No. 21-1017

In the Supreme Court of the United States

CAROLYN JEWEL, ET AL., PETITIONERS

v.

NATIONAL SECURITY AGENCY, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

ELIZABETH PRELOGAR
Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
H. THOMAS BYRON III
JOSEPH F. BUSA
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether 50 U.S.C. 1806(f) and 18 U.S.C. 2712(b)(4) displace the state-secrets privilege, such that a plaintiff may support his claim to Article III standing to challenge a government surveillance program using classified evidence over which the government asserted the privilege.

2. Whether the court of appeals correctly held that the district court did not abuse its discretion in excluding certain evidence at summary judgment, and further that petitioner had in any event failed to establish Article III standing.

3. Whether a court of appeals may decline to review a district court's classified order.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Cal.):

In re NSA Telecomms. Records Litigation, No. 4:06-md-1791 (June 3, 2009) (multi-district litigation including *Hepting* v. *AT&T*, *infra*)

Hepting v. *AT&T Corp*, No. 4:06-cv-672 (July 21, 2009)

Jewel v. *NSA*, No. 4:08-cv-4373 (Apr. 25, 2019)

United States Court of Appeals (9th Cir.):

Hepting v. *AT&T Corp.*, Nos. 06-17132, 06-17137 (Aug. 21, 2008)

In re NSA Telecomms. Records Litigation (*Hepting* v. *AT&T Corp.*), No. 09-16676 (Dec. 29, 2011)

Jewel v. *NSA*, No. 10-15616 (Dec. 29, 2011)

Jewel v. *NSA*, No. 15-16133 (Dec. 18, 2015)

Jewel v. *NSA*, No. 19-16066 (Aug. 17, 2021)

Supreme Court of the United States:

Hepting v. *AT&T Corp.*, No. 11-1200 (Oct. 9, 2012)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes—Continued: Page

In the Supreme Court of the United States

No. 21-1017

CAROLYN JEWEL, ET AL., PETITIONERS

v.

NATIONAL SECURITY AGENCY, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not published in the Federal Reporter but is available at 856 Fed. Appx. 640. The opinion of the district court (Pet. App. 5a-44a) is not published in the Federal Supplement but is available at 2019 WL 11504877. The supplemental classified order of the district court was lodged under seal with the district court's Classified Information Security Officer. See Pet. App. 45a.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 2021. A petition for rehearing was denied on October 26, 2021 (Pet. App. 46a-47a). The petition for a writ of certiorari was filed on January 14, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are five individuals (one now deceased) residing in California who use or used telephone

and internet services provided by AT&T or Verizon. Gov't C.A. Br. 8. In 2008, petitioners filed this district court action against the United States, several agencies, certain federal officials in their official capacities, and several former officials in their personal capacities to challenge certain intelligence-collection activities undertaken by the National Security Agency (NSA). Pet. App. 6a; C.A. E.R. 1098-1152 (complaint).[1]

Three categories of NSA activities are relevant here: internet content collection, telephony metadata collection, and internet metadata collection. The government has officially acknowledged that it has engaged in what is known as "upstream" content collection authorized under the Foreign Intelligence Surveillance Act of 1978 (FISA), 50 U.S.C. 1801 *et seq.* Under orders issued by the Foreign Intelligence Surveillance Court (FISC), the government has collected the content of certain internet communications (*e.g.*, emails) associated with targeted selectors (*e.g.*, an email address linked to a terrorist abroad) as those communications transit the "Internet backbone." C.A. E.R. 433-434. The government has also officially acknowledged that it previously collected in bulk—but no longer collects—certain metadata about (but not the content of) both telephone and internet communications, pursuant to FISC orders. C.A. Supp. E.R. 54-60.

The government has officially acknowledged the existence of those intelligence-collection activities and declassified certain information about their operation in order to "promot[e] informed public debate about the value and appropriateness of these programs." C.A. Supp. E.R. 5. But specific operational details—including

---

[1] This brief is filed on behalf of all respondents, including the personal-capacity defendants.

information about the targets and subjects of surveillance, the telecommunications providers that have assisted the NSA, and technical details about what information has been collected and the method of its collection —remain classified. *Id.* at 9, 60, 89-90. As Admiral Michael Rodgers, then-Director of the NSA, explained, those details would "help our adversaries evade detection and capitalize on limitations in the NSA's surveillance capabilities"; would "tend to reveal to our enemies who are the NSA's actual targets of surveillance and who are not, which channels of communication are free from NSA surveillance and which are not, and perhaps also sensitive intelligence methods and sources"; and would therefore "cause exceptionally grave damage to the national security of the United States." *Id.* at 28, 31. The government has asserted the state-secrets privilege to protect such information at multiple stages in this litigation. See Pet. App. 8a; C.A. Supp. E.R. 3-4 (¶¶ 7-8).

