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

17 **OAKLAND DIVISION**

18 CAROLYN JEWEL, *et al.*,

19 Plaintiffs,

20 v.

21 NATIONAL SECURITY AGENCY, *et al.*,

22 Defendants.

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

) **THE GOVERNMENT DEFENDANTS'**
) **RESPONSE TO THE COURT'S ORDER**
) **DIRECTING THE PARTIES TO SUBMIT**
) **SUPPLEMENTAL BRIEFING ON THE**
) **EFFECT OF *FAZAGA V. FBI***

) Hearing date: March 29, 2019
) Courtroom 5, 2nd Floor

) Hon. Jeffrey S. White

1 *Fazaga v. FBI*, 2019 WL 961953 (9th Cir. Feb. 28, 2019), involves a challenge to an
2 allegedly unlawful FBI counter-terrorism investigation that the plaintiffs claim involved, among
3 other things, electronic surveillance in violation of the First and Fourth Amendments. *Id.* at
4 *3-7. The district court dismissed all but one of the plaintiffs’ claims, at the pleading stage,
5 based on the Government’s assertion of the state secrets privilege. *Id.* at *7-8. On appeal, a
6 panel of the Ninth Circuit held that 50 U.S.C. § 1806(f) displaces the state secrets privilege (with
7 respect to the two alleged instances of unlawful electronic surveillance), albeit more
8 “narrow[ly]” than held by this Court in *Jewel v. NSA*, 965 F. Supp. 2d 1090 (N.D. Cal. 2013).
9 *Id.* at *17. The panel held that the plaintiffs’ “electronic surveillance claims are not subject to
10 outright dismissal at the pleading stage,” *id.* at *18, because § 1806(f) “displace[s] the common
11 law dismissal remedy created by the *Reynolds* state secrets privilege as applied to electronic
12 surveillance within FISA’s purview,” *id.* at *21. The panel also held that § 1806(f)’s procedures
13 are available when aggrieved persons bringing suit to challenge the legality of electronic
14 surveillance seek to discover or obtain evidence relating to the surveillance. *Id.* at *26-27.

15 The Government respectfully disagrees with these conclusions (and others) reached by
16 the *Fazaga* panel, and is considering whether to seek further appellate review of the panel’s
17 decision.¹ But regardless of any further review that may take place in *Fazaga*, the panel’s ruling
18 has no effect on the outcome of this case, or the Government’s entitlement to summary judgment
19 on the issue of Plaintiffs’ standing. Even assuming, *arguendo*, that § 1806(f) displaces the state
20 secrets privilege to the extent held by the panel, *Fazaga* itself makes clear that:

- 21 (i) The *ex parte, in camera* procedures authorized under § 1806(f) may be
22 utilized only “for a determination of whether the alleged [electronic]
23 surveillance was unlawful,” *id.* at *4, and not, as Plaintiffs argue, to
24 determine whether they are aggrieved persons who have been subjects of
25 surveillance in the first place (*see also id.* at *24, *26, *38); and
26 (ii) Plaintiffs seeking *ex parte, in camera* review of state-secret evidence to
27 adjudicate claims of unlawful electronic surveillance must prove that they
28 are aggrieved persons who have been subject to electronic surveillance
before § 1806(f)’s procedures may be invoked, *see id.* at *9, *40 & n.52, and
cannot establish their aggrieved-person status based on mere allegations.

¹ Even if the Court concluded that the panel opinion in *Fazaga* requires it to adjudicate Plaintiffs’ standing under § 1806(f) procedures, the Court should await the outcome of any further appellate review sought by the Government in *Fazaga* before issuing any ruling on the standing issue, in light of the national security risks involved. *See infra* at 3.

DISCUSSION

A. *Fazaga* Confirms That § 1806(f) Does Not Apply to the Current Circumstances of This Case.

The Government has explained that § 1806(f), even if it displaces the state secrets privilege to any extent, does not apply to the standing question at issue in this case, because (1) by its own terms, § 1806(f) authorizes *ex parte, in camera* review of sensitive national-security information solely “to determine whether [challenged] surveillance ... was lawfully authorized and conducted”; and (2) Plaintiffs have not established that they are in fact “aggrieved person[s]” entitled to invoke § 1806(f)’s procedures for any purpose. Gov’t Mot. for Summ. J. (ECF No. 413) at 17-18. *Fazaga* confirms both conclusions to be true.

