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9 **UNITED STATES DISTRICT COURT**

10 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

11 CAROLYN JEWEL, TASH HEPTING,)
12 GREGORY HICKS, ERIK KNUTZEN and)
13 JOICE WALTON, on behalf of themselves and)
all others similarly situated,)
14 Plaintiffs,)
15 v.)
16 NATIONAL SECURITY AGENCY, *et al.*,)
17 Defendants.)

CASE NO. 08-CV-4373-JSW

**BRIEF OF AMICUS CURIAE PEOPLE
FOR THE AMERICAN WAY
FOUNDATION IN SUPPORT OF
PLAINTIFFS' MOTION FOR PARTIAL
SUMMARY JUDGMENT**

Summary Judgment Hearing
Date: December 14, 2012
Time: 9:00 a.m.
Courtroom 11, 19th Floor
The Honorable Jeffrey S. White

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INTEREST OF AMICUS CURIAE

People For the American Way Foundation (“PFAWF”) is a non-partisan, non-profit citizen organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of civic, religious, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, PFAWF now has hundreds of thousands of members and activists nationwide, including more than 374,000 in the Ninth Circuit and more than 242,000 in the State of California alone. One of PFAWF’s primary missions is to educate the public on the vital importance of our nation's tradition of liberty and freedom, and to defend that tradition through research, advocacy, outreach, and litigation.

This case is of particular concern to PFAWF and its members, given the organization’s longstanding concern for and defense of civil liberties and the breadth of the electronic surveillance that has been alleged. Independent of this litigation, PFAWF has conducted extensive research on the Foreign Intelligence Surveillance Act of 1978 (“FISA”) and undertaken a public education initiative addressing legal and policy issues raised by the government’s recently disclosed surveillance programs. PFAWF is filing this brief on behalf of its members to highlight for the Court FISA’s historical context and Congress’s intent as expressed at the time of the legislation’s drafting and passage.

No counsel for a party authored this brief in whole or in part, and no person or entity other than amicus curiae, or its counsel, made a monetary contribution to the preparation or submission of this brief.¹

¹ This brief was prepared with the help of University of California, Berkeley, School of Law student Jose de Wit, acting under the supervision of Babak Siavoshy (264182) and Jennifer Urban (209845).

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SUMMARY OF THE ARGUMENT

3 The government’s invocation of the state secrets privilege, in response to allegations that it
4 unlawfully surveilled the domestic communications of millions of Americans, subverts the balance
5 between civil liberties and the need for secrecy in litigation over government surveillance that
6 Congress carefully crafted in FISA. Accepting the government’s state secrets claim would replace
7 the legislative compromise embodied in FISA with a system of unrestrained administrative
8 discretion that would let the Executive single-handedly dictate when and how it may subject the
9 public to surveillance in the name of national security.

10 Congress passed FISA in response to well-documented civil liberties abuses by
11 administrations throughout the post-World War II era, including domestic surveillance practices
12 that closely resemble the government’s alleged conduct in this case. FISA prescribes the
13 “exclusive means” by which the Executive can monitor domestic electronic communications for
14 foreign intelligence purposes, and also the exclusive means by which courts should address
15 government national security concerns in litigation regarding that surveillance.

16 FISA’s legislative history demonstrates that Congress deliberated the precise legal question
17 before this Court—whether the need for secrecy regarding intelligence-gathering should exempt
18 the Executive’s domestic electronic surveillance from judicial review—and decided that it should
19 not. In its deliberations, Congress rejected arguments that the Executive’s concerns over secrecy
20 trump the need to protect civil liberties altogether, and crafted in section 1806(f) a set of exclusive
21 procedures by which courts should review sensitive evidence. Congress carefully balanced these
22 procedures to safeguard individuals’ important constitutional and statutory rights while ensuring
23 that the Executive can protect sensitive national security information.

24 If, as Plaintiffs claim, Defendants avoided FISA’s *ex ante* judicial review requirements, and
25 the government is now allowed to avoid *ex post* review by quashing this litigation via the state
26 secrets privilege, Defendants will have avoided any judicial review whatsoever—directly
27 contravening Congress’s intent and our constitutional system of checks and balances. As FISA co-
28 sponsor Senator Charles Mathias, Jr. argued during a 1974 hearing, judicial oversight of electronic

1 surveillance is a critical part of any free society:

2 If the executive branch believes that the Congress and the courts cannot be trusted to
3 act responsibly on all matters of public policy including those loosely called
4 “national security,” then for all practical purposes, the constitutional system of
5 government has been rejected and replaced by an executive national security state.

6 If it is the view of the Justice Department and the executive branch that the
7 Congress and the courts are not equipped or competent to handle the problems of
8 national security then ways must be devised to make them competent and means
9 provided to equip them to handle such matters; the alternative is authoritarian rule.

10 *Electronic Surveillance for National Security Purposes: Hearings on S. 2820, S.3440, and S.4062*
11 *Before the Subcomms. on Criminal Laws and Procedures and Constitutional Rights of the S.*
12 *Comm. on the Judiciary, 93rd Cong. 255 (1974) (hereafter “1974 S. Judiciary Comm. Hearings”).*

13 Congress rejected such an outcome in passing FISA. Defendants’ state secrets claim would
14 upend FISA’s comprehensive system of regulation and oversight, which the Senate Judiciary
15 Committee called “a fair and just balance between protection of national security and protection of
16 personal liberties.” S. Rep. No. 95-604, at 7 (1977).