Petitioners' complaint alleges that the government's surveillance has captured the content of their internet communications and, in addition, metadata about their telephone and internet communications. C.A. E.R. 1100. Petitioners contend that the alleged surveillance of their communications violated, *inter alia*, the Fourth Amendment; the wiretap provisions (18 U.S.C. 2511) of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III), 18 U.S.C. 2510 *et seq.*; and provisions of the Stored Communications Act, 18 U.S.C. 2701 *et seq.* See Pet. App. 8a.

2. The district court granted the government's motion for summary judgment based on two independent grounds. Pet. App. 5a-44a.

a. The district court first held that petitioners failed to establish their Article III standing to sue. Pet. App. 16a-19a, 22a-31a, 39a-41a. To carry their "burden of proving" Article III standing, the court explained, petitioners must "proffer admissible evidence" at summary judgment showing that "'*their own* [internet communications and] metadata w[ere] collected by the government.'" *Id.* at 16a-17a, 19a (citation omitted).

i. The district court considered the evidence that petitioners had themselves proffered at summary judgment, resolved a series of evidentiary disputes about the admissibility and relevance of that evidence, Pet. App. 24a-31a, and ultimately concluded that petitioners "failed to proffer sufficient admissible evidence to indicate that" their communications (or metadata) had been subject to surveillance, *id.* at 31a. For example, the court considered a declaration by an AT&T technician (Mark Klein) who briefly worked at a particular AT&T facility in California and who discussed the possible use of a secure room at the facility (to which he lacked access) to collect internet communications. C.A. E.R. 1074-1079. The court stated that Klein lacked "independent knowledge" of the room's "content, function, or purpose," and that even if his declaration were admissible, he could "only speculate about what data were actually processed and by whom in the secure room and how and for what purpose." Pet. App. 24a-25a.

The district court also concluded that petitioners could not rely on a letter (C.A. E.R. 896-897) that purported to have been sent by a Division of the Department of Justice to the FISC and that petitioners downloaded from the *New York Times*' website. Pet. App. 28a-29a. After noting that the letter had "not been authenticated by the Government," the court stated that

"whether or not the letter is authentic" is itself classified information the disclosure of which "could reasonably be expected to cause grave harm to national security," and that there had been no waiver of the state-secrets privilege over the document. *Id.* at 29a.

The district court similarly concluded that petitioners could not establish the authenticity of an exhibit labeled as an NSA Office of the Inspector General (OIG) draft report (D. Ct. Doc. 147, Ex. A (July 2, 2013)) that petitioners downloaded from the *Guardian*'s website and that petitioners attempted to authenticate with a declaration by Edward Snowden (C.A. E.R. 87-88). Pet. App. 29a-30a; see D. Ct. Doc. 147 ¶ 5. The court concluded that it could not "rely on [the exhibit]," explaining that the government had "not authenticate[d] the exhibit" and that the court declined petitioners' "requests for admissions [from the government] regarding [its] authenticity," which were covered by the government's assertion of "the state secrets privilege." Pet. App. 30a. The court added that Snowden—whose declaration stated that "[i]f [he were] called as a witness, [he] could and would testify" that the exhibit is an authentic copy of an NSA document that he had read as a contractor, C.A. E.R. 88—could not himself properly "authenticate the purported NSA document" either through his "current declaration" or later "live testimony" in the case. Pet. App. 30a.

ii. The district court further determined that petitioners could not establish their standing using classified evidence that the government had itself submitted *ex parte* and *in camera* to the district court, as previously ordered by the court. Pet. App. 39a-41a; see *id.* at 11a. In an earlier 2013 order in the case, the district court had determined that a FISA provision, 50 U.S.C.