1. This Court held in *Jewel* that § 1806(f) preempts the state secrets privilege “only in cases within the reach of its provisions,” 965 F. Supp. 2d at 1106, and *Fazaga*, too, holds that § 1806(f) procedures displace *Reynolds*’ “dismissal remedy” only “where they apply,” 2019 WL 961953, at *24. And so far as the scope of the statute’s application is concerned, *Fazaga* held that § 1806(f)’s procedures “provide[] a detailed regime to determine whether surveillance ‘was lawfully authorized and conducted.’” *Id.* (quoting *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1205 (9th Cir. 2007)); *see id.* at *26 (“[T]he statute requires a court to use § 1806(f)’s procedures ‘to determine whether the surveillance ... was lawfully authorized and conducted.’”) (quoting § 1806(f)). *See also Wikimedia Found. v. NSA*, 335 F. Supp. 3d 772, 779-86 (D. Md. 2018). Accordingly, the panel in *Fazaga* directed the district court to use 1806(f)’s procedures on remand “to determine whether the [alleged] electronic surveillance was lawfully authorized and conducted.” 2019 WL 961953, at *38; *see also id.* at *4 (stating that the district court, instead of dismissing the plaintiffs’ claims “outright,” “should have reviewed any state secrets evidence necessary for a determination of whether the alleged surveillance was unlawful” using § 1806(f) procedures).

Nothing in *Fazaga* suggests, on the other hand, that § 1806(f) procedures may be used to determine whether particular plaintiffs are aggrieved persons who have been subjects of surveillance, and who therefore would have standing to challenge the claimed surveillance.

1 *Fazaga* did not consider or decide that question. The Court’s displacement rationale, however,
 2 supports the conclusion that § 1806(f) cannot be employed for that purpose. Important to the
 3 Court of Appeals’ determination that § 1806(f) displaces *Reynolds*’ dismissal remedy was its
 4 understanding that use of the statute’s procedures would be “secrecy-protective,” *id.* at *4, and
 5 would “not publicly expose ... state secrets,” *id.* at *24.² Yet as the Government has explained
 6 on numerous prior occasions, use of § 1806(f) procedures in this case to issue a ruling on each
 7 individual Plaintiff’s standing to challenge each of the intelligence-collection activities at issue
 8 would disclose sensitive information such as whether or not particular individuals have been
 9 subjects of foreign-intelligence surveillance, what kind of surveillance (if any) they have been
 10 subject to, and whether or not particular telecommunications service providers have assisted in
 11 specific NSA intelligence-collection programs. *See, e.g.*, PDDNI Decl. (ECF No. 388-2) ¶ 21;
 12 Gov’t Reply on Threshold Legal Issues [etc.] (ECF No. 185), at 14-17. *Fazaga* does not
 13 condone that result, which was expressly condemned in *Clapper v. Amnesty International, USA*,
 14 568 U.S. 398, 412 n.4 (2013).³

15 2. *Fazaga* also reinforces the conclusion that Plaintiffs must first prove their status as
 16 aggrieved persons, without reliance on state-secret evidence, before they may avail themselves of
 17 § 1806(f)’s procedures. *See* Gov’t Mot. for Summ. J. at 18; *Wikimedia*, 335 F. Supp. 3d at 786.
 18 *Fazaga* does not hold that “the determination of whether a plaintiff is an ‘aggrieved person’ for
 19 purposes of section 1806(f) is made based on the allegations put forth by the plaintiff,” as
 20 Plaintiffs assert in their Statement of Recent Decision (ECF No. 450) at 1. Quite to the contrary,
 21 the panel expressly stated that “[t]he complaint’s allegations” in *Fazaga* “are sufficient *if proven*
 22 to establish that [the *Fazaga* plaintiffs] are aggrieved persons.” 2019 WL 961953, at *9
 23 (emphasis added). The Court also stressed that at that point in the litigation the truth or falsity of

24 ² *See also id.* at *18 (“emphasiz[ing] that the [§ 1806(f)] procedure is ... extremely
 25 protective of government secrecy”); *id.* at *23 (observing that “[t]he procedures set out in
 26 § 1806(f) are animated by the same [national-security] concerns ... that underlie the state secrets
 privilege”); *id.* at *39 (admonishing that the district court, when using § 1806(f) procedures to
 review state secrets evidence, must “tak[e] care to avoid its public disclosure”).

27 ³ As the Government has also explained, revealing such sensitive information reasonably
 28 could be expected to cause serious or exceptionally grave damage to the national security. In no
 event should the Court publicly release a ruling on Plaintiffs’ standing without first providing the
 Government notice and an opportunity to seek appropriate appellate review of any determination
 by the Court to follow that course.

1 the plaintiffs’ allegations was “entirely unproven,” *id.* at *4, and that the predicate for displacing
 2 the Government’s assertion of privilege would “drop out” if the plaintiffs were unable to
 3 substantiate their aggrieved person status, *id.* at *40 & n.52. Thus it remains the case, even
 4 following *Fazaga*, that Plaintiffs must independently establish their aggrieved person status
 5 before invoking § 1806(f)’s procedures, and cannot rely on those procedures to establish that
 6 they have been subjects of surveillance in the first place.⁴

7 **B. The Government Remains Entitled to Judgment for Reasons in Addition**
 8 **to the Inapplicability of § 1806(f).**

9 There are at least two additional reasons why the panel opinion in *Fazaga* does not alter
 10 the Government’s entitlement to judgment, separate and apart from the inapplicability of
 11 § 1806(f) to the current circumstances of this case.