17 BACKGROUND

18 **A. Before FISA, The Executive Branch Engaged In Widespread Abuse Of Its Power To** 19 **Conduct Electronic Surveillance In The Name Of National Security.**

20 In 1978, Congress enacted FISA in response to “revelations that warrantless electronic
21 surveillance in the name of national security ha[d] been seriously abused.” S. Rep. No. 95-604, at
22 7. Those abuses resulted partly from Congress’s decision to exempt foreign intelligence and
23 national security surveillance from domestic electronic surveillance legislation that it enacted in
24 1968.² *See, e.g.,* S. Rep. No. 94-1161, at 15 (1977) (explaining that exempting “national security
25 wiretaps” from Title III’s electronic surveillance regulations had prompted abuses and that “checks
26 upon the exercise of these clandestine methods were clearly necessary”).

27 The misconduct came to light in the mid-1970s, when a Congressional task force known as
28 the Church Committee produced a series of investigative reports that documented a staggering

² Those statutes were the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 802, 82 Stat. 197, 212-223 (codified as amended at 18 U.S.C. §§ 2510-2520 (2006)) (“Title III”); *see also* 18 U.S.C. § 2511(3) (1968); FISA, Pub. L. No. 95-511, § 201(c), 97 Stat. 1783, 1797); S. Rep. No. 95-604, at 7.

1 amount of unlawful surveillance carried out in the name of national security. The Church
2 Committee concluded that, in the years before FISA, “surveillance was often conducted by illegal
3 or improper means” and focused on an over-inclusive set of targets, including “a United States
4 Congressman, Congressional staff member, journalists and newsmen, and numerous individuals
5 and groups who engaged in no criminal activity and who posed no genuine threat to the national
6 security.” S. Select Comm. to Study Governmental Operations with Respect to Intelligence
7 Activities (“Church Committee”), *Book II: Intelligence Activities and the Rights of Americans*, S.
8 Rep. No. 94-755, at 12 (1976) (hereafter “*Book II*”).³ Senator Kennedy explained at the time that
9 “[e]ach [of the government’s initiatives] was undertaken under the catch-all phrase of ‘national
10 security.’” *Warrantless Wiretapping and Electronic Surveillance - 1974: J. Hearings Before the*
11 *Subcomm. on Administrative Practice and Procedure and the Subcomm. on Constitutional Rights*
12 *of the S. Comm. on the Judiciary and the Subcomm. on Surveillance of the S. Comm. on Foreign*
13 *Relations*, 93rd Cong. 2 (1974).

14 The Church Committee devoted substantial attention to “Project SHAMROCK,” a
15 surveillance program that closely resembles the activities alleged in this case. For 30 years,
16 SHAMROCK operated a dragnet targeting international telegrams sent by United States citizens.
17 Church Committee, *Book III: Supplementary Detailed Staff Reports on Intelligence Activities and*
18 *the Rights of Americans*, S. Rep. No. 94-755, at 765-66 (1976). As the committee noted at the time,
19 “SHAMROCK was probably the largest governmental interception program affecting Americans
20 ever undertaken. Although the total number of telegrams read during its course is not available,
21 NSA estimates that in the last two or three years of SHAMROCK’s existence, about 150,000
22 telegrams per month were reviewed by NSA analysts.” *Id.*

23 The Church Committee concluded that “the massive record of intelligence abuses over the
24 years” had “undermined the constitutional rights of citizens ... primarily because checks and
25 balances designed by the framers of the Constitution to assure accountability have not been

26 _____
27 ³ The targets of surveillance also included a sitting Supreme Court Justice, *Book II* at 10, members
28 of the Civil Rights Movement, including Martin Luther King, Jr., *id.* at 286, and various “teachers,
writers, and publications.” *Id.* at 17.

1 applied.” *Book II* at 291. The Committee accordingly urged “fundamental reform,” recommending
 2 legislation that would “cover[] the field by ... provid[ing] the exclusive legal authority for
 3 domestic security activities,” including “warrantless electronic surveillance.” *Id.* at 299. The
 4 legislation would “make clear to the Executive branch that [Congress] will not condone, and does
 5 not accept, any theory of inherent or implied authority to violate the Constitution, the proposed
 6 new charters, or any other statutes.” *Id.* at 298. The political branches enacted FISA directly in
 7 response to the Church Committee’s findings and recommendations.

8 **B. FISA Was Passed To Create A Comprehensive System Of Regulation And Oversight**
 9 **That Would End Executive Abuse Of Warrantless Surveillance.**

10 FISA was born from the vigorous national debate on the limits of the government’s
 11 surveillance power following the Church Committee’s findings. The bill, negotiated by the Ford
 12 and Carter administrations⁴ and signed by President Carter, “represent[ed] a recognition by both
 13 the Executive branch and Congress that the statutory rule of law must prevail in the area of foreign
 14 intelligence surveillance.” S. Rep. No. 95-604, at 7.⁵ Congress crafted FISA’s regulatory