1806(f), "displaces the state secrets privilege." *Id.* at 12a-13a. Later, in 2017, the court orally ordered the government to submit to the court for its "*ex parte* and *in camera*" review any "classified documents and information responsive to [petitioners'] discovery requests" and any related classified government "evidence bearing on the issue of [petitioners'] standing." *Id.* at 11a; see C.A. E.R. 34. The government complied with that order, *ibid.*, and, at the same time, formally asserted the state-secrets privilege to exclude the government's classified information from the case. C.A. Supp. E.R. 3-4 (¶ 7), 17, 23-24 (¶ 2). Cf. C.A. E.R. 34 (order denying petitioners' "motion for access" to that classified information). The court stated that the process of requiring the government's submission of classified information to the court for its review comported with the Ninth Circuit's decision in *Fazaga* v. *FBI*, 916 F.3d 1202 (2019), amended, 965 F.3d 1015 (2020), rev'd, 142 S. Ct. 1051 (2022), which determined that Section 1806(f) "displaced" the state-secrets privilege by providing separate statutory "procedures" for "the district court * * * to review evidence over which [the government] had asserted the state secrets privilege." Pet. App. 13a.

The district court determined, however, that the Ninth Circuit in *Fazaga* had interpreted FISA's procedures in Section 1806(f) as applicable "when 'aggrieved persons' [as defined in FISA] challenge the legality of electronic surveillance." Pet. App. 39a; cf. 50 U.S.C. 1801(k) (defining "'[a]ggrieved person'" to mean "a person who is the target of an electronic surveillance or any other person whose communications or activities were subject to electronic surveillance"). The district court then concluded that where, as here, the state-secrets privilege concerns the antecedent "issue of standing"—

i.e., whether plaintiffs have established that their own communications or related metadata were subject to government surveillance—"*Fazaga* and Section 1806(f)" permit a district court to "dismiss[] on state secrets grounds." Pet. App. 41a; see *id.* at 40a (stating that the Ninth Circuit in *Fazaga* "was not presented with th[is] issue"); *id.* at 16a-17a, 19a (discussing standing). And the court further concluded that the government had properly "invoked the state secrets privilege" over the classified information. *Id.* at 41a; see *id.* at 35a-38a.

b. In the alternative, the district court concluded that even assuming *arguendo* that "[petitioners] could ostensibly [establish] sufficient facts to support their claim of standing" by "utilizing only [the] public evidence" that they submitted at summary judgment, the court would dismiss petitioners' claims on state-secrets grounds, Pet. App. 33a. See *id.* at 31a-34a, 41a-42a. The court found that "proceeding further with this case would cause exceptionally grave harm to the national security" (*ibid.*) because adjudication of "[petitioners'] theory of standing" based on the government's classified submissions, as well as "a full and fair adjudication of [respondents'] substantive defenses" on the merits, would require consideration of the "details of the alleged data collection process that are subject to [respondents'] assertion of the state secrets privilege." *Id.* at 31a-32a. A court determination on "the scope of the data collection program," the court explained, "would risk informing adversaries of the specific nature and operational details of the process and [the] scope of [the government's intelligence activities]." *Id.* at 33a. Because "permitting further proceedings would jeopardize the national security," the court stated that the case

had reached the point "at which [the court] c[ould] go no further." *Id.* at 42a.

c. The district court separately provided public notice that it had filed a supplemental classified order *ex parte* under seal. Pet. App. 45a. The court in its public opinion stated that its supplemental classified order reviewed the information over which the government claimed privilege, upheld the invocation of the privilege, determined the government had satisfied its discovery obligations, and explained in more detail, using classified information, why removal of the privileged information and dismissal of the case were warranted to protect national security. *Id.* at 14a, 23a, 31a, 34a, 36a, 43a.

3. a. As relevant here, petitioners argued on appeal that they had established Article III standing at summary judgment because they had themselves proffered "ample public evidence" that their own communications and metadata had been surveilled, Pet. C.A. Br. 12-13; see *id.* at 24-33, 36-45, 55-58; the same "public evidence" showed that petitioners "not only have standing but are also aggrieved persons" under Section 1806(f), *id.* at 21; and the district court had erroneously excluded parts of their proffered evidence on standing, *id.* at 33-36, 45-54.

