own communications through Upstream surveillance. *See Spokeo*, 136 S. Ct. at 1548 n.7; *accord Schuchardt*, 839 F.3d at 346. And, finishing up with the injury-in-fact element, the injury “is not too speculative for Article III purposes.” *Clapper*, 133 S. Ct. at 1147. Indeed, there’s nothing speculative about it—the interception of Wikimedia’s communications is an actual injury that has already occurred.

The Wikimedia Allegation also satisfies the other two elements of Article III standing. Upstream

surveillance is the direct cause of the alleged injury, and there's no reason to doubt that the requested injunctive and declaratory relief would redress the harm. *See Lujan*, 504 U.S. at 560–61 (providing that the injury must be “fairly traceable” to the conduct complained of and “likely” to be redressed by a favorable decision).

However, just because this allegation satisfies the elements of Article III standing doesn't mean that we must accept it as true for the purpose of resolving the government's facial challenge to the complaint. Thus, we proceed to the second part of our analysis to decide whether the Wikimedia Allegation is plausible.

Wikimedia alleges three key facts that are entitled to the presumption of truth. First, “[g]iven the relatively small number of international chokepoints,” the volume of Wikimedia's communications, and the geographical diversity of the people with whom it communicates, Wikimedia's “communications almost certainly traverse every international backbone link connecting the United States with the rest of the world.” J.A. 47–48.<sup>7</sup>

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<sup>7</sup> On appeal, Wikimedia attempts to rephrase this allegation so that it reads, “Wikimedia's communications traverse every major [I]nternet circuit entering or leaving the United States.” Appellants' Br. at 24. We look, however, to the wording of the complaint. That said, the plausibility pleading regime doesn't automatically invalidate allegations that contain probabilistic-sounding words. For the purpose of deciding whether the Wikimedia Allegation is plausible, we find this supporting allegation, based as it is upon other factual allegations, to be well-pleaded. Indeed, Wikimedia need only state a claim to relief that is plausible on its face,” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). Construing, as we must, all well-pleaded facts in the light most favorable to Wikimedia, *SD3*, 801 F.3d at 422, Wikimedia's claim that its “communications almost

Second, “in order for the NSA to reliably obtain communications to, from, or about its targets in the way it has described, the government,” for technical reasons that Wikimedia goes into at length, “must be copying and reviewing all the international text-based communications that travel across a given link” upon which it has installed surveillance equipment. J.A. 48. Because details about the collection process remain classified, Wikimedia can’t precisely describe the technical means that the NSA employs. Instead, it spells out the technical rules of how the Internet works and concludes that, given that the NSA is conducting Upstream surveillance on a backbone link, the rules require that the NSA do so in a certain way.

We would never confuse the plausibility of this conclusion with that accorded to Newton’s laws of motion. But accepting the technical rules about the Internet as true, and given that Wikimedia is applying them in an appropriate context (i.e., it uses the rules to explain the technical means through which Upstream surveillance functions), we find this conclusion reasonable and entitled to the presumption of truth.

Third, per the PCLOB Report and a purported NSA slide, “the NSA has confirmed that it conducts Upstream surveillance at more than one point along the [I]nternet backbone.” J.A. 49–51. Together, these allegations are sufficient to make plausible the conclusion that the NSA is intercepting, copying, and

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certainly traverse” every chokepoint is enough to satisfy the plausibility requirement. J.A. 48.

reviewing at least some of Wikimedia's communications. To put it simply, Wikimedia has plausibly alleged that its communications travel all of the roads that a communication can take, and that the NSA seizes all of the communications along at least one of those roads.

Thus, at least at this stage of the litigation, Wikimedia has standing to sue for a violation of the Fourth Amendment. And, because Wikimedia has self-censored its speech and sometimes forgone electronic communications in response to Upstream surveillance, it also has standing to sue for a violation of the First Amendment. *See Am. Civil Liberties Union*, 785 F.3d at 802 (holding that complaint established standing to assert First Amendment violation in addition to Fourth Amendment violation because “[w]hen the government collects appellants’ metadata, appellants’ members’ interests in keeping their associations and contacts private are implicated, and any potential ‘chilling effect’ is created at that point”); *see also Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013) (“In First Amendment cases, the injury-in-fact element is commonly satisfied by a sufficient showing of self-censorship, which occurs when a claimant is chilled from exercising his right to free expression.”) (quotation marks and alteration omitted).

2.

The government resists this conclusion, asserting that the Wikimedia Allegation “rest[s] on speculation as to the scope and scale of Upstream collection, and the means by which that collection is accomplished.” Appellees’ Br. at 23. The district court said much the same, and the best way to address this contention is



by examining the ways in which that court misapplied *Clapper's* discussion of speculative injury.

Unlike in *Clapper*, where the plaintiffs based their theories of standing on prospective or threatened injury and actions taken in response thereto, Wikimedia pleaded an actual and ongoing injury, which renders *Clapper's* certainly-impending analysis inapposite here. Compare *Schuchardt*, 839 F.3d at 351 (distinguishing *Clapper* and its discussion of a “speculative chain of possibilities” because plaintiff’s “alleged [Fourth Amendment] injury has already occurred insofar as he claims the NSA seized his emails”), with *Beck*, 848 F.3d at 267–69, 274–75 (applying *Clapper's* certainly impending standard to a motion to dismiss an action under the Privacy Act of 1974, and finding plaintiff’s allegation that “her information ‘will eventually be misused as a result of’” a data breach that compromised her personal information too speculative to establish standing).

In other words, the Wikimedia Allegation is different in kind than the facts (or lack thereof) alleged in *Clapper* to establish standing at summary judgment. That brings us to our next point. By relying so heavily on *Clapper*, the district court blurred the line between the distinct burdens for establishing standing at the motion-to-dismiss and summary-judgment stages of litigation. Put another way, what may perhaps be speculative at summary judgment can be plausible on a motion to dismiss.

For example, the district court characterized Wikimedia’s allegations as “speculative” based upon its own observation that it’s unclear whether the NSA is “using [its] surveillance equipment to its full potential” to intercept “all communications passing

through” chokepoints upon which the NSA has installed surveillance equipment. J.A. 190, 198–99. That observation might be appropriate with the benefit of an evidentiary record at summary judgment, but coming as it did on a motion to dismiss, it had the effect of rejecting Wikimedia’s well-pleaded allegations and impermissibly injecting an evidentiary issue into a plausibility determination. *See Schuchardt*, 839 F.3d at 347–48 (citing *Twombly*, 550 U.S. at 556); *SDR*, 801 F.3d at 431.

The district court made the same mistake by speculating that “the fact that all NSA surveillance practices must survive FISC review . . . suggests that the NSA is not using its surveillance equipment to its full potential.” J.A. 190–91. Wikimedia’s reliance at the motion-to-dismiss stage on publicly disclosed information about Upstream surveillance, purported NSA documents, technical rules about how the Internet works, and its understanding of its own operations is not, as the district court put it, “precisely the sort of speculative reasoning foreclosed by” *Clapper’s* discussion of how much factual material is necessary to satisfy the certainly-impending prong of the injury-in-fact element of Article III standing at summary judgment. J.A. 192.<sup>8</sup>

That’s not to say that all of Wikimedia’s allegations as to injury are both plausible and actual or imminent. For example, the district court was right to take issue with Wikimedia’s probability calculation, which “is

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<sup>8</sup> Like the Third Circuit, we assume without deciding that a heightened pleading standard does not apply to national security cases.

incomplete and riddled with assumptions.” J.A. 197. But we need not look further into that allegation’s deficiencies, because Wikimedia doesn’t need it to establish standing.

We also reject the government’s argument that Wikimedia hasn’t pleaded enough facts to establish injury flowing from its intercepted communications. To the contrary, Wikimedia’s detailed allegations suffice to plausibly establish cognizable injuries under the First and Fourth Amendments. *See Rakas v. Illinois*, 439 U.S. 128, 140 (1978) (providing that the “definition of [Fourth Amendment] rights is more properly placed within the purview of substantive Fourth Amendment law than within that of standing”); *Cooksey*, 721 F.3d at 235 (“The leniency of First Amendment standing manifests itself most commonly in the doctrine’s first element: injury-in-fact.”). At this stage of the litigation, that is enough.

Finally, we decline the government’s invitation to consider its evidence, including the two declarations, which it says “supports the district court’s analysis and undermines plaintiffs’ allegations about how they surmise Upstream surveillance operates.” Appellees’ Br. at 23. The district court treated the government’s motion to dismiss as a facial challenge to the complaint and didn’t consider the government’s evidence. We will follow suit and not look beyond the complaint and documents incorporated by reference therein. *See Beck*, 848 F.3d at 270 (explaining the differences between facial and factual challenges to standing). The government is free to bring a factual challenge on remand, where the district court in the first instance may consider Wikimedia’s argument—should it choose to raise it again—that the intertwined nature of the jurisdictional and merits

questions precludes such a challenge.<sup>9</sup>

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We now turn to the Dragnet Allegation, which is that the NSA is “intercepting, copying, and reviewing substantially all” text-based communications entering and leaving the United States. J.A. 46. The district court arrived at the correct conclusion as to whether this allegation establishes standing, but only by incorrectly analogizing to *Clapper*. As we explain below, the reason this allegation fails to establish standing is that it does not contain enough well-pleaded facts entitled to the presumption of truth.

C.

1.

The Dragnet and Wikimedia Allegations share much in common. Because each alleges the same particularized and ongoing cognizable injuries, our analysis of the injury-in-fact, traceability, and redressability elements of Article III standing with respect to the Wikimedia Allegation also applies here. But there’s a key difference in the scope of the two allegations. In the Dragnet Allegation, Plaintiffs must plausibly establish that the NSA is intercepting “substantially all” text-based communications entering and leaving the United States, whereas it’s sufficient for purposes of the Wikimedia Allegation to show that the NSA is conducting Upstream surveillance on a single backbone link. Because Plaintiffs don’t assert enough facts about Upstream’s

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<sup>9</sup> We decline to decide whether Wikimedia has established third-party standing. Wikimedia may, of course, raise that argument on remand.

operational scope to plausibly allege a dragnet, they have no Article III standing.

In support of a dragnet and in addition to the assertions in the Wikimedia Allegation, Plaintiffs allege the following: (1) “given the way the government has described Upstream surveillance,” including that its “aim is to ‘comprehensively’ and ‘reliably’ obtain communications to, from, and about targets scattered around the world,” the NSA “has a strong incentive to intercept communications at as many backbone chokepoints as possible,” and indeed “must” be doing so “at many different backbone chokepoints,” J.A. 49–50; (2) the technical rules governing online communications make this conclusion “especially true,” J.A. 50; and (3) a *New York Times* article asserts that the NSA “is temporarily copying and then sifting through the contents of what is apparently most e-mails and other text-based communications that cross the border,” J.A. 51.

We hold that these allegations, even when supplemented by the Wikimedia Allegation, including that the NSA is conducting Upstream surveillance on at least seven backbone links,<sup>10</sup> are insufficient to

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<sup>10</sup> Plaintiffs also reference “another NSA document [which] states that, in support of *FAA* [(i.e., the FISA Amendments Act of 2008)] *surveillance*, the ‘NSA has expended a significant amount of resources to create collection/processing capabilities at many of the chokepoints operated by U.S. providers.’” J.A. 51 (emphasis added). As Plaintiffs note, there are “at least two kinds of surveillance” under the Act—PRISM and Upstream. J.A. 40. Pointedly, and unlike in numerous other allegations throughout their complaint, including the immediately preceding one which references an “NSA slide illustrat[ing] the Upstream surveillance facilitated by just a single provider . . . at seven . . . chokepoints,” J.A. 50, Plaintiffs decline to specify which type of

make plausible the claim that the NSA is intercepting “substantially all” text-based communications entering and leaving the United States.

To begin with, the *New York Times* article is effectively a recitation of the Dagnet Allegation, and as such we ascribe little significance to it. The dissent takes issue with our treatment of this article because—as it must—it predates the complaint. Our friend misses the point. The article makes a broad statement almost identical to the Dagnet Allegation. Under the dissent’s view, one expansive allegation is enough to make plausible another almost-identical allegation. That is not the law.

Furthermore, we accept as true Plaintiffs’ allegation about what the NSA is incentivized to do, but even so, that fact, without more, doesn’t establish a dragnet. That leaves Plaintiffs with their allegation about what the NSA “must” be doing, a contention that lacks sufficient factual support to get “across the line from conceivable to plausible.” *See Twombly*, 550 U.S. at 570.

A point of emphasis—we are not rejecting the allegation because it’s phrased as an absolute. Indeed, we’ve already credited as true Plaintiffs’ allegation that the NSA “must be copying and reviewing all the international text-based communications that travel across” backbone links which the NSA is surveilling. J.A. 48. We did so because Wikimedia applied the rules governing Internet communications to Upstream surveillance’s stated purpose to arrive at a reasonable conclusion about the technical means

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surveillance the NSA document refers to. Accordingly, we accept this allegation as true, but give it little weight.

through which Upstream functions on the backbone links which the NSA surveils. One ground for that conclusion's reasonableness is that given that the NSA is surveilling a link, the rules governing Internet communications necessarily affect, to some degree, the way it surveils that link.

By contrast, in the Dragnet allegation, Plaintiffs seek to use the theory governing Internet communications in conjunction with Upstream surveillance's stated purpose to arrive at an allegation about what the program's *operational scope* must be. But neither theory nor purpose says anything about what the NSA is doing from an operational standpoint. While both are relevant factors, without more they can't establish a dragnet. In that sense, the facts alleged here are far different than those in *Schuchardt*, where the plaintiff plausibly pleaded a dragnet under PRISM surveillance by describing "the technical means through which PRISM" functions and by "confirming PRISM's operational scope and capabilities" through exhibits "replete with details." 839 F.3d at 349–50. Those exhibits included purported NSA slides which listed "company names and the dates they began cooperating with the" NSA and "confirm[ed] that . . . the scale of the data collected by PRISM is so vast that the Government [had] difficulty processing it according 'to the norms to which [it had] become accustomed.'" *Id.* at 350.

The last hope for the Dragnet Allegation, then, is to supplement the "must" allegation with facts detailing Upstream's operational scope. But even accepting the allegation that one telecommunications-service provider is facilitating Upstream surveillance at 7 of the approximately 49 chokepoints, we still don't think that Plaintiffs have plausibly alleged a dragnet.