12 1. First, the Court’s August 17, 2018, Order Requiring Dispositive Motions Briefing
 13 (ECF No. 410) observed that even where “the procedures for the handling of [state secrets]
 14 information set forth in section 1806(f) have been invoked,” the state secrets doctrine still may
 15 pose “a potential substantive bar to the ongoing litigation.” *Id.* at 2. That is still the case,
 16 because the *Fazaga* panel held, more narrowly than this Court, that § 1806(f) only displaces
 17 *Reynolds*’ “dismissal remedy,” 2019 WL 961953, at *17,⁵ meaning in *Fazaga* the “categorical
 18 dismissal” of the plaintiffs’ causes of action “at the pleading stage,” “even before any discovery
 19 or evidentiary requests have been made.” *See id.* at *17-18 (citation omitted); *id.* at *18 (“[W]e
 20 hold that [p]laintiffs’ electronic surveillance claims are not subject to outright dismissal at the
 21 pleading stage.”). *Fazaga* reiterated that “[d]ismissal at the pleading stage under *Reynolds* is a

22 ⁴ *Fazaga* also shines light on yet another reason why § 1806(f) does not apply to certain
 23 of Plaintiffs’ claims. As the panel observed, the applicability of § 1806(f) “turns on whether the
 24 surveillance at issues constitutes ‘electronic surveillance’ within the meaning of FISA.” 2019
 25 WL 961953, at *10; *see also* 50 U.S.C. § 1801(f) (defining “electronic surveillance” for purposes
 26 of FISA Title D); *id.* § 1806(f) (applying statute’s procedures “whenever any motion or request is
 27 made by an aggrieved person ... to discover or obtain applications or orders or other materials
 28 relating to electronic surveillance”). Plaintiffs have not made and cannot make a showing that all
 of the intelligence-collection activities they seek to challenge in this case constitute “electronic
 surveillance” within FISA’s meaning (or that their standing as to each can be shown “using the
 same set of evidence,” *see id.* at *39). The bulk collection of phone records, for example, does
 not constitute “electronic surveillance” under the statute’s definition.

⁵ *See also id.* at *21 (“[I]n enacting FISA, Congress displaced the common law dismissal
 remedy created by the *Reynolds* state secrets privilege.”); *id.* at 24 (“[W]here they apply,
 § 1806(f)’s procedures displace a dismissal remedy for the *Reynolds* state secrets privilege.”).

1 drastic result and should not be readily granted,” *id.* at *19 (quoting *Mohamed v. Jeppesen*
 2 *Dataplan, Inc.*, 614 F.3d 1070, 1089 (9th Cir. 2010) (en banc)), if circumstances will later permit
 3 a court to make a “specific and tailored” assessment of the extent to which state secrets are
 4 implicated by the plaintiffs’ claims, *id.* (citing *Jeppesen*, 614 F.3d at 1081-82).

5 Regardless of whether dismissal should have been upheld in the situation presented in
 6 *Fazaga* (as it was *Jeppesen*, 614 F.3d at 1076-77), this case has advanced beyond the pleading
 7 stage. At this Court’s direction, Plaintiffs were permitted to serve 160 discovery requests on the
 8 Government seeking evidence to support their standing to challenge six NSA intelligence-
 9 gathering programs conducted over the past 17 years. As the Court instructed, the Government
 10 “marshal[ed] all evidence” on the standing issue, *see* Civil Minute Order (ECF No. 356) at 1, and
 11 submitted its classified responses to the Plaintiffs’ requests for written discovery, together with
 12 documents responsive to Plaintiffs’ requests for production, for the Court’s *ex parte, in camera*
 13 review. *See generally* Gov’t Mot. for Summ. J. at 5-6. By proceeding in this fashion, the Court
 14 has already afforded Plaintiffs the opportunity to make “discovery [and] evidentiary requests,”
 15 and has undertaken the “specific and tailored” review of the actual state secrets information
 16 implicated by Plaintiffs’ claims, of concern to the panel in *Fazaga*.

17 2. Second, the classified and exceptionally sensitive information that the Government
 18 has made available to the Court in response to Plaintiffs’ discovery requests is protected from
 19 disclosure not only by the state secrets privilege, but also by the statutory privileges established
 20 by 50 U.S.C. §§ 3024(i)(1) and 3605(a). *See* Gov’t Mot. for Summ. J. at 25 n.5; Gov’t Opp’n to
 21 Pls.’ Mot. for Access to Classif. Disc. Mat’ls (ECF No. 400) at 7-8. Even if § 1806(f) applied
 22 here and displaced *Reynolds*’ “dismissal remedy,” *Fazaga* does not address the Government’s
 23 statutory privileges, and therefore does not affect the conclusion that these privileges, too,
 24 require the exclusion of the classified facts and information on which Plaintiffs seek to rely.

25 * * *

26 For these and the reasons discussed in the Government’s prior briefs, the Government
 27 Defendants are entitled to judgment as a matter of law.

1 Dated: March 11, 2019

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3 Respectfully submitted,

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