Petitioners argued that, "[m]oreover, [S]ections 1806(f) and 2712(b)(4) require that any secret evidence [submitted *in camera* and *ex parte*] favorable to [petitioners] also be considered" for standing purposes, reasoning that the Ninth Circuit's decision in "*Fazaga* makes clear that where [S]ection 1806(f) applies, the secret evidence is in the case for all purposes." Pet. C.A. Br. 13, 59; see *id.* at 58-59. Petitioners did not dispute that the government's assertion of the state-secrets privilege was valid. They instead argued that the "procedures of [S]ection 1806(f) displace the state secrets

privilege in electronic surveillance cases," that "Section 2712(b)(4) extended [S]ection 1806(f)'s procedures to [petitioners'] statutory claims under [Title III] and the [Stored Communications Act]," and that "the district court defied [the Ninth Circuit's] decision in *Fazaga*" by applying the state-secrets privilege in this case. *Id.* at 12; see *id.* at 15-18.

Petitioners separately argued that the district court had also erred in "dismissing [their] claims on state secrets grounds," arguing that Section 1806(f) and Section 2712(b)(4) both "preclude any state-secrets dismissal and require the district court to adjudicate plaintiffs' claims on the merits, using state-secrets evidence reviewed under secure *ex parte*, *in camera* procedures." Pet. C.A. Br. 12; see *id.* at 18-21.

b. The court of appeals affirmed in a short unpublished decision. Pet. App. 1a-4a.

The court of appeals determined that "[t]he district court did not abuse its discretion in excluding evidence at summary judgment." Pet. App. 3a. The court further determined that petitioners "failed to set forth sufficient evidence of standing for each of their claims" to survive summary judgment because they did not "demonstrat[e] that the government has interfered with *their* communications and communications records" and thus failed to present sufficient "evidence of particularized injuries in fact." *Id.* at 2a. In the alternative, the court determined that—"even assuming" that the district court had erred in "excluding evidence"—any such error was not prejudicial because "even considering the excluded evidence, [petitioners] failed to set forth sufficient evidence of standing." *Id.* at 3a.

The court of appeals rejected petitioners' "argument that, pursuant to the procedures set forth in 50 US.C.

§ 1806(f), they may use classified evidence to establish their standing." Pet. App. 3a. The court stated that "it is [*petitioners'*] 'burden to prove their standing *by pointing to specific facts*,' which they have failed to do here." *Ibid.* (quoting *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 412 n.4 (2013)).

In light of its conclusion that petitioners had failed to establish Article III standing, the court of appeals stated that "[it] need not consider whether the district court erred in also concluding that [petitioners'] claims were barred by the state secrets privilege." Pet. App. 4a.

c. The court of appeals denied rehearing. Pet. App. 46a-47a. No judge "requested a vote on whether to rehear the matter en banc." *Id.* at 47a.

ARGUMENT

The unpublished decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. It therefore does not warrant this Court's review.

Petitioners primarily contend that a FISA provision, 50 U.S.C. 1806(f), and a related Stored Communications Act provision, 18 U.S.C. 2712(b)(4), "displace[] the state-secrets privilege" in this context. Pet. 7-8, 14-17, 29. They further contend that, for that reason, they were erroneously denied the ability to use Section 1806(f)'s procedures to rely on classified government information submitted by the government (over which the government asserted the state secrets privilege) to establish their Article III standing. See Pet. ii, 6 & n.1, 8-10, 34-35. This Court's recent decision in *FBI* v. *Fazaga*, 142 S. Ct. 1051 (2022), forecloses that argument.

Petitioners also contend that the state-secrets privilege was erroneously applied to exclude certain "public evidence" that petitioners proffered to support their Article III standing. Pet. i, 23-24, 28, 34-35. And petitioners contend that the court of appeals erroneously refused to review the district court's classified order in this case. Pet. ii, 40-42. Those case-specific and fact-bound issues likewise do not warrant review.

1. Petitioners argue that a FISA provision codified at 50 U.S.C. 1806(f) and a provision of the Stored Communications Act, 18 U.S.C. 2712(b)(4), "displace[] the state-secrets privilege." Pet. 7-8, 14-17, 29. For that reason, petitioners contend that they were erroneously denied the ability to bolster their evidence concerning Article III standing under Section 1806(f)'s procedures, which petitioners believe would allow them to discover and use classified government information about standing that the government was ordered to submit for the district court's *ex parte* and *in camera* review. See Pet. ii, 6 & n.1, 8-10, 34-35. *Fazaga* forecloses those contentions.