The allegations here fall short of the level of detail in *Schuchardt*, and were we to accept Plaintiffs' approach to standing, we would sanction the extrapolation of the plausible from the conceivable.

Our recent decision in *SD3* is not to the contrary. There, we considered the plausibility of a complaint alleging an antitrust conspiracy in violation of the Sherman Antitrust Act. 801 F.3d at 423. We explained that for such a “claim to survive . . . a plaintiff must plead parallel conduct and something ‘more.’” *Id.* at 424 (quoting *Twombly*, 550 U.S. at 557). “That more,” we said, “must consist of further circumstances pointing toward a meeting of the minds.” *Id.* (alteration and internal quotation marks omitted). The plaintiff in *SD3* was able to establish that “more” by alleging the who, what, when, where, and why of a group boycott. *Id.* at 429–31.

Plaintiffs use our treatment of the “why” element in *SD3* to attach special significance to their allegation that the NSA has a strong incentive to establish a dragnet. But context is key. We observed in *SD3* that “motivation *for common action* is a key circumstantial fact.” *Id.* at 431 (emphasis added) (alteration and internal quotation marks omitted). It should come as no surprise that motive is an important factor when establishing an antitrust conspiracy. *SD3* does not, however, stand for the broad proposition that motivation is always of special significance in plausibly pleading an injury.

Relatedly, the level of detail in the *SD3* complaint is of a different magnitude than the one here, and further supports our conclusion about the implausibility of the Dragnet Allegation. For example, the *SD3* plaintiff “identifie[d] the particular time,



place, and manner in which the boycott initially formed” and gave “the means by which the defendants sealed their boycott agreement: a majority vote.” *Id.* at 430. Those are the sorts of operational details, albeit in a case concerning a different subject matter, that are by and large absent here and which we think are vital to render plausible an allegation as sweeping as the one Plaintiffs posit. See *Twombly*, 550 U.S. at 558 (“[A] district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.”); *Swanson v. Citibank, N.A.*, 614 F.3d 400, 405 (7th Cir. 2010) (“A more complex case involving financial derivatives, or tax fraud that the parties tried hard to conceal, or antitrust violations, will require more detail, both to give the opposing party notice of what the case is all about and to show how, in the plaintiff’s mind at least, the dots should be connected.”).

The dissent says that this analysis is flawed because the NSA’s inability to predict a communication’s path paired with its desire to “comprehensively acquire communications” renders plausible the allegation of a dragnet. The dissent thinks that’s a “logical extension” of our crediting as true Wikimedia’s allegation that the NSA reviews all communications that flow across each link that it surveils. Clearly, there are some similarities, in the sense that each allegation depends, in part, on the application of internet theory to a statement about Upstream’s purpose. But, perhaps because it fails to grapple with any of the relevant case law, the dissent misses two subtle but key distinctions.

The allegation that we credit as true uses theory to explain how the NSA is doing something, given a defined operational scope. Moreover, that theory

necessarily affects the way the NSA does what we know it to be doing. Conversely, the allegation that we do not credit as true uses theory to *define* scope. And, there's no direct link between that theory (the NSA doesn't know a communication's route) and operational scope. The dissent's analysis has no limiting principle and, if adopted, would dilute the plausibility pleading standard to a near-nullity.

In sum, Plaintiffs lack standing to sue for a violation of the Fourth Amendment under the Dragnet Allegation because they can't plausibly show that the NSA is intercepting their communications via a dragnet. From there, it follows that they also lack standing to sue for a violation of the First Amendment because "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Clapper*, 133 S. Ct. at 1152 (alteration in original) (quoting *Laird v. Tatum*, 408 U.S. 1, 13–14 (1972)). Nor can Plaintiffs establish standing on the ground that Upstream surveillance compels them to take burdensome and costly measures. The Dragnet Allegation's implausibility leaves them with nothing more than "fears of hypothetical future harm," and they "cannot manufacture standing merely by inflicting harm on themselves based on" those fears. *Id.* at 1151.<sup>11</sup>

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<sup>11</sup> We reach the same conclusion as to Joshua Dratel, who is a member of the National Association of Criminal Defense Lawyers. He too cannot show that his communications are being intercepted via a dragnet, and the district court correctly held that the claim that one of his clients "has received notice of [Section 702 surveillance]" didn't plausibly allege that the NSA targeted his client with Upstream surveillance. J.A. 68.

2.

Before concluding, we briefly address the dissent's contention that our analysis of the non-Wikimedia Plaintiffs' standing is superfluous.

Article III of the Constitution requires that we determine whether the non-Wikimedia Plaintiffs have standing because the complaint rests upon the premise that the NSA is seizing each Plaintiff's unique communications. As such, it includes the following request for individualized relief: "Order Defendants to purge all records of Plaintiffs' communications in their possession obtained pursuant to Upstream surveillance." J.A. 84. Thus, the Constitution requires that each Plaintiff be able to plausibly allege the Fourth Amendment injury in fact that the NSA has seized its communications, because if a Plaintiff cannot do so it doesn't have standing to, among other things, seek an order requiring the NSA to purge its records. To hold otherwise would be to sanction a shortcut around "the irreducible constitutional minimum of standing." *Lujan*, 504 U.S. at 560.

*Horne v. Flores*, 557 U.S. 433 (2009), and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), are not to the contrary. Each case is quite different from ours, rendering inapplicable the standing-avoidance doctrine which the dissent reads them to embody.<sup>12</sup>

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<sup>12</sup> As for the dissent's invocation of then-Judge Roberts's notable quotable that "if it is not necessary to decide more, it is necessary not to decide more," context is key— that remark in a concurrence had nothing to do with standing, but rather pertained to the judge's disagreement with the majority's application of the *Chevron* doctrine. See *PDK Labs. Inc. v. Drug*

Critically, in those cases each party for whom standing was at issue requested identical relief. *Horne*, 557 U.S. at 443; *Village of Arlington Heights*, 429 U.S. at 258. Thus, once the Court decided that a single party had standing, it made no difference to the resolution of either case whether any other party had standing. *See Horne*, 557 U.S. at 446 & n.2 (concluding that school superintendent had standing to seek vacatur of a district court’s orders in their entirety and declining to consider whether state legislators also had standing to pursue identical relief); *Village of Arlington Heights*, 429 U.S. at 264 & n.9 (concluding that one individual plaintiff had standing to pursue declaratory and injunctive relief and declining to consider whether other individuals had standing to pursue identical relief); *see also, e.g., Sec’y of the Interior v. California*, 464 U.S. 312, 319 n.3 (1984) (“Since the State of California clearly does have standing, we need not address the standing of the other respondents, whose position here is identical to the State’s.”).

Here, the Plaintiffs freely admit that they are not identical to one another. Instead, they fall into two different camps when it comes to demonstrating whether the NSA is seizing their communications. Moreover, the district court made an affirmative finding that none of the Plaintiffs had standing. Under these circumstances, we find it wholly appropriate (indeed necessary) to address fully this

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*Enft Admin.*, 362 F.3d 786, 799, 803–04 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment). We don’t disagree with the general sentiment. It’s just not relevant here.

threshold question.

III.

For the reasons given, we vacate that portion of the district court's judgment dismissing the complaint as to Wikimedia and remand for proceedings consistent with this opinion. We otherwise affirm the judgment.

*AFFIRMED IN PART,  
VACATED IN PART,  
AND REMANDED*

DAVIS, Senior Circuit Judge, concurring in part and dissenting in part:

I agree with the holding that Wikimedia has standing to challenge the NSA's surveillance of its internet communications. However, because I would find that the non-Wikimedia Plaintiffs also have standing, I respectfully dissent in part.

I.

In order to explain my disagreement with the majority, I briefly recount the relevant allegations in this case, taken as true, of course, at this stage of the proceedings. Plaintiffs make essentially two sets of factual allegations: the first explaining how international internet communications function and the second describing how the NSA surveils international internet communications as they enter and exit the United States.

First, Plaintiffs allege that internet communications are governed by certain technical rules as they travel from sender to recipient. The majority of international internet communications that move through the United States are transmitted through forty-nine submarine cables and a limited number of terrestrial cables. These cables (combined with the cables and networks that transmit domestic internet communications) are known as the internet backbone, and the different physical entry and exit points into the United States are known as backbone links. The junctions where these cables meet are chokepoints through which nearly all international internet traffic passes. Internet communications do not flow along the backbone as discrete and intact entities but instead are broken into smaller packets of information. The packets that make up a single

internet communication travel to their common destination independently from one another — in the process becoming intermingled with packets from unrelated communications — and are reassembled only once they reach their destination. Each packet reaches its destination following a different and wholly unpredictable path, which is determined by rapidly changing factors such as network conditions. Because packets travel along independent and dynamic paths, communications sent between two individuals in “real-time” can traverse different backbone links “even though the end points are the same.” J.A. 50. Similarly, a single individual’s communications sent at different times can traverse different backbone links.

Second, based on the government’s disclosures and media reports, Plaintiffs allege that the NSA is surveilling internet communications as they travel along the internet backbone, a practice known as Upstream surveillance. The NSA accomplishes this by installing surveillance devices at backbone links, which allow the agency to copy the internet communications traversing these links. The NSA searches the copied communications for selectors. Selectors are “specific communications facilit[ies]” (e.g. email address, telephone numbers, and IP addresses) associated with the NSA’s foreign surveillance targets. PCLOB Report 32. The NSA retains communications sent to or from a selector as well as communications containing a selector in their content, which are known as “about communications.” About communications are not necessarily sent to or from a foreign surveillance target. According to the government’s disclosures, surveillance of about communications is necessary because the NSA seeks

to “comprehensively acquire communications that are sent to or from its targets.” *Id.* at 10. With respect to the scope of Upstream surveillance, the New York Times reported that, through the use of this form of surveillance, the NSA is copying “what is apparently most e-mails and other text-based communications that cross the border.” J.A. 51. Plaintiffs also quote an NSA document that states the “NSA has expended a significant amount of resources to create collection/processing capabilities at many of the chokepoints operated by U.S. providers through which international communications enter and leave the United States.” *Id.*

## II.

I agree with the majority’s analysis concluding that *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013), does not control this case and that—accepted as true, as they must be—Plaintiffs’ allegations satisfy the three elements of standing. The majority also correctly finds that the factual allegations necessary to establish Wikimedia’s standing are plausible. However, the majority errs, both by reaching out to decide the issue of the non-Wikimedia Plaintiffs’ standing<sup>1</sup> and, as well, in the

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<sup>1</sup> See *Horne v. Flores*, 557 U.S. 433, 446 (2009) (“Because the Superintendent clearly has standing to challenge the lower courts’ decisions, we need not consider whether the legislators also have standing to do so.”); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 and n.9 (1977) (holding because “one individual plaintiff . . . has demonstrated standing,” the Court “need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit”). The majority’s “same relief” gloss on *Horne* and *Arlington Heights* completely reads out of Justice Alito’s opinion in *Horne* the following sentence: “[I]n *all standing inquiries*, the critical question is whether *at least one petitioner* has alleged such a



answer it gives to the question it need not even reach in holding that the non-Wikimedia Plaintiffs' lack standing because the pertinent allegations are not

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personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction." *Horne*, 557 U.S. at 445 (citations and internal quotation marks omitted). In any event, this case actually fits within the majority's "same relief" paradigm because all plaintiffs seek declaratory and injunctive relief intended to shut down the government's Upstream surveillance program. The mere fact that a "purging order" of the sort contemplated by the majority would operate only to "purge" seized communications of a particular plaintiff is a thin reed indeed on which to base the majority's unnecessary door-closing result.

It is not clear to me why the majority elects to ignore the Chief Justice's sage admonition: "[I]f it is not necessary to decide more, it is necessary not to decide more." *PDK Labs., Inc. v. Drug Enforcement Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment). The majority's assertion to the contrary notwithstanding, I think I know *dicta* when I see it, and here I see *dicta*. If, in fact, the Wikimedia Plaintiffs go on to prove their claims in this case, i.e., establish a violation of the Fourth Amendment as to *themselves*, it is beyond my capacity to conjure a rational basis on which the non-Wikimedia Plaintiffs would not be entitled to similar relief from seizures effected pursuant to the Upstream program and of course, the dismissal here of the non-Wikimedia Plaintiffs will be without prejudice. *S. Walk at Broadlands Homeowner's Ass'n v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 185 (4th Cir. 2013).

In sum, the day cannot be far off when defendants in a broad array of multi-plaintiff cases will point to the majority's holding in this case as authority requiring already short-handed and overworked federal district judges to separately assess the standing of each and every plaintiff in complex, impact litigation. Needless to say, we should avoid imposing such a requirement in the absence of the absolute necessity that we do so.

plausible.

In order to find that Wikimedia has standing in this action, the majority credits as true three factual allegations. *First*, because Wikimedia sends and receives so many international internet communications, its communications travel across every internet backbone link. *Second*, based on the government's disclosures, the NSA is surveilling at least one backbone link. *Third*, the NSA intercepts and copies every packet that passes through the backbone link(s) being surveilled (what the majority calls the Wikimedia Allegation). The third allegation is not based on Plaintiffs' knowledge of the NSA's surveillance techniques. Instead, the majority finds this factual allegation is plausible because it is based on Upstream surveillance's stated purpose and the technical rules that govern internet communications. The logical chain is as follows: The NSA has acknowledged that it uses Upstream surveillance to target "about communications," which contain a selector in the content of the communication. Before it can search the contents of an internet communication that has been broken up into discrete packets while in transit, the NSA must copy and reassemble all of the packets that make up the communication. However, packets from targeted communications cannot be segregated from the packets of unrelated communications. Thus, in order to "reliably" intercept targeted communications, the NSA must copy all of the packets that flow across a backbone link so that the government can be assured that it has captured all of the packets that make up the targeted communication (and in the process capturing unrelated packets). J.A. 48–49.