15 _____
 16 ⁴ In March 1976, after several meetings between Congressional leaders and President Ford and his
 17 administration, the President asked Congress to enact the electronic-surveillance legislation that
 18 eventually became FISA. *Communication From the President of the United States Transmitting a*
 19 *Draft of Proposed Legislation To Amend Title 18, United States Code, To Authorize Applications*
 20 *For a Court Order Approving the Use of Electronic Surveillance To Obtain Foreign Intelligence*
 21 *Information*, H.R. Doc. No. 94-422 (1976) (“The enactment of this bill will ensure that the
 22 government will be able to collect necessary national intelligence. At the same time, it will provide
 23 major assurance to the public that electronic surveillance for foreign intelligence purposes can and
 24 will occur only when reasonably justified in circumstances demonstrating an overriding national
 25 interest, and that they will be conducted according to standards and procedures that protect against
 26 the possibilities of abuse.”). Upon signing FISA, President Carter reemphasized the balance the
 27 statute struck between national security and civil liberties. *Statement of President Jimmy Carter on*
 28 *Signing S. 1566 Into Law* (Oct. 5, 1978) (“[O]ne of the most difficult tasks in a free society like
 our own is the correlation between adequate intelligence to guarantee our Nation’s security on the
 one hand, and the preservation of basic human rights on the other. This is a difficult balance to
 strike, but the act I am signing today strikes it ... It provides enough secrecy to ensure that
 intelligence relating to national security can be securely acquired, while permitting review by the
 courts and Congress to safeguard the rights of Americans and others.”).

⁵ FISA also responded to the Supreme Court’s call for Congress to establish “reasonable standards”
 for national security surveillance in the *Keith* case, *United States v. U.S. Dist. Court*, 407 U.S. 297,
 302, 322 (1972), which unanimously upheld Fourth Amendment requirements (including prior
 judicial approval) in cases of domestic national security surveillance. *See, e.g.*, S. Rep. No. 95-701,

1 framework over several years, beginning with hearings in April 1974 and concluding with a signed
2 statute in October 1978—an extensive legislative process that generated thousands of pages of
3 transcripts, reports, case law analysis, and other historical materials.

4 The resulting procedural and substantive provisions reflected Congress’s effort to “strike a
5 fair and just balance between protecting national security and safeguarding personal liberties.” S.
6 Rep. No. 94-1035, at 9 (1976). Among other things, FISA established an *ex ante* mechanism by
7 which the Executive branch, before engaging in domestic surveillance, must seek authorization
8 from a special court charged with finding probable cause that the target is an agent of a foreign
9 power as defined by the statute. *See* 50 U.S.C. §§ 1804-05. Crucially, FISA also establishes a
10 system of *ex post* court review of Executive conduct by establishing criminal and civil liability for
11 surveillance that willfully violates the statute, *id.* at §§ 1809-10,⁶ and secure procedures that courts
12 should follow in such cases to evaluate evidence that could endanger national security if disclosed,
13 *id.* at §1806(f).

14 Since enacting FISA in 1978, Congress has several times amended the sections of the
15 United States Code where FISA was codified.⁷ *See* Electronic Communications Privacy Act, Pub.
16 L. No. 99-508, 100 Stat. 1848 (1986) (amending 18 U.S.C. §§ 2510-22); PATRIOT Act, Pub. L.
17 No. 107-56, § 206-08, 115 Stat. 272, 282-283 (2001) (amending 50 U.S.C. §§ 1803-5, 1823);
18 Protect America Act, Pub. L. No. 110-55, 121 Stat. 552 (2007) (amending 50 U.S.C. § 1801);
19 FISA Amendments Act, Pub. L. 110-261, 122 Stat. 2436 (2008). Throughout, the basic framework
20 that Congress created in FISA—procedures for judicial approval of prospective surveillance,
21 subsequent court review of its legality, and criminal and civil liability—survived intact, and
22 remains today. *See* 50 U.S.C. §§ 1804-06, 1809-10.

23 at 21 (explaining that, under FISA, foreign intelligence surveillance would comply with Fourth
24 Amendment requirements under *Keith*).

25 ⁶ More recently, Congress explicitly authorized civil actions against the United States for willful
26 violations of FISA and other surveillance statutes. Uniting and Strengthening America by
27 Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (“PATRIOT Act”),
18 U.S.C § 2712 (2007) .

28 ⁷ FISA was codified at 50 U.S.C §§ 1801-11, 18 U.S.C. §§ 2511(2), 2511 (3), 2518(1), 2518(4),
2518(9)-(10), and 2519(3). Pub. L. No. 95-511 (1978).

ARGUMENT

I. FISA’S MANDATORY SYSTEM OF JUDICIAL OVERSIGHT APPLIES NOTWITHSTANDING THE GOVERNMENT’S INVOCATION OF STATE SECRETS.

FISA’s language and legislative history demonstrates that Congress deliberated the precise legal question before this Court—whether the need for secrecy regarding intelligence-gathering should exempt the Executive’s domestic electronic surveillance from judicial review—and decided that it should not. Instead, Congress crafted in section 1806(f) a set of exclusive procedures governing district court judges’ evaluation of sensitive evidence in surveillance cases. *See* 50 U.S.C. § 1806(f). Those procedures, which preserve judicial review of the surveillance conduct but allow the government to trigger *in camera* and *ex parte* procedures to protect sensitive materials, reflect the political branches’ careful effort to balance the national security interest in protecting sensitive information with the need to safeguard important constitutional and statutory privacy rights.

The Court should preserve the legislative compromise that Congress and the Executive reached through FISA and reject the government’s attempt to use the state secrets privilege to circumvent FISA’s secure, mandatory procedures. Judicial review over government surveillance conduct is particularly important here, where Defendants allegedly circumvented FISA’s pre-surveillance authorization procedures altogether, Plaintiffs’ Complaint ¶ 39, ECF No. 1, and where a court has upheld Plaintiffs’ standing to sue the government, *Jewel v. NSA*, 673 F.3d 902, 914 (9th Cir. 2011) (reversing dismissal of Plaintiffs’ claims for lack of standing).

A. Congress Specifically Rejected Both Arguments That Courts Lack Competence To Review Electronic Surveillance And Statutory Schemes That Would Have Eliminated Meaningful Judicial Review.