In *Fazaga*, this Court reversed the Ninth Circuit's decision on that issue by holding that—even assuming *arguendo* that Section 1806(f) applies "when 'a civil litigant seeks to obtain * * * secret information'" about government surveillance activity—"[Section] 1806(f) does not displace the state secrets privilege." *Fazaga*, 142 S. Ct. at 1059-1060 (citation omitted). In other words, "Congress did not eliminate, curtail, or modify the state secrets privilege when it enacted [Section] 1806(f)." *Id.* at 1062. It follows that the government could properly assert the privilege to protect the classified evidence it was required to submit to the district court, including the information that petitioners sought

to obtain through discovery. See *United States* v. *Reynolds*, 345 U.S. 1, 10-11 (1953) (applying the state-secrets privilege to preclude the "discovery of [protected] documents"). And because petitioners have not argued that the district court erred in holding that the government had properly invoked the state-secrets privilege, see pp. 8-9, *supra*, that privilege excludes from this case the classified information that petitioners seek.

Petitioners' reliance on Section 2712(b)(4) is also unavailing. That provision provides, as relevant here, that "[n]otwithstanding any other provision of law, the *procedures* set forth in [S]ection [18]06(f) * * * shall be the exclusive means by which materials governed by th[at] section[] may be reviewed." 18 U.S.C. 2712(b)(4) (emphasis added). *Fazaga* now makes clear that Section 1806(f)'s "procedures" (*ibid.*) are not "incompatible with" —and thus do not displace—"the state secrets privilege." *Fazaga*, 142 S. Ct. at 1061. And those procedures are no more incompatible with the privilege when they are incorporated for use under Section 2712(b)(4) than when applied directly under Section 1806(f) itself. The government may therefore assert the privilege to protect evidence from disclosure even if, as petitioners believe, Section 1806(f)'s "procedures" apply when a litigant seeks to discover evidence about government surveillance activities.

Petitioners identify no decision holding otherwise, much less a circuit conflict on the question that might warrant this Court's review. Although petitioners assert (Pet. 38) without elaboration that the court of appeals' decision in this case conflicts with *ACLU* v. *Clapper*, 785 F.3d 787 (2d Cir. 2015), none of the issues resolved by the court of appeals here was addressed by the Second Circuit in *ACLU*. The Second Circuit's *ACLU*

decision does not address any questions involving the state-secrets privilege, Section 1806(f), or the exclusion of summary-judgment evidence. See *id.* at 800-826. *ACLU* instead resolved an Article III standing question in the context of a pleading-stage dismissal of a complaint seeking injunctive relief, *id.* at 800, where the standing issue that was "disputed" on appeal was if (as the plaintiffs alleged) the government had in fact collected telephony metadata about the plaintiffs' calls, whether "any alleged injuries * * * depend on the government's *reviewing* the information [it] collected." *Id.* at 801. The Second Circuit determined that whether or not the government reviewed the information, plaintiffs whose information is collected by the government have "standing to allege injury from the collection" itself. *Ibid.* At the pleading stage in this case, petitioners were likewise able to survive dismissal based on their complaint's allegations. See Pet. App. 9a. But as the district court and court of appeals later determined, petitioners have now failed to substantiate their standing allegations with sufficient evidence at summary judgment.[2]

---

[2] To the extent petitioners argue that "the state-secrets privilege only [functions to] exclude[] evidence" from a case and is not a proper basis for concluding that claims are "nonjusticiable," Pet. 3-4; cf. Pet. ii (mentioning dismissal of an "action under the state-secrets privilege as nonjusticiable"), that question is not presented for this Court's review. The district court determined that, even if petitioners had established "sufficient facts to support their claim to standing," it would still dismiss their claims on state-secrets grounds. Pet. App. 33a; see *id.* at 31a-34a, 41a-42a. But the court of appeals concluded that because it affirmed the district court's decision on Article III standing grounds, it "need not consider whether the district court erred in also concluding that [petitioners'] claims were barred by the state secrets privilege." *Id.* at 4a. The court of ap-

2. Petitioners' remaining contentions likewise do not merit further review. Petitioners contend that the court of appeals erred in determining that the district court could exclude "public evidence" submitted by petitioners to support their Article III standing on the basis of the state-secrets privilege. Pet. i, 34-35. Petitioners state that they proffered "public" "documents published by the *New York Times* and the *Guardian*" that the district court "excluded under the state-secrets privilege." Pet. 34-35. Although the court of appeals held that "[t]he district court did not abuse its discretion in excluding evidence at summary judgment," Pet. App. 3a, the court of appeals' short, unpublished decision does not discuss the reasons for that holding. Petitioners' own description of the court of appeals' decision (Pet. 30-32) likewise does not elaborate on that issue. That lack of clarity or developed analysis in both the court of appeals' unpublished opinion and petitioner's contention is a sufficient reason to deny review. In any event, the court's judgment rests on its alternative holding that petitioners "failed to set forth sufficient evidence of standing" "even considering the excluded evidence." Pet. App. 3a. That judgment is correct and warrants no further review.