Conversely, under the majority's "crabbed

plausibility analysis,” see *Woods v. City of Greensboro*, --- F.3d ---, ---, 2017 WL 1754898, \*2 (4th Cir. 2017), the non-Wikimedia Plaintiffs are denied standing because, in the majority’s view, those Plaintiffs rely on an implausible guess regarding Upstream surveillance’s operational scope. For the non-Wikimedia Plaintiffs to have standing, according to the majority, Plaintiffs must plausibly allege an additional fact beyond those discussed with respect to Wikimedia: the NSA is surveilling most backbone links (what the majority calls the Dragnet Allegation). Just as with the Wikimedia Allegation, Plaintiffs base this factual allegation on Upstream surveillance’s stated purpose and the technical rules governing internet communications.<sup>2</sup> However, the majority finds this allegation implausible because it believes that “neither theory nor purpose says anything about what the NSA is doing from an operational standpoint.” Op. at 33. This misapprehends the full scope of Plaintiffs’ allegations.

Plaintiffs have plausibly alleged that the NSA surveils most backbone links because — based on the technical rules governing internet communications — the agency cannot know which link the

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<sup>2</sup> Plaintiffs provide additional support for this allegation by corroborating it with a N.Y. Times report, which stated that the NSA is surveilling “most e-mails and other text-based communications that cross the border.” J.A. 51. The majority finds that this report is entitled to “little significance” because it “is effectively a recitation of” Plaintiffs’ allegation. Op. at 32. The N.Y. Times report predates the complaint, however; thus, the allegation is a “recitation” of the factual news report, not the other way around. Moreover, the fact that Plaintiffs based their allegation on factual news reporting rather than their own conjecture means the allegation is entitled to more weight not less.

communications it targets will traverse when they enter or leave the United States. The path that packets take along the internet backbone is determined dynamically based on unpredictable conditions. Thus, a communication sent by a surveillance target can enter the United States through one backbone link, but an immediate response returned to the surveillance target can traverse a different backbone link. Similarly, communications sent by a surveillance target at different times or locations can traverse different backbone links. Given this technical limitation, the government's disclosure that the NSA seeks to "comprehensively acquire communications that are sent to or from its targets," J.A. 49, renders Plaintiffs' allegation plausible. If the NSA cannot know which backbone link its targets' internet communications will traverse, then the only way it can comprehensively acquire its targets' communications is by surveilling virtually every backbone link.

This allegation is essentially a logical extension of Plaintiffs' earlier allegation that the NSA must copy every communication that flows across a backbone link it surveils. Just as it is plausible that the government must copy all of the packets that flow through a backbone link in order to "reliably" capture the packets that make up a targeted internet communication, because the government does not know across which backbone link a communication will travel, it is also plausible that the government must monitor virtually every link in order to "comprehensively" capture its targets' communications. Given that we review here a motion to dismiss and not a motion for summary judgment,

the non-Wikimedia Plaintiffs have provided enough factual support to their allegation to survive dismissal.

### III.

For the reasons set forth, while I discern no need whatsoever to review the district court's legal determination of the non-Wikimedia Plaintiffs' standing, I respectfully dissent from the majority opinion's unnecessary resolution of that issue

## APPENDIX G

### IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

WIKIMEDIA  
FOUNDATION,

Plaintiff,

v.

NATIONAL SECURITY  
AGENCY / CENTRAL  
SECURITY SERVICE,

*et al.*,

Defendants.

Case No. 1:15-cv-662

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#### MEMORANDUM OPINION

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This is the latest in the recent series of constitutional challenges to the National Security Agency's ("NSA") data gathering efforts.<sup>1</sup> In this case, plaintiffs, nine organizations that communicate over

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<sup>1</sup> See *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1144 (2013) (involving a facial challenge to Section 702 of the Foreign Intelligence Surveillance Act); *Obama v. Klayman*, Nos. 14-5004, 14-5005, 14-5016, 14-5017, 2015 WL 5058403 (D.C. Cir. Aug. 28, 2015) (involving a challenge to the NSA's bulk collection of telephone metadata produced by telephone companies); *Am. Civil Liberties Union v. Clapper*, 785 F.3d 787 (2d Cir. 2015) (involving a challenge to the NSA's bulk telephone metadata collection program); *Jewel v. Nat'l Sec. Agency*, No. C 08-04373, 2015 WL 545925 (N.D. Cal. Feb. 10, 2015), *appeal docketed*, No. 15-16133 (9th Cir. June 4, 2015) (involving a challenge to the NSA's interception of Internet communications).

the Internet, allege that the NSA's interception, collection, review, and storing of plaintiffs' Internet communications violates plaintiffs' rights under the First and Fourth Amendments and exceeds the NSA's authority under the Foreign Intelligence Surveillance Act ("FISA"). Typical of these challenges to the NSA's surveillance programs is defendants' threshold jurisdictional contention that plaintiffs lack Article III standing to assert their claims. This memorandum opinion addresses the standing issue.

## I.<sup>2</sup>

The nine plaintiff organizations are as follows:

- Wikimedia Foundation ("Wikimedia") is a non-profit organization based in San Francisco, California, that maintains twelve Internet projects—including Wikipedia—that provide free content to users around the world.
- The National Association of Criminal Defense Lawyers ("NACDL") is a membership organization based in Washington, D.C., that focuses on criminal defense matters.
- Amnesty International USA, headquartered in New York City, is the largest division of Amnesty

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<sup>2</sup> The facts stated here are derived from the amended complaint and "documents incorporated into the complaint by reference," as is appropriate on a motion to dismiss. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). Plaintiffs' amended complaint incorporates, *inter alia*, the Privacy and Civil Liberties Oversight Board Report ("PCLOB Report") (July 2, 2014), the Office of the Director of National Intelligence Report ("ODNI Report") (April 22, 2015), the President's Review Group on Intelligence and Communications Technologies Report ("PRG Report") (Dec. 12, 2013), and *[Redacted]*, 2011 WL 10945618 (FISA Ct. Oct. 3, 2011).

International, which focuses on human rights around the world.

- Human Rights Watch is a non-profit human rights organization based in New York City.
- PEN American Center is an association based in New York City that advocates on behalf of writers.
- Global Fund for Women is a non-profit grant-making foundation based in San Francisco, California, and New York City, that focuses on women's rights around the world.
- The Nation Magazine, published by The Nation Company, LLC, is based in New York City and reports on issues related to international affairs.
- The Rutherford Institute is a civil liberties organization based in Charlottesville, Virginia.
- The Washington Office on Latin America is a non-profit organization based in Washington, D.C., that focuses on social justice in the Americas.

The six defendants are the following government agencies and officers:

- The NSA is headquartered in Fort Mead, Maryland, and is the federal agency responsible for conducting the surveillance alleged in this case.
- The Department of Justice is a federal agency partly responsible for directing and coordinating the activities of the intelligence community, including the NSA.
- The Office of the Director of National Intelligence is a federal agency partly responsible for directing and coordinating the activities of the intelligence community, including the NSA.



- Adm. Michael S. Rogers is the Director of the NSA and the Chief of the Central Security Service.
- James R. Clapper is the Director of National Intelligence (“DNI”).
- Loretta E. Lynch is the Attorney General of the United States.

**A.**

Before setting forth the facts alleged in the amended complaint (“AC”), it is useful to describe briefly the statutory context pertinent to the NSA’s data gathering efforts. In 1978, in response to revelations of unlawful government surveillance directed at specific United States citizens and political organizations, Congress enacted FISA to regulate government electronic surveillance within the United States for foreign intelligence purposes. FISA provides a check against abuses by placing certain types of foreign-intelligence surveillance under the supervision of the Foreign Intelligence Surveillance Court (“FISC”), which reviews government applications for surveillance in certain foreign intelligence investigations. *See* 50 U.S.C. § 1803(a). As originally enacted, FISA required the government to obtain an individualized order from the FISC before conducting electronic surveillance in the United States. *See id.* § 1804(a). In this respect, the FISC could issue an order authorizing surveillance only if it found that there was “probable cause to believe that the target of the electronic surveillance [was] a foreign power or an agent of a foreign power” and that “each of the facilities or places at which the electronic surveillance [was] directed [was] being used, or [was] about to be used, by a foreign power or an agent of a foreign power.” *Id.* § 1805(a)(2).

In 2008, thirty years after FISA's enactment, Congress passed the FISA Amendments Act, which established procedures and requirements for the authorization of surveillance targeting persons located outside the United States. *See* 50 U.S.C. §§ 1881a-1881g. Specifically, FISA Section 702, 50 U.S.C. § 1881a, “supplements pre-existing FISA authority by creating a new framework under which the [g]overnment may seek the FISC’s authorization of certain foreign intelligence surveillance targeting ... non-U.S. persons located abroad,” *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1144 (2013). Section 702 provides that the Attorney General and the Director of National Intelligence may jointly authorize, for up to one year, the “targeting of [non-U.S.] persons reasonably believed to be located outside the United States to acquire foreign intelligence information”<sup>3</sup> if the FISC approves “a written certification” submitted by the government that attests, *inter alia*, that (i) a significant purpose of the acquisition is to obtain foreign intelligence information and (ii) the acquisition will be conducted “in a manner consistent with the [F]ourth [A]mendment” and the targeting and minimization procedures required by statute. 50 U.S.C. § 1881a(b), (g). Specifically, before approving a certification, the FISC must find that the government's targeting procedures are reasonably designed:

- (i) to ensure that acquisition "is limited to

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<sup>3</sup> Importantly, the statute expressly prohibits the intentional targeting of any person known at the time of acquisition to be in the United States or any U.S. person reasonably believed to be located outside the United States. 50 U.S.C. § 1881a(b).

targeting persons reasonably believed to be located outside the United States," *id.* § 1881a(i)(2)(B)(i);

(ii) to prevent the intentional acquisition of wholly domestic communications, *id.* § 1881a(i)(2)(B)(ii);

(iii) to "minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign-intelligence information," *id.* § 1801(h)(1); see *id.* § 1881a(i)(2)(C); and

(iv) to ensure that the procedures "are consistent with ... the [F]ourth [A]mendment," *id.* § 1881a(i)(3)(A).

In effect, an approval of government surveillance by the FISC means that the surveillance comports with the statutory requirements and the Constitution.

Additional details regarding the collection of communications under Section 702 have recently been disclosed in a number of public government reports and declassified FISC opinions. The government has disclosed, for example, that in 2011, Section 702 surveillance resulted in the retention of more than 250 million communications and that in 2014, the government targeted the communications of 92,707 individuals, groups, and organizations under a single FISC Order.<sup>4</sup> The total number of U.S. persons'

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<sup>4</sup> See AC ¶ 37. The AC cites a redacted FISC Order and a government report for this information. See *[Redacted]*, 2011 WL 10945618, at \*9 (FISA Ct. Oct. 3, 2011); ODNI Report, at 1, 2.

communications that the government has intercepted or retained pursuant to Section 702 remains classified. The government has also disclosed that the NSA conducts two kinds of surveillance pursuant to Section 702. Under a surveillance program called “PRISM,”<sup>5</sup> U.S.-based Internet Service Providers furnish the NSA with electronic communications that contain information specified by the NSA. This case concerns the second method of surveillance, which is referred to as “Upstream surveillance.”

## B.

Plaintiffs challenge the NSA’s use of Upstream surveillance, alleging that this mode of surveillance enables the government to collect communications as they transit the Internet “backbone,” the network of high-capacity cables, switches, and routers that facilitates domestic and international Internet communication. With the assistance of telecommunications providers, Upstream surveillance enables the NSA to copy and review “text-based” communications—*i.e.*, those whose content includes searchable text, such as emails, search-engine queries, and webpages—for search terms called “selectors.” Importantly, selectors cannot be key words or names of targeted individuals, but must instead be specific communications identifiers, such as email addresses, phone numbers, and IP addresses.

Plaintiffs allege that Upstream surveillance encompasses the following four processes, one or more

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<sup>5</sup> “PRISM” is a government code name for a data-collection that is officially known as US-984XN. *See* PRISM/US-984XN Overview, April 2013, *available at* <https://www.aclu.org/files/natsec/nsa/20130816/PRISM%20Overview%20Powerpoint%20Slides.pdf> (last visited Oct. 22, 2015).

of which is implemented by telecommunications providers at the NSA's direction:

(i) Copying: Using surveillance devices installed at key access points along the Internet backbone, the NSA intercepts and copies text-based communications flowing across certain high-capacity cables and routers.

(ii) Filtering: The NSA attempts to filter the copied data and discard wholly domestic communications, while preserving international communications. Because the NSA's filtering of domestic communications is imperfect, some domestic communications are not filtered out.

(iii) Content Review: The NSA reviews the copied communications that are not filtered out for instances of tasked selectors.

(iv) Retention and Use: The NSA retains all communications that contain selectors associated with its targets and other communications that were bundled in transit with the targeted communications; NSA analysts may read and query the retained communications and may share the results with the FBI.

*See* AC ¶¶ 40, 47-49.<sup>6</sup>

Plaintiffs emphasize two aspects of Upstream surveillance. First, surveillance under that program is not limited to communications sent or received by the NSA's targets, as the government has acknowledged

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<sup>6</sup> Plaintiffs' description of Upstream surveillance is based on the PCLOB Report, at 32-41.

that, as part of Upstream surveillance, the NSA also engages in what is called "about surveillance"—the searching of Internet communications that are *about* its targets. AC ¶ 50. In other words, plaintiffs allege that the NSA intercepts substantial quantities of Internet traffic and examines those communications to determine whether they include references to the NSA's search terms. Second, Upstream surveillance implicates domestic communications because (i) the NSA's filters are imperfect, (ii) the NSA sometimes mistakes a domestic communication for an international one, and (iii) the NSA retains communications that happen to be bundled, while in transit, with communications that contain selectors.

All nine plaintiffs allege that the NSA uses Upstream surveillance to copy their Internet communications, filter the large body of collected communications in an attempt to remove wholly domestic communications, and then search the remaining communications with "selectors," looking for potentially terrorist-related foreign intelligence information. Plaintiffs further claim that these government actions invade their privacy—as well as the privacy of their staffs, Wikimedia's users, and NACDL's members—and infringe on plaintiffs' rights to control their communications and the information therein. Plaintiffs also allege that the NSA intercepts, copies, and reviews two other categories of communications specific to Wikimedia: (i) the over one trillion annual communications that plaintiffs claim occur when individuals around the globe view and edit Wikimedia websites and interact with one another on those sites; and (ii) Wikimedia's logs of online requests by such users to view its webpages. In addition to the claimed interception, copying, and selector review of

their communications, plaintiffs allege that there is a “substantial likelihood” that plaintiffs’ communications are retained, read, and disseminated by the NSA. *Id.* ¶ 71. This is so, plaintiffs allege, because plaintiffs, their members, and their employees communicate online with people whom the government is likely to target when conducting Upstream surveillance, and a significant amount of the information plaintiffs, their members, and their employees exchange with those persons constitutes “foreign intelligence information” under FISA. *Id.* ¶ 74. Plaintiffs further allege that Upstream surveillance undermines their ability to carry out activities crucial to their missions (i) by forcing them to take burdensome measures to minimize the risk that the confidentiality of their sensitive information will be compromised and (ii) by reducing the likelihood that individuals will share sensitive information with them.