FISA’s legislative history demonstrates that Congress intentionally gave the judiciary a central role in preventing Executive branch abuses of electronic surveillance. From the earliest hearings on legislative proposals, Congress assessed the practical and legal viability of judicial review over foreign intelligence-gathering. *See, e.g., Foreign Intelligence Electronic Surveillance: Hearings on H.R. 5794, H.R. 9745, H.R. 7308, and H.R. 5632, The Foreign Intelligence*

1 *Surveillance Act of 1977, Before the Subcomm. on Legis. of the H. Permanent Select Comm. on*
 2 *Intelligence, 95th Cong. 3 (1978) (hereafter “1978 H.R. Intelligence Comm. Hearings”); 1974 S.*
 3 *Judiciary Comm. Hearings, at 40; Foreign Intelligence Surveillance Act of 1977: Hearings Before*
 4 *the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 95th Cong.*
 5 *26 (1977) (hereafter “1977 S. Judiciary Comm. Hearings”).* After extensive deliberation and
 6 debate, Congress concluded that protecting civil liberties requires checking documented Executive
 7 overreaching though comprehensive judicial oversight of national-security electronic surveillance.

8 In the course of drafting FISA, several House and Senate committees heard testimony that
 9 courts cannot effectively review foreign-intelligence surveillance because judges purportedly lack
 10 experience in the field and might leak sensitive information. *See, e.g., H.R. Rep. No. 95-1283(I), at*
 11 *25 (1978); 1974 S. Judiciary Comm. Hearings, at 255.* Relatedly, some legislators suggested a
 12 statutory system functionally equivalent to the pre-FISA regime of unchecked Executive
 13 authority—and to the regime the government proposes now. *See, e.g., 1978 H.R. Intelligence*
 14 *Comm. Hearings, at 3 (statement of Rep. McClory, introducing a competing bill which “retains*
 15 *with the Executive—where it should be—the authority to approve national security foreign*
 16 *intelligence surveillance”).*

17 In enacting FISA, a strong majority in Congress, along with the top executive officials who
 18 negotiated the bill, rejected that position.⁸ The law provides for court review of government
 19 electronic surveillance both before surveillance takes place, *see* 50 U.S.C. § 1804-05, and to
 20 determine its legality afterward, *see id.* §§ 1806(f), 1809-10; *see also,* 18 U.S.C. § 2712. The Act’s
 21 legislative history makes clear that these judicial review provisions were intended to impose
 22 meaningful limits on the Executive’s ability to conduct unchecked electronic surveillance in the

23 ⁸ The House voted 226-176 to approve FISA and the Senate approved it by a voice vote. 124 *Cong.*
 24 *Rec.* 36,414, 36,417 (1978). The Senate had passed the pre-Conference bill 95-1. 124 *Cong. Rec.*
 25 34,845 (1978). Legislators and executive officials alike explicitly rejected concerns about the
 26 courts’ competence to handle national security evidence. S. Rep. No. 94-1035, at 79 (“We believe
 27 that these same issues—secrecy and emergency, judicial competence and purpose—do not call for
 28 any different result in the case of foreign intelligence collection through electronic surveillance.”);
1977 S. Judiciary Comm. Hearings, at 26 (Attorney General Bell asserting that “[t]he most
leakproof branch of the Government is the judiciary . . . I have seen intelligence matters in the
courts. . . I have great confidence in the courts,” and Senator Orrin Hatch replying, “I do also.”).

1 name of national security. *See* S. Rep. No. 94-1035, at 11 (“[T]he past record establishes clearly
2 that the executive branch cannot be the sole or final arbiter of when such proper circumstances
3 exist.”), 20 (noting that FISA “is based on the premise (supported by history), that executive self-
4 restraint, in the area of national security electronic surveillance, is neither feasible nor wise”).

5 Although Congress has revised FISA several times since enacting it in 1978, it has always
6 left intact FISA’s basic framework—judicial approval of prospective surveillance, subsequent
7 judicial review of its legality, and criminal and civil liability for surveillance outside the statute.
8 *See* 50 U.S.C. §§ 1804-06, 1809-10. Accordingly, FISA reflects Congress’s judgment that courts
9 must play a central role in assessing the legality of government electronic surveillance.

10 **B. Congress Adopted FISA As The Exclusive Means Of Conducting Electronic**
11 **Surveillance.**

12 In enacting FISA, Congress intended for FISA’s judicial oversight mechanisms to provide
13 the legitimate—and exclusive—framework by which the Executive branch may conduct electronic
14 surveillance for foreign intelligence purposes. S. Rep. No. 95-604, at 15 (FISA crafted to “provide
15 the secure framework by which the Executive branch may conduct legitimate electronic
16 surveillance for foreign intelligence purposes”).

17 Indeed, the Joint House and Senate Conference Committee rejected narrow language that
18 would have made FISA merely the “exclusive *statutory* means by which [foreign intelligence]
19 electronic surveillance” could be conducted (emphasis added), instead accepting the Senate’s
20 broader requirement that FISA established the “exclusive means” for such surveillance. H.R.
21 Conf. Rep. No. 95-1720, at 35 (1978) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S.
22 579, 637 (1952) (“[w]hen a President takes measures incompatible with the express or implied will
23 of Congress, his power is at the lowest ebb”).