a. Petitioners describe the district court's decision as "exclud[ing] under the state secrets privilege" a document that is "public evidence" because it was pub-

---

peals' judgment therefore does not turn on whether the state-secrets privilege can warrant dismissal of claims on the ground that their adjudication would pose an unwarranted risk to the national security. Cf. *Fazaga*, 142 S. Ct. at 1062 (explaining that the state-secrets privilege "sometimes authorizes district courts to dismiss claims on the pleadings" before questions of evidence arise, but finding it unnecessary to "delineate the circumstances in which dismissal is appropriate").

lished by the *New York Times*. Pet. 35. Petitioners refer to a letter that purports to be from a Division of the Department of Justice to the FISC (C.A. E.R. 896-897), which petitioners state (Pet. 23-24) "is sufficient evidence" to establish their standing for their telephonic metadata claims. The district court explained that that "letter * * * ha[d] not been authenticated by the Government" and "whether or not the letter is authentic is itself classified" and implicates the "state secret[s] privilege." Pet. App. 28a-29a.

The court of appeals may have concluded that the district court correctly determined that reliance on government evidence that is subject to the state-secrets privilege would be necessary to confirm or deny whether the letter was authentic and that the letter was therefore excluded in the absence of such authentication. This Court has recently held that "information that has entered the public domain may nonetheless fall within the scope of the state secrets privilege" where the privilege applies to prevent "confirmation or denial of the information" by government personnel. *United States* v. *Zubaydah*, 142 S. Ct. 959, 968 (2022). The state-secrets privilege can therefore properly be invoked in certain circumstances to protect the government from being forced to authenticate documents that are available to the public.

b. In any event, whether or not the letter was correctly excluded, the court of appeals correctly held that petitioners failed to establish standing "even considering the excluded evidence." Pet. App. 3a. Petitioners' theory of standing for their telephony metadata claims appears to be as follows: The government has officially acknowledged and released a redacted FISC primary order in FISC Docket No. BR 10-10 (C.A. E.R. 849-867)

that previously governed the collection of telephony metadata. In that order dated February 26, 2010, which by its terms expired on May 21, 2010, the FISC ordered that an unspecified custodian of records shall produce to NSA—"upon service of [an] appropriate secondary order"—"all call detail records or 'telephony metadata' created by [redacted] for communications" between the United States and abroad and within the United States. *Id.* at 851-852, 867. That primary order—the caption of which is "In re application of the Federal Bureau of Investigation for an order requiring the production of tangible things from [redacted]," *id.* at 849 (capitalization altered)—does not identify which telephone carriers might have been subject to its requirements. The 2010 order therefore does not itself indicate that it would have required the disclosure of the telephony metadata of petitioners, who were telephone customers of AT&T and Verizon.

Petitioners appear to believe that the letter published by the *New York Times* shows that the FISC BR 10-10 order applied to AT&T and Verizon because the letter appears to reproduce the unredacted caption for "Docket Number BR 10-10" that names both "AT&T" and "Verizon." C.A. E.R. 896. Because the 2010 FISC BR 10-10 order references the production of "all" telephony metadata and (according to petitioners) the letter "identif[ies]" AT&T and Verizon "as participants in the phone records collection program," petitioners contend that the letter "alone is sufficient evidence" to establish their standing to challenge the NSA's telephony metadata collection. Pet. 22-24.

For multiple reasons, the letter is insufficient to establish petitioners' Article III standing. First, petitioners "bear[] the burden of establishing standing as of the

time [they] brought this lawsuit," *i.e.*, in September 2008. *Carney* v. *Adams*, 141 S. Ct. 493, 499 (2020); accord *Davis* v. *FEC*, 554 U.S. 724, 734 (2008) (standing focuses on whether the requisite stake existed "when the suit was filed"); see Pet. App. 6a. Even accepting *arguendo* petitioners' interpretation of the letter and February 2010 primary FISC order, those materials would at most suggest that AT&T and Verizon had been ordered to produce telephonic metadata for the period between February 26, 2010, and May 21, 2010, long after petitioners filed their 2008 complaint in this case. See C.A. E.R. 852, 867, 896. As a result, petitioners can only speculate on the summary-judgment record whether those companies had been required to produce any telephony metadata on or before the date of their September 2008 complaint.