Plaintiffs claim that the alleged injuries result from the NSA’s use of Upstream surveillance that violates the First and Fourth Amendments of the Constitution and exceeds the government’s authority under Section 702.<sup>7</sup> By way of relief, plaintiffs seek a declaration that Upstream surveillance is unlawful, an injunction prohibiting the NSA from using Upstream surveillance to intercept plaintiffs’ communications, and a purge from government databases of any of plaintiffs’ communications

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<sup>7</sup> Of course, the FISC opinion that relates to the data collection practices challenged here is unavailable because it is classified. It would be helpful and generally beneficial to the public for FISC opinions to be published by way of either declassification or redaction.

acquired through Upstream surveillance.

Defendants have moved to dismiss plaintiffs' AC pursuant to Rule 12(b)(1), Fed. R. Civ. P., on the ground that plaintiffs lack Article III standing to contest the legality of the NSA's Upstream surveillance because plaintiffs have not alleged facts that plausibly establish an actual injury attributable to the NSA's Upstream surveillance.

## II.

Article III limits the jurisdiction of federal courts to certain "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 2. As the Supreme Court has made clear, one "essential and unchanging part of the case-or-controversy requirement" is that a plaintiff must establish Article III standing to sue. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). A plaintiff establishes Article III standing by showing that he seeks relief from an injury that is "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Clapper*, 133 S. Ct. at 1147 (quoting *Monsanto Co. v. Geerston Seed Farms*, 561 U.S. 139, 149 (2010)). The alleged injury must be "real and immediate," not "conjectural or hypothetical," *City of Los Angeles v. Lyons*, 461 U.S. 95, 201 (1983). The Supreme Court has "repeatedly reiterated that '[a] threatened injury must be certainly impending to constitute injury in fact,' and that '[a]llegations of possible future injury' are not sufficient." *Clapper*, 133 S. Ct. at 1147 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)) (emphases in original). Importantly, the standing inquiry is "especially rigorous when reaching the merits of the dispute would force [a court] to decide whether an action taken



by one of the other two branches of the Federal Government was unconstitutional,” particularly “in the fields of intelligence gathering and foreign affairs.” *Clapper*, 133 S. Ct. at 1147.

Because standing is a threshold jurisdictional requirement, it may be attacked at any time, including at the outset of a case pursuant to Rule 12(b)(1), Fed. R. Civ. P. As the Fourth Circuit has made clear, where, as here, “standing is challenged on the pleadings, [a court must] accept as true all material allegations of the complaint and construe the complaint in favor of the complaining party.” *David v. Alphin*, 704 F.3d 327, 333 (4th Cir. 2013) (citing *Pennell v. City of San Jose*, 485 U.S. 1, 7 (1988)). But a court should not “take account of allegations in the complaint labeled as fact but that constitute nothing more than ‘legal conclusions’ or ‘naked assertions.’” *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). A complaint must contain “sufficient factual matter, accepted as true, to ‘state a claim that is plausible on its face.’” *Ashcroft*, 556 U.S. at 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Standing is adequately alleged only if the “well-pleaded allegations” allow for a “reasonable inference,” rather than a “sheer possibility,” that the plaintiff has standing, *Iqbal*, 556 U.S. at 678-79; *David*, 704 F.3d at 333.<sup>8</sup>

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<sup>8</sup> As the parties correctly note, a jurisdictional motion to dismiss may be brought as a facial or factual challenge. *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). On a factual challenge, “a trial court may go beyond the allegations of the complaint ... [and] consider evidence by affidavit, depositions or live testimony without converting the proceeding to one for summary judgment.” *Id.*; see also *Kerns v. United States*, 585 F.3d 187, 193 (4th Cir. 2009). When appropriate, a court may also

### III.

*Clapper v. Amnesty International* is the Supreme Court’s most recent pronouncement on standing with respect to litigants challenging the NSA’s data gathering efforts, and therefore is the leading case in this series. In *Clapper*, the plaintiffs argued that they had standing to bring a facial challenge to Section 702 because there was an “objectively reasonable likelihood” that plaintiffs’ communications “[would] be intercepted” in the future. 133 S. Ct. at 1147. The Supreme Court rejected this “novel view of standing” because plaintiffs’ “speculative chain of possibilities [did] not establish that injury based on future surveillance [was] certainly impending or [was] fairly traceable to [Section 702 surveillance].” *Id.* at 1146, 1150. Of course, if the alleged facts and arguments in this case are essentially identical to those in *Clapper*, then *Clapper* must control the result reached here. On the other hand, if plaintiffs in this case present facts and arguments that are different from those asserted in *Clapper*, then those facts and arguments must be carefully considered to determine whether they compel a result different from *Clapper*.

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grant jurisdictional discovery to ensure that the record is fully developed. *See, e.g., Animators at Law, Inc. v. Capital Legal Solutions, LLC*, 786 F. Supp. 2d 1114, 1115 n.2 (E.D. Va. 2011) (granting jurisdictional discovery “to allow consideration of [a] pivotal issue on a more complete record”). Here, defendants have brought a facial challenge, but have also submitted declarations and accompanying exhibits not incorporated by reference in the complaint. As plaintiffs correctly note, this additional evidence is properly considered only if the motion to dismiss is decided on a factual-rather than facial-basis. Because the dispute can be resolved on the face of the complaint, the additional declarations and exhibits are not considered.

In the course of oral argument, plaintiffs' counsel was asked to identify the facts and arguments in this case that are different from those asserted in *Clapper*.<sup>9</sup> Plaintiffs' counsel identified four differences:

- (i) the legal standard in this case is different from the legal standard that controlled in *Clapper* because the standing challenge here arises on a motion to dismiss rather than, as in *Clapper*, on a motion for summary judgment.
- (ii) far more is known about Section 702 surveillance, including Upstream surveillance, than was known at the time of *Clapper*;
- (iii) the Upstream surveillance at issue here is fundamentally different from the surveillance at issue in *Clapper*; and
- (iv) plaintiffs here are different from the *Clapper* plaintiffs in important respects concerning their Internet communications.<sup>10</sup>

Clearly there are differences between the facts and arguments raised in this case and those raised in *Clapper*, but the question is not simply whether there are differences, but whether those differences compel the same or a different result from the result reached in *Clapper*.

Before addressing plaintiffs' arguments, it is important to describe *Clapper* in more detail. Plaintiffs in *Clapper* brought a facial challenge to Section 702, seeking a declaration that Section 702

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<sup>9</sup> Mot. to Dismiss Hr'g Tr. 19:13-16 (Sept. 25, 2015).

<sup>10</sup> *Id.* at 20:4-6, 21:12-14, 23:4-7, 27:17-21.

was unconstitutional and an injunction against the surveillance authorized by that provision. 133 S. Ct. at 1142-46. The Supreme Court's opinion began its consideration of the standing issue by reviewing what was known and alleged concerning the NSA's surveillance practices under Section 702. Specifically, the Supreme Court explained that Section 702 surveillance "[was] subject to statutory conditions, judicial authorization, congressional supervision, and compliance with the Fourth Amendment," emphasizing that the government must obtain the FISC's "approval of 'targeting' procedures, 'minimization' procedures, and a governmental certification regarding proposed surveillance." *Id.* at 1144, 1145 (quoting 50 U.S.C. § 1881a(a), (c)(1), (i)(2), (i)(3)). As the Supreme Court's opinion noted, "the [FISC's] role includes determining whether the [g]overnment's certification contains the required elements"<sup>11</sup> and whether the government's targeting procedures are "reasonably designed' (1) to 'ensure that an acquisition ... is limited to targeting persons

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<sup>11</sup> As the *Clapper* majority further explained, the "[g]overnment's certification must attest" (1) that the procedures in place "have been approved, have been submitted for approval, or will be submitted with the certification for approval by the [FISC]" and "are reasonably designed' to ensure that an acquisition is 'limited to targeting persons reasonably believed to be located outside' the United States;" (2) that the "minimization procedures adequately restrict the acquisition, retention, and dissemination of nonpublic information about unconsenting U.S. persons, as appropriate;" (3) that "guidelines have been adopted to ensure compliance with targeting limits and the Fourth Amendment;" and (4) that "the procedures and guidelines referred to above comport with the Fourth Amendment." *Id.* at 1145 (quoting 50 U.S.C. § 1881a(g)(2)).

reasonably believed to be located outside the United States’ and (2) to ‘prevent the intentional acquisition of any communication as to which the sender and all intended recipients are known ... to be located in the United States.’ *Id.* at 1135 (quoting 50 U.S.C. § 1881a(i)(2)(8)).

The Supreme Court explained that in attempting to establish standing, the *Clapper* plaintiffs did not provide “any evidence that their communications ha[d] been monitored under” any program authorized by Section 702. *Id.* at 1148. Instead, plaintiffs argued that they had standing because there was an “objectively reasonable likelihood” that plaintiffs’ communications “[would] be intercepted” in the future. *Id.* at 1147. The Supreme Court’s opinion characterized plaintiffs’ argument as a “speculative chain of possibilities,” *id.* at 1150.<sup>12</sup> The *Clapper* plaintiffs also argued that “they should be held to have standing because otherwise the constitutionality of [Section 702 surveillance] could not be challenged” and would be “insulate[d]” from “meaningful judicial review.” The Supreme Court rejected that argument

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<sup>12</sup> The speculative chain consisted of five contingencies: (i) that the “[g]overnment [would] decide to target the communications of non-U.S. persons with whom [plaintiffs] communicate;” (ii) that in targeting those communications, “the [g]overnment [would] choose to invoke its authority under [Section 702] rather than utilizing another method of surveillance;” (iii) that “the Article III judges who serve on the [FISC would] conclude that the Government’s proposed surveillance procedures satisfy [Section 702’s] many safeguards and are consistent with the Fourth Amendment;” (iv) that upon such a finding by the FISC, “the Government [would] succeed in intercepting the communications of plaintiffs’ contacts;” and (v) that “[plaintiffs would] be parties to the particular communications that the Government intercept[ed].” *Id.* at 1148.

as “both legally and factually incorrect.” *Id.* at 1154. The Supreme Court explained that Section 702 surveillance orders are not in fact insulated from judicial review because (i) the FISC reviews targeting and minimization procedures of Section 702 surveillance, (ii) criminal defendants prosecuted on the basis of information derived from Section 702 surveillance are given notice of that surveillance and can challenge its validity, and (iii) electronic communications service providers directed to assist the government in surveillance may challenge the directive before the FISC. *Id.* Even if these other avenues for judicial review were not available, the Supreme Court made clear that “[t]he assumption that if [plaintiffs] have no standing to sue, no one would have standing, is not a reason to find standing.” *Id.* (quoting *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 489 (1982)).

In holding that plaintiffs’ alleged injury was speculative, the *Clapper* majority rejected the approach advocated by the dissenting Justices. The dissent relied on “commonsense inferences” to find a “very high likelihood” that the government would “intercept at least some of plaintiffs’ communications.” *Id.* at 1157 (Breyer, J., dissenting). Specifically, the dissent concluded that (i) the plaintiffs regularly engaged in the type of electronic communications that the government had “the capacity” to collect, (ii) the government was “strong[ly] motiv[at]ed” to intercept for counter-terrorism purposes the type of communications in which plaintiffs engaged, and (iii) the government had in fact intercepted the same type of communications on thousands of occasions in the past. *Id.* at 1157-59 (Breyer, J. dissenting). The

dissent also noted that the government had not “describe[d] any system for avoiding the interception of an electronic communication” to which plaintiffs were a party. *Id.* at 1159. Without evidence that a system was in place to prevent government interception of plaintiffs’ communications,<sup>13</sup> the dissent reasoned that “we need only assume that the [g]overnment is doing its job (to find out about, and combat, terrorism) in order to conclude that there is a high probability that the [g]overnment will intercept at least some electronic communication to which at least some of the plaintiffs are parties.” *Id.*

In essence, the Supreme Court held that the *Clapper* plaintiffs’ chain of probabilities and inferences—based on the government’s capacity and motivation to intercept communications similar to the *Clapper* plaintiffs’ communications—was speculative, and therefore did not establish standing. The dissent, on the other hand, was convinced that such inferences and probabilities were sufficient to establish standing. At issue here is whether the four differences plaintiffs have identified compel the same or a different result from the result reached in *Clapper*. Each of plaintiffs’ arguments with respect to those differences is separately addressed.

#### A.

Plaintiffs first argue that *Clapper* does not control here on the ground that the legal standard in this case

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<sup>13</sup> The majority noted that “[t]he dissent attempt[ed] to downplay the safeguards,” as it “[did] not directly acknowledge that [Section 702] surveillance must comport with the Fourth Amendment ... and that the [FISC] must assess whether targeting and minimization procedures are consistent with the Fourth Amendment.” *Id.* at 1145 n.3.

is different from the legal standard applicable in *Clapper* because the standing challenge in the present case arises on a motion to dismiss rather than, as in *Clapper*, on a motion for summary judgment. To the extent this argument refers to the difference between reliance on factual allegations and reliance on a factual record, plaintiffs are undoubtedly correct. The Supreme Court has made clear that, because the elements of standing are “an indispensable part of the plaintiffs case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages in litigation.” *Lujan*, 504 U.S. at 561. At the summary judgment stage, a plaintiff cannot rest simply on allegations, but must “set forth’ by affidavit or other evidence ‘specific facts;’” at the motion to dismiss stage, however, “allegations of injury resulting from defendant’s conduct may suffice.” *Id.* at 561 (quoting Rule 56(2), Fed. R. Civ. P.).