24 Congress’s most recent revision to FISA, the FISA Amendments Act of 2008, puts to rest
25 the question of whether FISA’s framework of judicial authorization and review applies to all
26 Executive efforts to intercept domestic electronic communications under the pretense of
27 intelligence gathering. The Act makes clear that the statute’s procedures “shall be the exclusive
28 means by which electronic surveillance and the interception of domestic wire, oral, or electronic

1 communications may be conducted.” 50 U.S.C. § 1812(a).⁹

2 **C. Section 1806(f) Establishes The Exclusive Framework For Ensuring The Security Of**
 3 **Sensitive Information In Cases Implicating Electronic Surveillance.**

4 FISA precludes the government’s argument that it can avoid all judicial review of its
 5 domestic surveillance activities by invoking the state secrets privilege to protect the national
 6 security interests at stake. Congress already included procedures in FISA to protect national
 7 security, and established those procedures as the exclusive framework for reviewing sensitive
 8 materials in litigation pertaining to government surveillance. *See* 50 U.S.C. § 1806(f).¹⁰

9 FISA section 1806(f)—which applies “notwithstanding any other law”—is the “exclusive”
 10 procedure for protecting sensitive surveillance materials in suits against the government under
 11 FISA and other surveillance statutes. *Id.*; 18 U.S.C. § 2712(b)(4) (designating 1806(f) as “the
 12 exclusive means by which materials [designated as sensitive by the government] shall be
 13 reviewed” in suits against the United States under FISA, the Wiretap Act and the Electronic
 14 Privacy Protection Act).¹¹ Section 1806(f) allows the government to trigger¹² secure review

15 ⁹ FISA leaves open only one other avenue by which the Executive may intercept domestic
 16 electronic communications – where Congress has provided “express statutory authorization” to do
 so. *Id.* at § 1812(b) . The government has made no arguments under this provision.

17 ¹⁰ Section 1806(f) requires that

18 the United States district court . . . shall, notwithstanding any other law, [and provided] the
 19 Attorney General files an affidavit under oath that disclosure or an adversary hearing would
 20 harm the national security of the United States, review in camera and ex parte the
 21 application, order, and such other materials relating to the surveillance as may be necessary
 22 to determine whether the surveillance of the aggrieved person was lawfully authorized and
 23 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.

24 50 U.S.C. § 1806(f) . The first half of the provision is discussed separately in Part D.(1), below.

25 ¹¹ 18 U.S.C. § 2712 is discussed in greater detail in Part D(2), below.

26 ¹² The provision is triggered, initially, when the Attorney General files an affidavit notifying the
 27 court that certain information in a legal dispute is “related to” government electronic surveillance
 28 and that “disclosure or an adversary hearing” regarding that information could “harm the national
 security of the United States.” 50 U.S.C. § 1806(f).

1 procedures anytime it believes litigation would reveal sensitive surveillance materials and harm
2 national security. *Id.* Once triggered, section 1806(f)'s secure procedures protect the national
3 security interest by mandating *ex parte* and *in camera* review, by a federal district court, of the
4 sensitive surveillance materials. They further protect national security by giving the government
5 the opportunity during that review to persuade the court to withhold the materials from the
6 aggrieved party. *Id.*

7 Invoking section 1806(f) does not permit the government to avoid all review of the legality
8 of its surveillance conduct, however. The provision requires the court to review any "application,
9 order, and such other materials relating to the surveillance" *in camera* and *ex parte* "to determine
10 whether the surveillance of the aggrieved person was lawfully authorized and conducted." *Id.* If
11 necessary to make an accurate determination of the legality of the surveillance, the court "may
12 disclose to the aggrieved person, under appropriate security procedures and protective orders,
13 portions of the application, order, or other materials relating to the surveillance." *Id.* These
14 provisions reflect Congress's attempt to "strike a reasonable balance between an entirely *in camera*
15 proceeding . . . and mandatory disclosure [to the aggrieved party], which might occasionally result
16 in the wholesale revelation of sensitive foreign intelligence information." S. Rep. No. 95-604, at
17 58.

18 Section 1806(f) therefore represents the political branches' balanced legislative solution to
19 the national security problems raised by litigation over unlawful government surveillance. This
20 solution leaves no room for the government's blanket invocation of a common law doctrine to
21 shield its conduct from review. Indeed, the Senate Judiciary Committee explained that litigants
22 should not be allowed to evade section 1806(f)'s procedures by invoking other laws or
23 jurisprudential doctrines:

24 The Committee wishes to make clear that the procedures set out in [the subsection
25 ultimately codified at section 1806(f)] apply whatever the underlying rule or statute
26 referred to in [a party's] motion. This is necessary to prevent the carefully drawn
procedures in [the same subsection] from being bypassed by the inventive litigant
using a new statute, rule or judicial construction.

27 S. Rep. No. 95-604, at 57; *accord* S. Rep. No. 95-701, at 63 ("When the procedure is so triggered,
28 however, the Government *must* make available to the court a copy of the court order and

1 accompanying application upon which the surveillance was based.” (emphasis added)); *accord*
 2 H.R. Rep. No. 95-1283(I), at 91 (when the legality of surveillance is at issue, “it is this procedure
 3 ‘notwithstanding any other law’ that must be used to resolve the question”).

4 The government nevertheless argues that it may invoke state secrets to avoid any court
 5 review—even *in camera*, *ex parte* review—of an otherwise justiciable claim regarding its
 6 surveillance conduct. The government’s argument contradicts the plain language and legislative
 7 history of section 1806(f). In giving the Executive the extraordinary power to compel a court to
 8 review evidence relevant to litigants’ claims *in camera* and *ex parte*, Congress precluded the
 9 Executive from using national security as a ground to avoid altogether any judicial review of a
 10 claim against it.