Second, the 2010 primary FISC order required a custodian of records to produce telephony metadata to NSA "upon service of the appropriate secondary order." C.A. E.R. 851-852. But as petitioners acknowledged during oral argument in the court of appeals, they have proffered no evidence of a secondary order issued to their telephone providers. C.A. Oral Argument at 12:20-13:13, https://go.usa.gov/xuwHh. Without evidence showing that a secondary order was in fact served on either AT&T or Verizon in conjunction with the 2010 primary order, petitioners cannot show that those companies would have been required to produce any metadata to NSA.

Third, even if such a secondary order was served on AT&T and Verizon, petitioners have not shown that such an order would have required those companies to produce telephony metadata on *all* telephone calls (which would presumably include petitioners' calls as

AT&T and Verizon customers). The Privacy and Civil Liberties Oversight Board report (C.A. E.R. 152-389) that petitioners proffered to support their telephony metadata claim states that "[*a*]*t least one* telephone company" had been "ordered to provide less than all of its call detail records." *Id.* at 177 n.29 (emphasis added). Without the relevant unredacted primary and secondary orders, petitioners can only speculate that AT&T and Verizon were required under Docket No. BR 10-10 to produce petitioners' telephony metadata.[3]

3. Finally, petitioners appear to contend that the court of appeals erroneously refused to review the district court's classified order and any of the classified evidence in this case. Pet. ii; see Pet. 40-42. That contention does not warrant this Court's review.

To the extent that petitioners argue that a court of appeals must review a classified district court opinion to decide whether it contains legal error, this Court's resolution of that question would not alter the court of appeals' judgment affirming the district court's grant of summary judgment. That judgment rests on the court of appeals' conclusion that the *unclassified* evidence petitioners proffered was insufficient to establish petition-

---

[3] Petitioners state that they proffered a "document published by the *Guardian* newspaper supporting petitioners' standing," Pet. 28, and that the document was "public evidence" that was "excluded" in this case, Pet. 34. See Pet. App. 29a-30a; p. 5, *supra*. But petitioners present no developed argument with respect to the *Guardian* document to explain why the court of appeals erred, either in concluding that "[t]he district court did not abuse its discretion in excluding [the] evidence" or in holding that petitioners "failed to set forth sufficient evidence of standing" "even considering the excluded evidence," Pet. App. 3a. Cf. Gov't C.A. Br. 47-49. Petitioners' passing references to the document, Pet. 28, 34, identify no sound basis for this Court's review.

ers' Article III standing. Pet. App. 2a-3a. And although the court of appeals upheld the district court's exclusion of certain evidence (*id.* at 3a) which rested in part on the state-secrets privilege, the court of appeals would not have needed to review the classified record to decide whether the state-secrets privilege had been properly asserted because petitioners did not challenge the district court's holding that it was. See pp. 8-9, *supra*. Moreover, as discussed above, petitioners cannot support their Article III standing with the *classified* evidence that the government submitted as required by the district court for its *ex parte* and *in camera* review, because that information is privileged and, as this Court held in *Fazaga*, Section 1806(f) does not alter the normal application of the state-secrets privilege. See pp. 11-13, *supra*. As a result, even if there was some error in the discussion of the classified evidence in that order, that would not alter the fact that petitioners failed to establish their Article III standing.

Moreover, in light of the court of appeals' resolution of this case, it would not have been necessary for the court to have reviewed the classified record or the district court's supplemental classified order. The district court stated that its classified supplemental order addressed how the district court, "after extensive *in camera* review of the classified materials and a similarly thorough review of the public evidence, f[ound] that making any particularized determination on standing in order to continue with this litigation may imperil the national security." Pet. App. 34a; see also *id.* at 14a. But because the court of appeals affirmed the district court on other grounds, the court of appeals had no "need [to] consider" whether the district court erred in concluding

that dismissal would also be required to protect state secrets. *Id.* at 4a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH PRELOGAR
Solicitor General
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
H. THOMAS BYRON III
JOSEPH F. BUSA
Attorneys

MAY 2022