But to say the evidentiary basis is different is not to say that the standing requirements change at each successive stage. They do not. The means by which a plaintiff establishes standing—by allegation or by record evidence—changes, but the three elements of standing—actual injury, causation, and redressability—remain constant and applicable at all stages of the case. This is so because standing is a jurisdictional requirement that “is an essential and unchanging part of the case-or-controversy requirement of Article III.” *Id.* at 560. Indeed, the three elements of standing are the “irreducible constitutional minimum” that “set[] apart the ‘Cases’ and ‘Controversies’ that are of the sort referred to in Article III—’serv[ing] to identify those disputes which



are appropriately resolved through the judicial process.” *Id.* (quoting U.S. Const. art. III, § 2, cl. 2; *Whitmore*, 495 U.S. at 155).

Thus, to withstand defendants’ standing challenge on a motion to dismiss, plaintiffs must allege facts that plausibly establish (i) that there is an “injury in fact—an invasion of a legally protected interest which is concrete and particularized and actual or imminent, not conjectural or hypothetical;” (ii) that the injury is “fairly trace[able] to the challenged action of the defendant;” and (iii) that it is “likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Id.* at 560-61. A court must, of course, “accept as true all material allegations of the complaint and construe the complaint in favor of the complaining party,” but a court should not “take account of allegations in the complaint labeled as fact but that constitute nothing more than ‘legal conclusions’ or ‘naked assertions.’” *David*, 704 F.3d at 333 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). In short, a complaint alleges facts that plausibly establish standing only if the “well-pleaded allegations” allow for a “reasonable inference,” rather than a “sheer possibility,” that the plaintiff has satisfied each of the three elements of standing. *Iqbal*, 556 U.S. at 678-79; *David*, 704 F.3d at 333.

In sum, the standing requirement—the “irreducible constitutional minimum”—applies here just the same as it applied in *Clapper. Lujan*, 504 U.S. at 560. Moreover, the result in *Clapper*—that standing cannot be established on the basis of a “speculative chain of possibilities”—also applies here. 133 S. Ct. at 1150. Whether speculation is based on allegations in a complaint or facts in a record has no bearing on the outcome, as in neither context may

standing be established on a “speculative chain of possibilities.” *Id.*

## B.

Plaintiffs next argue that *Clapper* does not control this case because more is now known about Section 702 surveillance, including Upstream surveillance, than was known at the time of *Clapper*. Plaintiffs cite in their AC several publicly disclosed documents in support of the allegation that the NSA uses Upstream surveillance to intercept substantially all international text-based Internet communications, including plaintiffs’ communications.<sup>14</sup> Specifically, plaintiffs describe the technical features that enable the NSA to use Upstream surveillance to copy and review all or substantially all international text-based Internet communications, and the “strategic imperatives” that compel it to do so. Pls. Opp. Br. at 17. The AC alleges that:

- (i) the Internet backbone funnels most communications entering or leaving the United States through 49 international chokepoints, AC ¶ 46;
- (ii) the NSA has installed surveillance equipment at seven of those chokepoints, and the NSA has a strong incentive to intercept communications at more chokepoints in order to obtain the communications it seeks, *id.* ¶¶65-66, 68;
- (iii) the installed surveillance equipment is

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<sup>14</sup> The AC cites, among other things, the PCLOB Report, the ODNI Report, the PRG Report, and [Redacted], 2011 WL I 0945618 (FISA Ct. Oct. 3, 2011).

capable of “examin[ing] the contents of all transmissions passing through,” *id.* ¶162 (quoting PCLOB Report, at 122);

(iv) in order to identify the targeted communications, the NSA must copy and review the contents of an enormous quantity of transiting communications, *id.* ¶¶ 50, 51, 62; and

(v) because the NSA cannot know in advance which Internet “packets”<sup>15</sup> relate to its targets, the NSA, in order to be successful, must copy and reassemble all the packets associated with international text-based communications that transit the circuits it is monitoring, *id.* ¶¶ 42, 63-64.

Plaintiffs’ series of allegations does not establish Article III standing because those allegations depend on suppositions and speculation, with no basis in fact, about how the NSA implements Upstream surveillance. Specifically, plaintiffs assume that the fact that Upstream surveillance equipment has been installed at some of the Internet backbone chokepoints implies that the NSA is intercepting all communications passing through those chokepoints. That may or may not be so; plaintiffs merely speculate that it is so. Even if the NSA’s surveillance equipment is capable of “examin[ing] the contents of all transmissions passing through collection devices,” as plaintiffs allege, *id.* ¶ 62, it does not follow that the

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<sup>15</sup> All Internet communications are broken into “packets”—discrete chunks of information—that traverse a variety of physical circuits. AC ¶ 42. Once the packets that make up a particular communication reach their final destination, they are reassembled. *Id.*

NSA is, in fact, using the surveillance equipment to its full potential. As with any piece of technology, technical capability is not tantamount to usage levels. For example, a car capable of speeds exceeding 200 mph is not necessarily driven at such speeds; more information is needed to conclude that the top speed is reached. And there may indeed be circumstances that suggest a limited level of use—e.g., a speed limit of 70 mph. The same is true here. Plaintiffs provide no factual basis to support the allegation that the NSA is using its surveillance equipment at full throttle,<sup>16</sup> and the fact that all NSA surveillance practices must survive FISC review—i.e., must comport with the Fourth Amendment—suggests that the NSA is not using its surveillance equipment to its full potential. In addition, plaintiffs assume that the NSA must be intercepting communications at all 49 chokepoints because the NSA has a strong incentive to do so. But apart from plaintiffs’ suppositions and speculation concerning the government’s incentive and decision to act in accordance with that incentive, plaintiffs provide no factual basis that the NSA is actually

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<sup>16</sup> Plaintiffs’ AC cites a newspaper article that claimed “the N.S.A. is temporarily copying and then sifting through the contents of what is apparently most e-mails and other text-based communications that cross the border.” Charlie Savage, *NSA. Said to Search Content of Messages to and from U.S.*, N.Y. Times, Aug. 8, 2013, <http://nyti.ms/1E1n1si>. But the article’s claim is speculative, as it is based on a publicly disclosed document that says the NSA “seeks to acquire communications about the target that are not to or from the target” but does not indicate that the NSA is *actually* acquiring vast amounts of internet communications. *Id.* Indeed, the PCLOB Report—another document on which plaintiffs rely—refers to the article’s claim as “represent[ing] a misunderstanding of a more complex reality.” PCLOB Report, at 119.

intercepting communications at all chokepoints.

Plaintiffs cannot provide a sufficient factual basis for their allegations because the scope and scale of Upstream surveillance remain classified, leaving plaintiffs to prop their allegation of actual injury on suppositions and speculation about how Upstream surveillance must operate in order to achieve the government's "stated goals." AC ¶ 64. Indeed, plaintiffs cite the government's so-called "stated goals" in nearly every facet of their argument, specifically in support of their allegations regarding: (i) the volume of communications collected by Upstream surveillance, Pls. Opp. at 22, 28; (ii) the geographic distribution of the sites at which Upstream collection occurs, *id.* at 25; and (iii) the scope of Upstream surveillance at any site where it occurs, *id.* at 23, 30. It is, of course, a "possibility" that the NSA conducts Upstream surveillance in the manner plaintiffs allege, but this "bare assertion[]" is unaccompanied by "factual matter" that raises it "above a speculative level," and hence does not establish standing. *Iqbal*, 556 U.S. at 681.

In sum, plaintiffs are correct that more is known about the nature and capabilities of NSA surveillance than was known at the time of *Clapper*, but no more is known about whether Upstream surveillance actually intercepts all or substantially all international text-based Internet communications, including plaintiffs' communications. Thus, although plaintiffs' speculative chain is shorter than was the speculative chain in *Clapper*, it is a chain of speculation nonetheless. And *Clapper* makes clear that it is not the length of the chain but the fact of speculation that is fatal. Indeed, plaintiffs' reliance on the government's capacity and motivation to collect

substantially all international text-based Internet communications is precisely the sort of speculative reasoning foreclosed by *Clapper*.<sup>17</sup> An alleged injury that is “speculative” does not establish Article III standing, especially the standing of litigants who seek to challenge the constitutionality of government action in the field of foreign intelligence. *Clapper*, 133 S. Ct. 1147-50.<sup>18</sup>

C.

Plaintiffs further allege that *Clapper* does not control here because newly disclosed information reveals that Upstream surveillance is fundamentally different from the surveillance at issue in *Clapper*. Specifically, Upstream surveillance involves the use of “about surveillance,” which the NSA allegedly uses to review every portion of everyone’s communications—a broader mode of surveillance than the targeted surveillance of particular individuals’ communications that was at issue in *Clapper*.

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<sup>17</sup> As described above, the Supreme Court in *Clapper* rejected the argument that standing could be based on a “very strong likelihood” that the NSA would “intercept at least some of plaintiffs’ communications” based on speculation about the government’s “motivat[ion]” to exercise its “capacity” for such interception. 133 S. Ct. at 1159 (Breyer, J., dissenting). The same line of speculative reasoning was recently rejected by the D.C. Circuit in a case involving NSA surveillance. *Klayman*, 2015 WL 5058403, at \*7 (Williams, J.) (holding that the plaintiffs’ standing to challenge NSA bulk collection of telephone records could not be grounded in “their assertion that NSA’s collection must be comprehensive in order for the program to be most effective”).

<sup>18</sup> See also *Klayman*, 2015 WL 5058403, at \*6 (Williams, J.) (noting that, although plaintiff may plausibly show why “the effectiveness of the program [would] expand with its coverage,” such a showing does not make plaintiffs’ claims of actual injury any less speculative).

Plaintiffs contend that “about surveillance” is the “digital analogue of having a government agent open every piece of mail that comes through the post to determine whether it mentions a particular word or phrase.” Pls. Br. at 10. This analogy is inapt; contrary to plaintiffs’ contention, the publicly disclosed documents on which plaintiffs rely do not state facts that plausibly support the proposition that “about surveillance” involves examining every portion of *every* copied communication. According to the PCLOB Report cited by plaintiffs,

[T]he NSA’s ‘upstream collection’ ... may require access to a larger body of international communications than those that contain a tasked selector[,] ... [but] the government has no ability to examine or otherwise make use of this larger body of communications, except to promptly determine whether any of them contain a tasked selector.

PCLOB Report, at 111 n.476. Indeed, “[o]nly those communications ... that contain a tasked selector go into government databases.” *Id.* Thus, plaintiffs’ contention that “about surveillance” is like the hypothetical government agent reading every piece of mail misses the mark. Unlike the hypothetical government agent reading every word of every communication and retaining the information, “about surveillance” is targeted insofar as it makes use of only those communications that contain information matching the tasked selectors.

Even if plaintiffs’ description of “about surveillance” were correct, it would not change the result reached here. Plaintiffs’ claim of actual injury

resulting from “about surveillance” rests on plaintiffs’ allegation that the NSA uses Upstream surveillance to intercept substantially all international text-based Internet communications. And as already discussed, that allegation is a “bare assertion[]” unaccompanied by “factual matter” that raises it “above a speculative level.” *See Iqbal*, 556 U.S. at 681; *see also Clapper*, 133 S. Ct. at 1150. Details about the tools of Upstream surveillance reveal how Upstream surveillance functions when the NSA engages in that mode of surveillance, but those details do not cure the speculative foundation on which plaintiffs’ claim of actual injury is based—that the NSA is *in fact* using Upstream surveillance to intercept substantially all text-based international Internet communications, including plaintiffs’ communications.

#### D.

Plaintiffs next argue that *Clapper* does not control here because plaintiffs are different from the *Clapper* plaintiffs in important respects concerning their Internet communications. Although six of the nine plaintiffs in this case were plaintiffs in *Clapper*, plaintiffs identify two differences related to the new parties: (i) two clients of an NACDL attorney have received notice that they are targets of Section 702 surveillance and (ii) Wikimedia engages in over one trillion communications each year that are distributed around the globe.

##### **1. NACDL Attorney Dratel**

With respect to the first difference, plaintiffs argue that they adequately allege an actual injury because the government acknowledged that NACDL attorney Joshua Dratel’s client, Agron Hasbajrami, was subject to Section 702 surveillance and another Dratel client,



Sabirhan Hasanoff, was prosecuted on the basis of officially acknowledged Section 702 surveillance.<sup>19</sup> Plaintiffs allege that as a result of this government acknowledged surveillance, Dratel's own international Internet communications were *likely* intercepted and retained because he *almost certainly* communicated with or about the targeted foreign individuals in the course of representing his clients. As plaintiffs note, Dratel's scenario is similar to a hypothetical mentioned in *Clapper*, in which the government "monitors [a] target's conversations with his or her attorney." 133 S. Ct. at 1154. The Supreme Court in *Clapper* described such a scenario as likely "hav[ing] a stronger evidentiary basis for establishing standing" than the *Clapper* plaintiffs had. *Id.* at 1154.

Here, however, the facts alleged differ from the *Clapper* hypothetical in important respects. The Supreme Court in *Clapper* was describing a situation in which there was some basis for an allegation that the government had "monitor[ed a] target's conversations with his or her attorney" using the type of surveillance at issue in the case, not a situation where an attorney lacks "concrete evidence to substantiate [his] fears." *Id.* Plaintiffs in this case, by contrast, do not allege facts that plausibly establish that the information gathered from the two instances of Section 702 surveillance was the product of Upstream surveillance. In neither of Dratel's cases did the government indicate whether the information at issue was derived from PRISM or Upstream

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<sup>19</sup> See Letter re Supplemental Notification, *United States v. Hasbajrami*, 1:11-cr-00623, ECF No. 65 (E.D. N.Y. Feb. 24, 2014); See Mem. Of Law, *Hasanoff v. United States*, 10 Cr. 162 (S.D.N.Y. Feb. 11, 2015), ECF No. 208, at 10-11.

surveillance, and no factual allegations in the AC plausibly establish that Upstream surveillance—rather than PRISM—was used to collect the information. Moreover, given what is known about the two surveillance programs, it appears substantially more likely that PRISM collection was used in these cases because, according to a 2011 FISC Order, the “vast majority” of collected communications are obtained via PRISM, not Upstream surveillance. [Redacted], 2011 WL 10945618, at \*9 (FISA Ct. Oct. 3, 2011) (finding that “upstream collection constitute[d] only approximately 9% of the total Internet communications [then] acquired by [the] NSA under Section 702”).