11 **D. Section 1806(f)’s Mandatory Procedures Apply Both In Criminal Proceedings And In**
 12 **Civil Suits Against The Government.**

13 The government argues that section 1806(f)’s procedures apply only in the context of
 14 motions to suppress evidence used in criminal proceedings, and therefore do not apply to the civil
 15 suit against the government in this case. *See generally* Defs.’ Mot. to Dismiss and for Summ. J.
 16 33-47, ECF No. 102 (“Defs.’ Brf.”). To the contrary, section 1806(f)’s plain language, statutory
 17 context, legislative history, and historical background demonstrate that the provision’s mandatory
 18 procedures and review requirements apply equally in civil suits against the government.

19 1. Section 1806(f)’s Plain Language Extends Its Procedures To Civil Suits
 20 Against the Government.

21 A straightforward reading of section 1806(f)’s plain language extends its mandatory
 22 procedures to civil proceedings. Section 1806(f) applies in three different circumstances, the third
 23 of which (emphasized below) is relevant here:

- 24 • “Whenever a court or other authority is notified pursuant to subsection (c) or (d)
 25 of Section 1806,” which govern the federal or a state government’s use of
 surveillance evidence in a judicial or administrative proceeding.
- 26 • Whenever “a motion is made pursuant to subsection (e) of Section 1806,” which
 27 is triggered when a person against whom the government intends to use
 28 surveillance evidence moves to suppress that evidence; or

- 1 • ***“Whenever any motion or request is made by an aggrieved person pursuant to***
2 ***any other statute or rule of the United States or any State before any court or***
3 ***other authority of the United States or any state,” to --***
 - 4 ○ ***“discover or obtain applications or orders or other materials relating to***
5 ***electronic surveillance, or***
 - 6 ○ To discover, obtain, or suppress evidence or information obtained or
7 derived from electronic surveillance under [FISA]....”

8 50 U.S.C. § 1806(f) (emphasis added).

9 The italicized language extends section 1806(f)’s procedures to “any motion or request”
10 made by an aggrieved person “pursuant to any other statute or rule of the United States or any
11 State” to “discover or obtain applications or orders or other materials relating to electronic
12 surveillance.” *Id.* The plain meaning of this provision applies section 1806(f)’s requirements—i.e.,
13 that the court review (*ex parte* and *in camera*) the sensitive materials and determine the legality of
14 the government’s surveillance conduct—to motions or requests filed in an otherwise justiciable
15 civil suit against the government, including, for example, a “discovery” motion that might
16 implicate sensitive surveillance information. *See* 50 U.S.C. § 1806(f). As with the rest of section
17 1806(f), these requirements apply notwithstanding “any other law,” *id.*, including the government’s
18 invocation of the state secrets privilege.

19 2. Congress Specifically Incorporated Section 1806(f)’s Procedures In Civil
20 Liability Provisions Regarding Unlawful Government Surveillance.

21 The straightforward reading of 1806(f)’s plain language is consistent with the fact that
22 Congress specifically designated section 1806(f) as the “exclusive means” by which courts should
23 review sensitive evidence in electronic surveillance-related civil actions against the United States.
24 *See* 18 U.S.C. § 2712 (creating civil liability against the United States and incorporating section
25 1806(f) as the “the exclusive means by which materials [governed by that section] shall be
26 reviewed”).

27 Congress in 2001 supplemented FISA by creating a cause of action against the United
28 States for willful violations of the Electronic Communications Privacy Act (“ECPA”), the Wiretap
Act, and various subsections of FISA. *See* 18 U.S.C. § 2712 (enacted as part of the PATRIOT

1 Act). Section 2712 created an avenue for “any person” aggrieved by the willful, unlawful
2 collection, use or dissemination of information obtained in violation of these three statutes to seek
3 money damages against the United States. *Id.* Congress understood that section 2712’s expanded
4 liability provisions would create new opportunities for litigants to unearth sensitive surveillance
5 information. Accordingly, Congress explicitly provided in section 2712 that “notwithstanding any
6 other provision of law,” section 1806(f)’s secure procedures “shall be the exclusive means” by
7 which courts should evaluate sensitive evidence in surveillance-related civil suits against the
8 United States government arising under FISA section 1806, ECPA and the Wiretap Act. *See* 18
9 U.S.C. § 2712(b)(4).

10 The government’s argument that section 1806(f) applies only to criminal cases belies that
11 statutory language. Had Congress intended for section 1806(f)’s procedures to apply only to
12 criminal evidence-suppression motions, it would not have explicitly designated those procedures as
13 the “exclusive means” by which courts should handle sensitive evidence when plaintiffs seek to
14 vindicate the privacy rights that Congress incorporated in section 2712.

15 3. FISA’s Legislative History Confirms That Section 1806(f) Applies In Civil
16 Proceedings Against The Government.

17 FISA’s legislative history similarly shows that Congress intended for section 1806(f) to
18 apply in civil proceedings.

19 The House Judiciary Committee expressly envisioned that section 1806(f) would apply in
20 civil suits. In discussing the provision that became section 1806(f), the House Committee stated
21 that

22 [a] decision of illegality [of government surveillance] may not always arise in the context of
suppression; rather **it may, for example, arise incident to a discovery motion in a civil
trial.**

23 H.R. Rep. No. 95-1283(I), at 91 (emphasis added). To account for the procedural differences
24 between criminal proceedings (where the government can avoid disclosure simply by not using
25 surveillance materials to prosecute) and civil trials (where discovery rules could force the
26 government to disclose surveillance materials), the House Committee devised different procedures
27 to apply in each context. *Id.* at 90-93. The first set of procedures, which the House Committee
28 codified as subsection (f), would have applied in “those rare situations in which the Government

1 states it will use evidence obtained or derived from electronic surveillance,” *id.* at 90., such as a
 2 suppression motion in criminal proceedings.