## **2. Wikimedia**

Plaintiffs next allege that Wikimedia has standing because it is “virtually certain” that Upstream surveillance has intercepted at least some of Wikimedia’s communications given the volume and geographic distribution of those communications. Specifically, Wikimedia allegedly engages in more than one trillion international text-based Internet communications each year and exchanges information with individuals in nearly every country on earth.

At the outset, an important implication of plaintiffs’ allegation regarding Wikimedia’s Internet communications must be noted. Plaintiffs have not alleged that any of the other eight plaintiffs (besides Wikimedia) engage in a substantial number of text-based international Internet communications. Indeed, plaintiffs simultaneously allege that (i) all nine plaintiffs “collectively engage in more than a trillion sensitive international [I]nternet communications each year,” AC ¶ 58; and (ii) “Wikimedia engages in

more than one trillion international communications each year,” *id.* at ¶ 88. The AC does not quantify the other eight plaintiffs' communications. Thus, insofar as plaintiffs seek to establish standing on the basis of probabilities grounded in the volume of communications, plaintiffs' effort is limited to Wikimedia, as the AC says nothing about the volume of the other plaintiffs' communications.

With respect to Wikimedia, plaintiffs contend that Wikimedia's communications traverse all of the chokepoints at which the NSA conducts Upstream surveillance, however many that may be.<sup>20</sup> Plaintiffs argue that, because Upstream surveillance could achieve the government's stated goals *only if* Upstream surveillance involved the copying and review of a large percentage of international text-based Internet traffic at each chokepoint that is monitored, it is virtually certain that the government has copied and reviewed at least one of Wikimedia's communications. Specifically, plaintiffs assume a 0.00000001% chance that any particular text-based Internet communication will be copied and reviewed by the NSA to conclude that the odds of the government copying and reviewing at least one of plaintiffs' over one trillion communications in a one-year period would be greater than 99.9999999999%. AC ¶58. Given the large volume of Wikimedia's communications with individuals all over the world,

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<sup>20</sup> The government has acknowledged using Upstream surveillance to monitor communications on more than one “international Internet link” or “circuit” on the Internet backbone. *Id.* at \*15; PCLOB Report 36-37. Plaintiffs, citing a publicly disclosed NSA document, allege that the NSA has installed Upstream surveillance equipment at seven of the 49 chokepoints. *See* AC ¶ 68.

plaintiffs claim that some of Wikimedia’s communications almost certainly traverse every major Internet circuit connecting the United States with the rest of the world. *Id.* ¶61.

Plaintiffs’ argument is unpersuasive, as the statistical analysis on which the argument rests is incomplete and riddled with assumptions. For one thing, plaintiffs insist that Wikimedia’s over one trillion annual Internet communications is significant in volume.<sup>21</sup> But plaintiffs provide no context for assessing the significance of this figure. One trillion is plainly a large number, but size is always relative. For example, one trillion dollars are of enormous value, whereas one trillion grains of sand are but a small patch of beach. Here, the relevant universe for comparison purposes is the total number of annual Internet communications, a figure that plaintiffs do not provide—nor even attempt to estimate—in the AC. Without defining the universe of the total number of Internet communications, it is impossible to determine whether Wikimedia’s alleged one trillion annual Internet communications is significant or just a drop in the bucket of all annual Internet communications.

Moreover, plaintiffs conclude that there is a greater than 99.999999999% chance that the NSA has intercepted at least one of their over one trillion communications on the basis of an arbitrary assumption, namely that there is a 0.00000001% chance that the NSA will intercept any particular

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<sup>21</sup> AC ¶58 (“[T]he sheer volume of [p]laintiffs’ communications makes it virtually certain that the NSA has intercepted, copied, and reviewed at least some of those communications.”).

Internet communication. AC ¶ 58. Plaintiffs provide no basis for the 0.00000001% figure, nor do they explain why the figure is presented as a conservative assumption.<sup>22</sup> Plaintiffs seem to presume a string of zeros buys legitimacy. It does not. Indeed, a closer look reveals that the number of zeros chosen by plaintiffs leads conveniently to plaintiffs' desired result. If three more zeros are added to plaintiffs' figure (0.0000000001%), the odds that at least one of Wikimedia's one trillion annual communications is intercepted drops to approximately 10%. If four more zeros are added (0.00000000001%), the odds that at least one of Wikimedia's communications is intercepted drops to 1%. In short, plaintiffs' assumption appears to be the product of reverse engineering; plaintiffs first defined the conclusion they sought—virtual certainty—and then worked backwards to find a figure that would lead to that conclusion. Mathematical gymnastics of this sort do not constitute “sufficient factual matter” to support a “plausible” allegation. *Ashcroft*, 556 U.S. at 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). And contrary to plaintiffs' efforts, the “speculative” reasoning foreclosed by *Clapper* cannot be avoided by dressing “a chain of possibilities” in the clothing of mathematical certainty when the calculation lacks a statistical basis. 133 S. Ct. at 1150.<sup>23</sup>

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<sup>22</sup> *Id.* (“*even* if one assumes a 0.00000001% chance” that “the NSA [intercepts] any particular communication”) (emphasis added).

<sup>23</sup> Plaintiffs' probability analysis also assumes that (i) the chance of interception for each communication is the same and (ii) the interception of one communication does not affect the odds of any other communication's interception. In other words,

Furthermore, plaintiffs' allegation that interception of Wikimedia's communications is virtually certain fails for a more fundamental reason. Logically antecedent to plaintiffs' flawed statistical analysis are plaintiffs' speculative claims about Upstream surveillance based on limited knowledge of Upstream surveillance's technical features and "strategic imperatives." Pls. Opp. Br. at 17. In other words, the "virtual certainty" plaintiffs allege assumes that the NSA is *actually* using Upstream surveillance in the way plaintiffs suppose is necessary for that mode of surveillance to achieve the NSA's stated goals. As already discussed, although plaintiffs have alleged facts that plausibly establish that the NSA uses Upstream surveillance at some number of chokepoints, they have not alleged facts that plausibly establish that the NSA is using Upstream surveillance to copy all or substantially all communications passing through those chokepoints. In this regard, plaintiffs can only speculate, which *Clapper* forecloses as a basis for standing. Indeed, the Supreme Court in *Clapper* rejected the argument that standing could be based on a "very strong likelihood" that the NSA would "intercept at least some of plaintiffs' communications" based on speculation about the government's "motivat[ion]" to exercise its "capacity" for such interception. 133 S. Ct. at 1159

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plaintiffs assume that a communication from Syria has the same likelihood of being intercepted as a communication from Canada and that the fact that a communication from a Syrian computer has been intercepted has no bearing on the likelihood that a subsequent communication sent from the same computer in Syria will be intercepted. Moreover, plaintiffs provide no evidence of how many of Wikimedia's international Internet communications are transmitted to or from areas of the world in which interception is more likely.

(Breyer, J. dissenting). Relying on a speculative foundation regarding how Upstream surveillance must operate, plaintiffs fail to allege that an injury is “real and immediate” rather than “conjectural or hypothetical.” *Lyons*, 461 U.S. at 201. This is true regardless of how probable NSA interception of Wikimedia’s communications would be if the NSA were in fact routinely using Upstream surveillance to intercept substantial quantities of text-based Internet communications.<sup>24</sup>

In the end, plaintiffs’ standing argument boils down to suppositions about how Upstream surveillance must operate in order to achieve the government’s stated goals. Of course, in a case like this, plaintiffs necessarily rely on probabilities and speculation because most facts about Upstream surveillance remain classified, and hence plaintiffs see through a glass darkly. Nevertheless, the speculative reasoning plaintiffs advance is not a basis for standing under *Clapper*. *See id.* at 1147-50. To see why this must be so, consider the risks of error at play on a threshold standing question. On the one hand, a court that does not find standing on the basis of probabilities and suppositions runs the risk of a false negative—closing the courthouse doors to a plaintiff

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<sup>24</sup> Plaintiffs also cite a publicly disclosed NSA document, which states that “HTTP” is used in “nearly everything a typical user does on the Internet” and identifies Wikipedia (along with several other well-known websites) as an example of a source of HTTP communications. AC ¶107. But as defendants correctly point out, the document does not help to establish an injury to Wikimedia that is fairly traceable to Upstream surveillance because it neither identifies Upstream surveillance nor gives any indication that the NSA is actually collecting the communications of the websites listed.

who suffers an actual injury fairly traceable to the defendant. On the other hand, a court that bases standing on such speculation runs the risk of a false positive—proceeding in a litigation that is not a “Case[]” or “Controvers[y]” under Article III. U.S. Const. art. III, § 2, cl. 2. Obviously, both risks of error should be avoided where possible, but where, as here, a court is confronted with substantial uncertainty, the risk of a false positive is of greater concern because it implicates an existential question about the litigation—whether it is, in fact, a case or controversy—and the limits of the judiciary’s power in relation to the other branches of government.<sup>25</sup> As the Supreme Court recognized in *Clapper*, this is especially true where, as here, “reaching the merits of the dispute would force [a court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional,” particularly “in the fields of intelligence gathering and foreign affairs.” *Clapper*, 133 S. Ct. at 1147. Thus, as *Clapper* dictates, standing cannot be established on the basis of mere speculation. *See id.* at 1147-50. Accordingly, plaintiffs in this case lack standing on that ground to challenge the NSA’s use of Upstream surveillance.<sup>26</sup>

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<sup>25</sup> *See Lujan*, 504 U.S. at 559-60 (“[T]he Constitution’s central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislature, to executives, and to courts,” which includes identifying cases “that are of the justiciable sort referred to in Article III”).

<sup>26</sup> In addition to alleging that some of their communications are intercepted, plaintiffs allege a “substantial likelihood” that some of those communications must be retained, read, and disseminated by the NSA. AC ¶71. This allegation necessarily



#### IV.

Plaintiffs further allege actual injury on the ground that Upstream surveillance undermines plaintiffs' ability to carry out activities crucial to their missions (i) by forcing them to take burdensome measures to minimize the chance that the confidentiality of their sensitive information will be compromised and (ii) by reducing the likelihood that individuals will share sensitive information with them. Attorney Dratel, for example, allegedly employed burdensome electronic security measures to protect his communications with his clients and, in some instances, travelled abroad to gather information in person.

The *Clapper* plaintiffs advanced indistinguishable arguments, and the Supreme Court flatly rejected them, explaining that the alleged injuries were not "fairly traceable to [Section 702]" because (i) plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending" and (ii) plaintiffs cannot establish injury "based on third parties' subjective fear of surveillance." 133 S. Ct. at 1151, 1152 n.7.<sup>27</sup> Thus,

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fails. Because plaintiffs have not plausibly alleged initial NSA interception of their text-based Internet communications, it follows that they have not adequately alleged that any of their communications are retained, read, or disseminated by the NSA.

<sup>27</sup> The amici curiae in this case argue that standing can be established on the ground that the alleged government surveillance chills speech protected by the First Amendment. See Br. of *Amici Curiae* American Booksellers Association, *et al.*, at 12-17; Br. of *Amici Curiae* First Amendment Scholars, at 9-19. As with plaintiffs' argument, the amici curiae's argument fails for the reasons articulated in *Clapper*. 133 S. Ct. at 1150-52. Both

*Clapper* controls here. The subjective fears of third parties and any alleged burdensome measures taken as a result of subjective fear of surveillance are not fairly traceable to Upstream surveillance, and therefore do not establish Article III standing.

## V.

A final point, raised in *Clapper*, merits mention here: whether the standing requirement as applied in *Clapper* bids fair to immunize Section 702 and Upstream surveillance from judicial scrutiny. This concern is misplaced. To be sure, no government surveillance program should be immunized from judicial scrutiny, and indeed Section 702 and Upstream surveillance have no such immunity. As the *Clapper* majority noted, Section 702 surveillance is reviewed when: (i) the FISC reviews targeting and minimization procedures of general surveillance practices to ensure, *inter alia*, “the targeting and minimization procedures comport with the Fourth Amendment,” (ii) criminal defendants prosecuted on the basis of Section 702 surveillance challenge the validity of that surveillance, and (iii) electronic communications service providers who are directed to assist the government in surveillance challenge the directives before the FISC. *Clapper*, 133 S. Ct. at 1154. Moreover, the recently enacted USA FREEDOM Act provides that amicus curiae may be appointed to represent the public in certain FISC proceedings

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amicus briefs, which focus chiefly on the chilling argument, have been carefully reviewed and found unpersuasive. It is also worth noting that the only other nine individuals who cite their own works as frequently as do the nine authors of the First Amendment Scholars amicus brief are members of the Supreme Court, who, unlike the amici, do so out of sheer necessity.

involving NSA surveillance pursuant to Section 702. Pub. L. No. 114-23, 129 Stat. 268, 279.<sup>28</sup> These examples, of course, are not civil challenges to Section 702, and establishing standing to challenge Section 702 in a civil case is plainly difficult. But such difficulty comes with the territory. It is not a flaw of a classified program that standing to challenge that program is not easily established; it is a constitutional requirement essential to separation of powers.

VI.

For the reasons stated here, defendants' motion to dismiss is granted.

An appropriate Order will issue.

Alexandria, Virginia

October 23, 2015

/s/ T. S. Ellis, III

T. S. Ellis, III

United States District Judge

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<sup>28</sup> It should also be remembered that the classified program at issue here is authorized by a law that was passed through the democratic process. Should society's suspicions about surveillance programs rise to a level sufficient to cause citizens to suspect Orwellian harms that outweigh the benefits to national security, surveillance programs can be revised or eliminated the same way they were authorized, namely through the legislative process. It is also possible that the jurisprudence of constitutional standing may change in the future.

**APPENDIX H**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

WIKIMEDIA  
FOUNDATION, *et al.*,

Plaintiff,

v.

NATIONAL SECURITY  
AGENCY/ CENTRAL  
SECURITY SERVICE,

*et al.*,

Defendants.

Case No. 1:15-cv-662

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**ORDER**

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This matter came before the Court on defendants' Motion to Dismiss for lack of jurisdiction pursuant to Rule 12(b)(1), Fed. R. Civ. P (Doc. 77). This matter was fully briefed and argued.

For the good cause, and for the reasons stated in the Memorandum Opinion,

It is hereby **ORDERED** that the defendants' Motion to Dismiss is **GRANTED**.

The Clerk is directed to send a copy of this Order to all counsel of records and to place this matter among the ended causes.