3 The House Committee’s second set of procedures—which it codified as subsection (g)—
 4 would apply whenever the Attorney General certified that “*no information obtained or derived*
 5 *from an electronic surveillance has been or is to be used by the Government*” in the litigation—i.e.,
 6 situations where a criminal suppression motion would be unnecessary. *Id.* at 91 (emphasis added).
 7 This, the House explained, included situations where a party filed a “motion or request” to
 8 “discover or obtain” surveillance materials before “any court or other authority of the United States
 9 or a state” under “any law,” and those materials would implicate sensitive national security
 10 information. *Id.* at 10, 90-91.¹³ The House’s version of subsection (g) therefore envisioned that *in*
 11 *camera* and *ex parte* review could “arise incident to a discovery motion in a civil trial.” *Id.* at 91.

12 The Senate Committees, on the other hand, did not adopt a two-procedure model, but
 13 instead proposed a single-procedure model with language similar to the House’s bill. As the
 14 government points out, the Senate committees focused much of their discussion on safeguarding
 15 defendants’ rights through criminal suppression proceedings. Defs.’ Brf. at 38-42; S. Rep. No. 95-
 16 701, at 58; S. Rep. No. 95-604, at 57-59.

17 In drafting the final language of section 1806(f), however, the Joint House and Senate
 18 Conference Committee reconciled the two houses’ approaches to FISA’s judicial review
 19 procedures.¹⁴ The Committee’s compromise between those two approaches adopted the Senate’s

20 _____
 21 ¹³ Under subsection (g), civil disputes implicating electronic surveillance materials would have
 22 been considered *in camera* and *ex parte* by a “Special Court of Appeals.” The court would have
 disclosed, at its discretion, “materials relating to the surveillance” to the aggrieved party only if
 necessary to afford due process to that party. H.R. Rep. No. 95-1283(I), at 90-93.

23 ¹⁴ The Conference Committee described the difference between the House and Senate bills:

24 The Senate bill provided a single procedure for determining the legality of electronic
 25 surveillance in a subsequent *in camera* and *ex parte* proceeding ... [by contrast] the House
 26 amendments provided two separate procedures of determining the legality of electronic
 27 surveillance ... In criminal cases, there would be an *in camera* proceeding ... In civil suits,
 28 there would be an *in camera* and *ex parte* proceeding before a court of appeals; and the
 court would disclose... to the aggrieved person or his attorney materials relating to the
 surveillance only if necessary to afford due process to the aggrieved person.

1 single-procedure model while, crucially, retaining key language from the House bill’s subsection
 2 (g) that extended *ex post* court review procedures to civil actions.¹⁵

3 Declaring that “[t]he conferees agree that an *in camera* and *ex parte* proceeding is
 4 appropriate for determining the lawfulness of electronic surveillance in both criminal and civil
 5 cases,” the Conference Committee adopted section 1806(f), as the single, exclusive framework for
 6 handling sensitive evidence in *all* cases involving electronic foreign intelligence-gathering. H.R.
 7 Conf. Rep. No. 95-1720, at 32 (emphasis added). Shortly after the Committee reconciled FISA’s
 8 judicial review provisions, President Carter signed the statute into law. 124 *Cong. Rec.* 38,086
 9 (1978).

10 The legislative history therefore demonstrates that Congress expressly considered whether
 11 FISA’s judicial review procedures should apply to civil suits. Congress determined that they
 12 should, and established section 1806(f)’s procedures as the exclusive means courts should follow
 13 for “determinin[g] the lawfulness of electronic surveillance in both criminal and civil cases.” H.R.
 14 Conf. Rep. No. 95-1720, at 31.

15 4. FISA’s Historical Background Confirms That Section 1806(f)
 16 Applies In Civil Proceedings Against The Government.

17 Finally, the historical circumstances that led to FISA’s enactment further support that
 18 Congress meant section 1806(f)’s mandatory procedures to apply to civil suits against the

19 H.R. Conf. Rep. No. 95-1720, at 31-32.

20 ¹⁵ Indeed, the relevant portions of section 1806(f) closely mirror the House bill’s subsection (g),
 21 which expressly applied to civil proceedings:

22 **Relevant language in section 1806(f):** [*in camera* and *ex parte* judicial review triggered]
 23 “...whenever any motion or request is made by an aggrieved person pursuant to any other
 24 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...”

25 **House Report’s subsection (g):** [*in camera* and *ex parte* judicial review triggered]
 26 “...whenever any motion or request is made pursuant to any statute or rule of the United
 27 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 surveillance...”

28 H.R. Rep. No. 85-1283(I), at 10; 50 U.S.C. § 1806(f).

1 government. Few of the surveillance-related violations detailed in the Church Committee’s report
2 that led to FISA’s enactment involved the use of surveillance evidence in criminal proceedings.
3 *See Book II* at 10 (surveillance of Justice Douglas), 286 (surveillance of Civil Rights Movement
4 members), 12 (surveillance of journalists, politicians, and “numerous individuals and groups who
5 engaged in no criminal activity”); *also c.f.* H.R. Rep. No. 95-1283(I), at 24 n. 20 (“[I]n the area of
6 foreign intelligence surveillances . . . prosecution is rarely the result.”). Had Congress limited
7 section 1806(f) to criminal suppression motions, as the government argues, it would have created
8 in FISA a drastically inadequate response to the types of surveillance abuses that motivated
9 Congress to enact the statute.