Alexandria, Virginia

October 23, 2015

/s/ T. S. Ellis, III

T. S. Ellis, III

United States District Judge

**APPENDIX I**

FILED: March 29, 2022

UNITED STATES COURT OF APPEALS FOR THE  
FOURTH CIRCUIT

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No. 20-1191  
(1:15-cv-00662-TSE)

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WIKIMEDIA FOUNDATION

Plaintiff–Appellant

and

NATIONAL ASSOCIATION OF CRIMINAL  
DEFENSE ATTORNEYS; HUMAN RIGHTS  
WATCH; PEN AMERICAN CENTER; GLOBAL  
FUND FOR WOMEN; THE NATION MAGAZINE;  
THE RUTHERFORD INSTITUTE; WASHINGTON  
OFFICE ON LATIN AMERICA; AMNESTY  
INTERNATIONAL USA

Plaintiffs

v.

NATIONAL SECURITY AGENCY/CENTRAL  
SECURITY SERVICE; GENERAL PAUL M.  
NAKASONE, in his official capacity as Director of  
the National Security Agency and Chief of the  
Central Security Service; OFFICE OF THE  
DIRECTOR OF NATIONAL INTELLIGENCE;  
RICHARD GRENELL, in his official capacity as  
acting Director of National Intelligence; MERRICK  
B. GARLAND, Attorney General; DEPARTMENT

OF JUSTICE.

Defendants–Appellees

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CENTER FOR DEMOCRACY & TECHNOLOGY;  
NEW AMERICA'S OPEN TECHNOLOGY  
INSTITUTE; DAVID H. KAYE, Evidence Law  
Professor; EDWARD J. IMWINKELREID, Evidence  
Law Professor, D. MICHAEL RISINGER, Evidence  
Law Professor, REBECCA WEXLER, Evidence Law  
Professor, PROFESSOR STEPHEN I. VLADECK;  
AMERICANS FOR PROSPERITY FOUNDATION;  
BRENNAN CENTER FOR JUSTICE; ELECTRONIC  
FRONTIER FOUNDATION; ELECTRONIC  
PRIVACY INFORMATION CENTER;  
FREEDOMWORKS FOUNDATION;  
TECHFREEDOM; NETWORK ENGINEERS AND  
TECHNOLOGISTS

Amici Supporting Appellant

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ORDER

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The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

## APPENDIX J

### 50 U.S.C. § 1881a

#### **Procedures for targeting certain persons outside the United States other than United States persons**

##### **(a) Authorization**

Notwithstanding any other provision of law, upon the issuance of an order in accordance with subsection (j)(3) or a determination under subsection (c)(2), the Attorney General and the Director of National Intelligence may authorize jointly, for a period of up to 1 year from the effective date of the authorization, the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information.

##### **(b) Limitations**

An acquisition authorized under subsection (a)--

- (1) may not intentionally target any person known at the time of acquisition to be located in the United States;
- (2) may not intentionally target a person reasonably believed to be located outside the United States if the purpose of such acquisition is to target a particular, known person reasonably believed to be in the United States;
- (3) may not intentionally target a United States person reasonably believed to be located outside the United States;
- (4) may not intentionally acquire any communication as to which the sender and all



intended recipients are known at the time of the acquisition to be located in the United States;

(5) may not intentionally acquire communications that contain a reference to, but are not to or from, a target of an acquisition authorized under subsection (a), except as provided under section 103(b) of the FISA Amendments Reauthorization Act of 2017; and

(6) shall be conducted in a manner consistent with the fourth amendment to the Constitution of the United States.

**(c) Conduct of acquisition**

(1) In general

An acquisition authorized under subsection (a) shall be conducted only in accordance with--

(A) the targeting and minimization procedures adopted in accordance with subsections (d) and (e); and

(B) upon submission of a certification in accordance with subsection (h), such certification.

(2) Determination

A determination under this paragraph and for purposes of subsection (a) is a determination by the Attorney General and the Director of National Intelligence that exigent circumstances exist because, without immediate implementation of an authorization under subsection (a), intelligence important to the national security of the United States may be lost or not timely acquired and time does not permit the issuance of an order pursuant to subsection (j)(3) prior to the

implementation of such authorization.

(3) Timing of determination

The Attorney General and the Director of National Intelligence may make the determination under paragraph (2)--

(A) before the submission of a certification in accordance with subsection (h); or

(B) by amending a certification pursuant to subsection (j)(1)(C) at any time during which judicial review under subsection (j) of such certification is pending.

(4) Construction

Nothing in subchapter I shall be construed to require an application for a court order under such subchapter for an acquisition that is targeted in accordance with this section at a person reasonably believed to be located outside the United States.

**(d) Targeting procedures**

(1) Requirement to adopt

The Attorney General, in consultation with the Director of National Intelligence, shall adopt targeting procedures that are reasonably designed to--

(A) ensure that any acquisition authorized under subsection (a) is limited to targeting persons reasonably believed to be located outside the United States; and

(B) prevent the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of

the acquisition to be located in the United States.

(2) Judicial review

The procedures adopted in accordance with paragraph (1) shall be subject to judicial review pursuant to subsection (j).

**(e) Minimization procedures**

(1) Requirement to adopt

The Attorney General, in consultation with the Director of National Intelligence, shall adopt minimization procedures that meet the definition of minimization procedures under section 1801(h) of this title or section 1821(4) of this title, as appropriate, for acquisitions authorized under subsection (a).

(2) Judicial review

The minimization procedures adopted in accordance with paragraph (1) shall be subject to judicial review pursuant to subsection (j).

(3) Publication

The Director of National Intelligence, in consultation with the Attorney General, shall--

(A) conduct a declassification review of any minimization procedures adopted or amended in accordance with paragraph (1); and

(B) consistent with such review, and not later than 180 days after conducting such review, make such minimization procedures publicly available to the greatest extent practicable, which may be in redacted form.

**(f) Queries**

(1) Procedures required

(A) Requirement to adopt

The Attorney General, in consultation with the Director of National Intelligence, shall adopt querying procedures consistent with the requirements of the fourth amendment to the Constitution of the United States for information collected pursuant to an authorization under subsection (a).

(B) Record of United States person query terms

The Attorney General, in consultation with the Director of National Intelligence, shall ensure that the procedures adopted under subparagraph (A) include a technical procedure whereby a record is kept of each United States person query term used for a query.

(C) Judicial review

The procedures adopted in accordance with subparagraph (A) shall be subject to judicial review pursuant to subsection (j).

(2) Access to results of certain queries conducted by FBI

(A) Court order required for FBI review of certain query results in criminal investigations unrelated to national security

Except as provided by subparagraph (E), in connection with a predicated criminal investigation opened by the Federal Bureau of

Investigation that does not relate to the national security of the United States, the Federal Bureau of Investigation may not access the contents of communications acquired under subsection (a) that were retrieved pursuant to a query made using a United States person query term that was not designed to find and extract foreign intelligence information unless--

- (i) the Federal Bureau of Investigation applies for an order of the Court under subparagraph (C); and
- (ii) the Court enters an order under subparagraph (D) approving such application.

**(B) Jurisdiction**

The Court shall have jurisdiction to review an application and to enter an order approving the access described in subparagraph (A).

**(C) Application**

Each application for an order under this paragraph shall be made by a Federal officer in writing upon oath or affirmation to a judge having jurisdiction under subparagraph (B). Each application shall require the approval of the Attorney General based upon the finding of the Attorney General that the application satisfies the criteria and requirements of such application, as set forth in this paragraph, and shall include--

- (i) the identity of the Federal officer making the application; and

(ii) an affidavit or other information containing a statement of the facts and circumstances relied upon by the applicant to justify the belief of the applicant that the contents of communications described in subparagraph (A) covered by the application would provide evidence of--

(I) criminal activity;

(II) contraband, fruits of a crime, or other items illegally possessed by a third party; or

(III) property designed for use, intended for use, or used in committing a crime.

(D) Order

Upon an application made pursuant to subparagraph (C), the Court shall enter an order approving the accessing of the contents of communications described in subparagraph (A) covered by the application if the Court finds probable cause to believe that such contents would provide any of the evidence described in subparagraph (C)(ii).

(E) Exception

The requirement for an order of the Court under subparagraph (A) to access the contents of communications described in such subparagraph shall not apply with respect to a query if the Federal Bureau of Investigation determines there is a reasonable belief that such contents could assist in mitigating or eliminating a threat to life or serious bodily harm.

(F) Rule of construction

Nothing in this paragraph may be construed as--

(i) limiting the authority of the Federal Bureau of Investigation to conduct lawful queries of information acquired under subsection (a);

(ii) limiting the authority of the Federal Bureau of Investigation to review, without a court order, the results of any query of information acquired under subsection (a) that was reasonably designed to find and extract foreign intelligence information, regardless of whether such foreign intelligence information could also be considered evidence of a crime; or

(iii) prohibiting or otherwise limiting the ability of the Federal Bureau of Investigation to access the results of queries conducted when evaluating whether to open an assessment or predicated investigation relating to the national security of the United States.

(3) Definitions

In this subsection:

(A) The term “contents” has the meaning given that term in section 2510(8) of Title 18.

(B) The term “query” means the use of one or more terms to retrieve the unminimized contents or noncontents located in electronic and data storage systems of communications of or concerning United States persons

obtained through acquisitions authorized under subsection (a).

**(g) Guidelines for compliance with limitations**

(1) Requirement to adopt

The Attorney General, in consultation with the Director of National Intelligence, shall adopt guidelines to ensure--

(A) compliance with the limitations in subsection (b); and

(B) that an application for a court order is filed as required by this chapter.

(2) Submission of guidelines

The Attorney General shall provide the guidelines adopted in accordance with paragraph (1) to--

(A) the congressional intelligence committees;

(B) the Committees on the Judiciary of the Senate and the House of Representatives; and

(C) the Foreign Intelligence Surveillance Court.

**(h) Certification**

(1) In general

(A) Requirement

Subject to subparagraph (B), prior to the implementation of an authorization under subsection (a), the Attorney General and the Director of National Intelligence shall provide to the Foreign Intelligence Surveillance Court a written certification and any supporting affidavit, under oath and under seal, in accordance with this subsection.



(B) Exception

If the Attorney General and the Director of National Intelligence make a determination under subsection (c)(2) and time does not permit the submission of a certification under this subsection prior to the implementation of an authorization under subsection (a), the Attorney General and the Director of National Intelligence shall submit to the Court a certification for such authorization as soon as practicable but in no event later than 7 days after such determination is made.

(2) Requirements

A certification made under this subsection shall--

(A) attest that--

(i) there are targeting procedures in place that have been approved, have been submitted for approval, or will be submitted with the certification for approval by the Foreign Intelligence Surveillance Court that are reasonably designed to--

(I) ensure that an acquisition authorized under subsection (a) is limited to targeting persons reasonably believed to be located outside the United States; and

(II) prevent the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States;

(ii) the minimization procedures to be used with respect to such acquisition--

(I) meet the definition of minimization procedures under section 1801(h) or 1821(4) of this title, as appropriate; and

(II) have been approved, have been submitted for approval, or will be submitted with the certification for approval by the Foreign Intelligence Surveillance Court;

(iii) guidelines have been adopted in accordance with subsection (g) to ensure compliance with the limitations in subsection (b) and to ensure that an application for a court order is filed as required by this chapter;

(iv) the procedures and guidelines referred to in clauses (i), (ii), and (iii) are consistent with the requirements of the fourth amendment to the Constitution of the United States;

(v) a significant purpose of the acquisition is to obtain foreign intelligence information;

(vi) the acquisition involves obtaining foreign intelligence information from or with the assistance of an electronic communication service provider; and

(vii) the acquisition complies with the limitations in subsection (b);

(B) include the procedures adopted in accordance with subsections (d) and (e);

(C) be supported, as appropriate, by the affidavit of any appropriate official in the area of national security who is--

(i) appointed by the President, by and with the advice and consent of the Senate; or

(ii) the head of an element of the intelligence community;

(D) include--

(i) an effective date for the authorization that is at least 30 days after the submission of the written certification to the court; or

(ii) if the acquisition has begun or the effective date is less than 30 days after the submission of the written certification to the court, the date the acquisition began or the effective date for the acquisition; and

(E) if the Attorney General and the Director of National Intelligence make a determination under subsection (c)(2), include a statement that such determination has been made.

(3) Change in effective date

The Attorney General and the Director of National Intelligence may advance or delay the effective date referred to in paragraph (2)(D) by submitting an amended certification in accordance with subsection (j)(1)(C) to the Foreign Intelligence Surveillance Court for review pursuant to subsection (i).

(4) Limitation

A certification made under this subsection is not

required to identify the specific facilities, places, premises, or property at which an acquisition authorized under subsection (a) will be directed or conducted.

(5) Maintenance of certification

The Attorney General or a designee of the Attorney General shall maintain a copy of a certification made under this subsection.

(6) Review

A certification submitted in accordance with this subsection shall be subject to judicial review pursuant to subsection (j).

**(i) Directives and judicial review of directives**

(1) Authority

With respect to an acquisition authorized under subsection (a), the Attorney General and the Director of National Intelligence may direct, in writing, an electronic communication service provider to--

(A) immediately provide the Government with all information, facilities, or assistance necessary to accomplish the acquisition in a manner that will protect the secrecy of the acquisition and produce a minimum of interference with the services that such electronic communication service provider is providing to the target of the acquisition; and

(B) maintain under security procedures approved by the Attorney General and the Director of National Intelligence any records concerning the acquisition or the aid furnished that such electronic communication service

provider wishes to maintain.

(2) Compensation

The Government shall compensate, at the prevailing rate, an electronic communication service provider for providing information, facilities, or assistance in accordance with a directive issued pursuant to paragraph (1).

(3) Release from liability

No cause of action shall lie in any court against any electronic communication service provider for providing any information, facilities, or assistance in accordance with a directive issued pursuant to paragraph (1).

(4) Challenging of directives

(A) Authority to challenge

An electronic communication service provider receiving a directive issued pursuant to paragraph (1) may file a petition to modify or set aside such directive with the Foreign Intelligence Surveillance Court, which shall have jurisdiction to review such petition.

(B) Assignment

The presiding judge of the Court shall assign a petition filed under subparagraph (A) to 1 of the judges serving in the pool established under section 1803(e)(1) of this title not later than 24 hours after the filing of such petition.

(C) Standards for review

A judge considering a petition filed under subparagraph (A) may grant such petition only if the judge finds that the directive does not

meet the requirements of this section, or is otherwise unlawful.

(D) Procedures for initial review

A judge shall conduct an initial review of a petition filed under subparagraph (A) not later than 5 days after being assigned such petition. If the judge determines that such petition does not consist of claims, defenses, or other legal contentions that are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law, the judge shall immediately deny such petition and affirm the directive or any part of the directive that is the subject of such petition and order the recipient to comply with the directive or any part of it. Upon making a determination under this subparagraph or promptly thereafter, the judge shall provide a written statement for the record of the reasons for such determination.

(E) Procedures for plenary review

If a judge determines that a petition filed under subparagraph (A) requires plenary review, the judge shall affirm, modify, or set aside the directive that is the subject of such petition not later than 30 days after being assigned such petition. If the judge does not set aside the directive, the judge shall immediately affirm or affirm with modifications the directive, and order the recipient to comply with the directive in its entirety or as modified. The judge shall provide a written statement for the record of the reasons for a determination under this

subparagraph.

(F) Continued effect

Any directive not explicitly modified or set aside under this paragraph shall remain in full effect.

(G) Contempt of court

Failure to obey an order issued under this paragraph may be punished by the Court as contempt of court.

(5) Enforcement of directives

(A) Order to compel

If an electronic communication service provider fails to comply with a directive issued pursuant to paragraph (1), the Attorney General may file a petition for an order to compel the electronic communication service provider to comply with the directive with the Foreign Intelligence Surveillance Court, which shall have jurisdiction to review such petition.

(B) Assignment

The presiding judge of the Court shall assign a petition filed under subparagraph (A) to 1 of the judges serving in the pool established under section 1803(e)(1) of this title not later than 24 hours after the filing of such petition.

(C) Procedures for review

A judge considering a petition filed under subparagraph (A) shall, not later than 30 days after being assigned such petition, issue an order requiring the electronic communication service provider to comply with the directive or

any part of it, as issued or as modified, if the judge finds that the directive meets the requirements of this section and is otherwise lawful. The judge shall provide a written statement for the record of the reasons for a determination under this paragraph.

(D) Contempt of court

Failure to obey an order issued under this paragraph may be punished by the Court as contempt of court.

(E) Process

Any process under this paragraph may be served in any judicial district in which the electronic communication service provider may be found.

(6) Appeal

(A) Appeal to the Court of Review

The Government or an electronic communication service provider receiving a directive issued pursuant to paragraph (1) may file a petition with the Foreign Intelligence Surveillance Court of Review for review of a decision issued pursuant to paragraph (4) or (5). The Court of Review shall have jurisdiction to consider such petition and shall provide a written statement for the record of the reasons for a decision under this subparagraph.

(B) Certiorari to the Supreme Court

The Government or an electronic communication service provider receiving a directive issued pursuant to paragraph (1)



may file a petition for a writ of certiorari for review of a decision of the Court of Review issued under subparagraph (A). The record for such review shall be transmitted under seal to the Supreme Court of the United States, which shall have jurisdiction to review such decision.

**(j) Judicial review of certifications and procedures**

(1) In general

(A) Review by the Foreign Intelligence Surveillance Court

The Foreign Intelligence Surveillance Court shall have jurisdiction to review a certification submitted in accordance with subsection (g) and the targeting, minimization, and querying procedures adopted in accordance with subsections (d), (e), and (f)(1), and amendments to such certification or such procedures.

(B) Time period for review

The Court shall review a certification submitted in accordance with subsection (g) and the targeting, minimization, and querying procedures adopted in accordance with subsections (d), (e), and (f)(1) and shall complete such review and issue an order under paragraph (3) not later than 30 days after the date on which such certification and such procedures are submitted.

(C) Amendments

The Attorney General and the Director of

National Intelligence may amend a certification submitted in accordance with subsection (g) or the targeting, minimization, and querying procedures adopted in accordance with subsections (d), (e), and (f)(1) as necessary at any time, including if the Court is conducting or has completed review of such certification or such procedures, and shall submit the amended certification or amended procedures to the Court not later than 7 days after amending such certification or such procedures. The Court shall review any amendment under this subparagraph under the procedures set forth in this subsection. The Attorney General and the Director of National Intelligence may authorize the use of an amended certification or amended procedures pending the Court's review of such amended certification or amended procedures.

(2) Review

The Court shall review the following:

(A) Certification

A certification submitted in accordance with subsection (h) to determine whether the certification contains all the required elements.

(B) Targeting procedures

The targeting procedures adopted in accordance with subsection (d) to assess whether the procedures are reasonably designed to--

(i) ensure that an acquisition authorized under subsection (a) is limited to targeting persons reasonably believed to be located outside the United States; and

(ii) prevent the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States.

(C) Minimization procedures

The minimization procedures adopted in accordance with subsection (e) to assess whether such procedures meet the definition of minimization procedures under section 1801(h) of this title or section 1821(4) of this title, as appropriate.

(D) Querying procedures

The querying procedures adopted in accordance with subsection (f)(1) to assess whether such procedures comply with the requirements of such subsection.

(3) Orders

(A) Approval

If the Court finds that a certification submitted in accordance with subsection (h) contains all the required elements and that the targeting, minimization, and querying procedures adopted in accordance with subsections (d), (e), and (f)(1) are consistent with the requirements of those subsections and with the fourth amendment to the Constitution of the United States, the Court

shall enter an order approving the certification and the use, or continued use in the case of an acquisition authorized pursuant to a determination under subsection (c)(2), of the procedures for the acquisition.

(B) Correction of deficiencies

If the Court finds that a certification submitted in accordance with subsection (h) does not contain all the required elements, or that the procedures adopted in accordance with subsections (d), (e), and (f)(1) are not consistent with the requirements of those subsections or the fourth amendment to the Constitution of the United States, the Court shall issue an order directing the Government to, at the Government's election and to the extent required by the Court's order--

(i) correct any deficiency identified by the Court's order not later than 30 days after the date on which the Court issues the order; or

(ii) cease, or not begin, the implementation of the authorization for which such certification was submitted.

(C) Requirement for written statement

In support of an order under this subsection, the Court shall provide, simultaneously with the order, for the record a written statement of the reasons for the order.

(D) Limitation on use of information

(i) In general

Except as provided in clause (ii), if the

Court orders a correction of a deficiency in a certification or procedures under subparagraph (B), no information obtained or evidence derived pursuant to the part of the certification or procedures that has been identified by the Court as deficient concerning any United States person shall be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in or before any court, grand jury, department, office, agency, regulatory body, legislative committee, or other authority of the United States, a State, or political subdivision thereof, and no information concerning any United States person acquired pursuant to such part of such certification or procedures shall subsequently be used or disclosed in any other manner by Federal officers or employees without the consent of the United States person, except with the approval of the Attorney General if the information indicates a threat of death or serious bodily harm to any person.

(ii) Exception

If the Government corrects any deficiency identified by the order of the Court under subparagraph (B), the Court may permit the use or disclosure of information obtained before the date of the correction under such minimization procedures as the Court may approve for purposes of this clause.

(4) Appeal

(A) Appeal to the Court of Review

The Government may file a petition with the Foreign Intelligence Surveillance Court of Review for review of an order under this subsection. The Court of Review shall have jurisdiction to consider such petition. For any decision under this subparagraph affirming, reversing, or modifying an order of the Foreign Intelligence Surveillance Court, the Court of Review shall provide for the record a written statement of the reasons for the decision.

(B) Continuation of acquisition pending rehearing or appeal

Any acquisition affected by an order under paragraph (3)(B) may continue--

- (i) during the pendency of any rehearing of the order by the Court en banc; and
- (ii) if the Government files a petition for review of an order under this section, until the Court of Review enters an order under subparagraph (C).

(C) Implementation pending appeal

Not later than 60 days after the filing of a petition for review of an order under paragraph (3)(B) directing the correction of a deficiency, the Court of Review shall determine, and enter a corresponding order regarding, whether all or any part of the correction order, as issued or modified, shall be implemented during the pendency of the review.

(D) Certiorari to the Supreme Court

The Government may file a petition for a writ of certiorari for review of a decision of the Court of Review issued under subparagraph (A). The record for such review shall be transmitted under seal to the Supreme Court of the United States, which shall have jurisdiction to review such decision.

(5) Schedule

(A) Reauthorization of authorizations in effect

If the Attorney General and the Director of National Intelligence seek to reauthorize or replace an authorization issued under subsection (a), the Attorney General and the Director of National Intelligence shall, to the extent practicable, submit to the Court the certification prepared in accordance with subsection (h) and the procedures adopted in accordance with subsections (d), (e), and (f)(1) at least 30 days prior to the expiration of such authorization.

(B) Reauthorization of orders, authorizations, and directives

If the Attorney General and the Director of National Intelligence seek to reauthorize or replace an authorization issued under subsection (a) by filing a certification pursuant to subparagraph (A), that authorization, and any directives issued thereunder and any order related thereto, shall remain in effect, notwithstanding the expiration provided for in subsection (a), until the Court issues an order with respect to such certification under paragraph (3) at which time the provisions of

that paragraph and paragraph (4) shall apply with respect to such certification.

**(k) Judicial proceedings**

(1) Expedited judicial proceedings

Judicial proceedings under this section shall be conducted as expeditiously as possible.

(2) Time limits

A time limit for a judicial decision in this section shall apply unless the Court, the Court of Review, or any judge of either the Court or the Court of Review, by order for reasons stated, extends that time as necessary for good cause in a manner consistent with national security.

**(l) Maintenance and security of records and proceedings**

(1) Standards

The Foreign Intelligence Surveillance Court shall maintain a record of a proceeding under this section, including petitions, appeals, orders, and statements of reasons for a decision, under security measures adopted by the Chief Justice of the United States, in consultation with the Attorney General and the Director of National Intelligence.

(2) Filing and review

All petitions under this section shall be filed under seal. In any proceedings under this section, the Court shall, upon request of the Government, review *ex parte* and *in camera* any Government submission, or portions of a submission, which may include classified information.



(3) Retention of records

The Attorney General and the Director of National Intelligence shall retain a directive or an order issued under this section for a period of not less than 10 years from the date on which such directive or such order is issued.

**(m) Assessments reviews, and reporting**

(1) Semiannual assessment

Not less frequently than once every 6 months, the Attorney General and Director of National Intelligence shall assess compliance with the targeting, minimization, and querying procedures adopted in accordance with subsections (d), (e), and (f)(1) and the guidelines adopted in accordance with subsection (g) and shall submit each assessment to--

(A) the Foreign Intelligence Surveillance Court; and

(B) consistent with the Rules of the House of Representatives, the Standing Rules of the Senate, and Senate Resolution 400 of the 94th Congress or any successor Senate resolution--

(i) the congressional intelligence committees; and

(ii) the Committees on the Judiciary of the House of Representatives and the Senate.

(2) Agency assessment

The Inspector General of the Department of Justice and the Inspector General of each element of the intelligence community authorized to acquire foreign intelligence information under

subsection (a), with respect to the department or element of such Inspector General--

(A) are authorized to review compliance with the targeting, minimization, and querying procedures adopted in accordance with subsections (d), (e), and (f)(1) and the guidelines adopted in accordance with subsection (g);

(B) with respect to acquisitions authorized under subsection (a), shall review the number of disseminated intelligence reports containing a reference to a United States-person identity and the number of United States-person identities subsequently disseminated by the element concerned in response to requests for identities that were not referred to by name or title in the original reporting;

(C) with respect to acquisitions authorized under subsection (a), shall review the number of targets that were later determined to be located in the United States and, to the extent possible, whether communications of such targets were reviewed; and

(D) shall provide each such review to--

(i) the Attorney General;

(ii) the Director of National Intelligence;  
and

(iii) consistent with the Rules of the House of Representatives, the Standing Rules of the Senate, and Senate Resolution 400 of the 94th Congress or any successor Senate resolution--

(I) the congressional intelligence committees; and

(II) the Committees on the Judiciary of the House of Representatives and the Senate.

(3) Annual review

(A) Requirement to conduct

The head of each element of the intelligence community conducting an acquisition authorized under subsection (a) shall conduct an annual review to determine whether there is reason to believe that foreign intelligence information has been or will be obtained from the acquisition. The annual review shall provide, with respect to acquisitions authorized under subsection (a)--

(i) an accounting of the number of disseminated intelligence reports containing a reference to a United States-person identity;

(ii) an accounting of the number of United States-person identities subsequently disseminated by that element in response to requests for identities that were not referred to by name or title in the original reporting;

(iii) the number of targets that were later determined to be located in the United States and, to the extent possible, whether communications of such targets were reviewed; and

(iv) a description of any procedures

developed by the head of such element of the intelligence community and approved by the Director of National Intelligence to assess, in a manner consistent with national security, operational requirements and the privacy interests of United States persons, the extent to which the acquisitions authorized under subsection (a) acquire the communications of United States persons, and the results of any such assessment.

(B) Use of review

The head of each element of the intelligence community that conducts an annual review under subparagraph (A) shall use each such review to evaluate the adequacy of the minimization procedures utilized by such element and, as appropriate, the application of the minimization procedures to a particular acquisition authorized under subsection (a).

(C) Provision of review

The head of each element of the intelligence community that conducts an annual review under subparagraph (A) shall provide such review to--

(i) the Foreign Intelligence Surveillance Court;

(ii) the Attorney General;

(iii) the Director of National Intelligence; and

(iv) consistent with the Rules of the House of Representatives, the Standing Rules of

the Senate, and Senate Resolution 400 of the 94th Congress or any successor Senate resolution--

(I) the congressional intelligence committees; and

(II) the Committees on the Judiciary of the House of Representatives and the Senate.

(4) Reporting of material breach

(A) In general

The head of each element of the intelligence community involved in the acquisition of abouts communications shall fully and currently inform the Committees on the Judiciary of the House of Representatives and the Senate and the congressional intelligence committees of a material breach.

(B) Definitions

In this paragraph:

(i) The term “abouts communication” means a communication that contains a reference to, but is not to or from, a target of an acquisition authorized under subsection (a).

(ii) The term “material breach” means significant noncompliance with applicable law or an order of the Foreign Intelligence Surveillance Court concerning any acquisition of abouts communications.