10 Indeed, the Church Committee anticipated both that civil liability would be used to enforce
11 FISA, and that secure procedures would be required to resolve disputes involving sensitive
12 surveillance materials. The Committee recommended that

13 courts [should] be able to fashion discovery procedures, including inspection of materials in
14 chambers, and to issue orders as the interests of justice require, to allow plaintiffs with
15 substantial claims to uncover enough factual materials to argue their case, while protecting
16 the secrecy of governmental information in which there is a legitimate security interest.

17 *Book II* at 337. Given that Congress adopted FISA in direct response to the Church Committee’s
18 report, it is unsurprising that these procedures closely resemble those Congress adopted in section
19 1806(f).

20 *****

21 The government’s contention that it can avoid judicial review of its surveillance conduct
22 through a blanket (and unreviewable) invocation of state secrets is contrary to FISA’s plain
23 meaning and its legislative history—both of which make clear that FISA’s system of mandatory,
24 secure, *in camera* and *ex parte* judicial review, codified in section 1806(f), provides the exclusive
25 means for resolving civil disputes involving sensitive national security materials. The Court should
26 give effect to FISA’s procedural and substantive requirements, which together reflect Congress’s
27 effort to “strike a fair and just balance between protecting national security and safeguarding
28 personal liberties.” S. Rep. No. 94-1035, at 9.

1 **II. ALLOWING THE GOVERNMENT TO AVOID JUDICIAL REVIEW WOULD**
2 **UPEND THE POLITICAL BRANCHES' CAREFUL BALANCING OF NATIONAL**
3 **SECURITY AND CIVIL LIBERTIES INTERESTS IN FISA.**

4 FISA's requirement that courts employ secure procedures to review all national security-
5 related electronic surveillance, both before and after it takes place, represents the policy judgment
6 that the Executive and both houses of Congress reached together after four years of debate. In
7 arguing that the state secrets doctrine immunizes the Executive from *any* judicial oversight
8 whatsoever, the government effectively asks this Court to rebalance the political branches'
9 carefully considered—and legislatively enacted—policy decision.

10 As the House Permanent Select Committee on Intelligence remarked just before Congress
11 passed FISA,

12 the decision as to the standards governing when and how foreign intelligence
13 electronic surveillance should be conducted is and should be a political decision, in
14 the best sense of the term, because it involves the weighing of important public
15 policy concerns—civil liberties and the national security. Such a political decision is
16 one properly made by the political branches of Government together, not adopted by
17 one branch on its own and with no regard for the other. Under our Constitution
18 legislation is the embodiment of such political decisions.

19 H.R. Rep. No. 95-1283(I), at 21-22 (emphasis added).

20 Our constitutional system of checks and balances exists precisely to prevent the
21 Executive from unilaterally disregarding the types of inherently political, historically significant,
22 legislative balancing that FISA embodies. *See Youngstown*, 343 U.S. at 637-38 (Jackson, J.,
23 concurring) (“[W]hen the President takes measures incompatible with the expressed or implied
24 will of Congress, his power is at its lowest ebb, for then he can rely only upon his own
25 constitutional powers minus any constitutional powers of Congress over the matter ... Courts can
26 sustain exclusive Presidential control in such a case only by disabling Congress from acting upon
27 the subject”).

28 These checks and balances continue to apply in a time of war, and even with respect to
the government's war powers, which are “powers granted jointly to the President and Congress,”
Hamdan v. Rumsfeld, 548 U.S. 577, 591 (2006); *id.* at 593 n. 23. (“Whether or not the President
has independent power ... he may not disregard limitations that Congress has, in proper exercise
of its own war powers, placed on his powers”); *see also Little v. Barreme*, 6 U.S. 170, 178-79

1 (1804) (the President did not have the power to authorize searches and seizures by naval vessels
2 during wartime beyond specific statutory limitations imposed by Congress).

3 Thus, where the political branches have made a considered policy choice and prescribed not
4 just the availability of a cause of action but also the precise procedures by which litigation should
5 transpire, as they did in FISA, a common law rule cannot be used to circumvent that legislative
6 judgment. *United States v. Texas*, 507 U.S. 529, 534 (1993) (“Statutes which invade the common
7 law ... are to be read with a presumption favoring the retention of long-established and familiar
8 principles, *except* when a statutory purpose to the contrary is evident.”) (emphasis added);
9 *Dickerson v. United States*, 530 U.S. 428, 437 (2000) (“Congress retains the ultimate authority to
10 modify or set aside any judicially created rules of evidence and procedure that are not required by
11 the Constitution.”); *Kasza*, 133 F.3d 1159, 1165 (9th Cir. 1998) (describing the state secrets
12 doctrine as a common law evidentiary privilege).

13 In enacting FISA, the political branches collaborated through the legislative process to
14 carefully weigh two important, competing policy interests, and created procedures to protect both.
15 Our Constitution demands that any readjustment to FISA’s framework—whether to better preserve
16 government secrets or to better protect civil liberties—must likewise begin with the political
17 branches, through the legislative process. It is neither for the Executive alone, nor for this Court, to
18 engage in policy-making that belongs in the democratic process.

19 CONCLUSION

20 Accordingly, People For the American Way Foundation respectfully urges this Court to
21 grant Plaintiffs’ Motion for Partial Summary Judgment.

22
23 DATED: October 12, 2012

Respectfully submitted,

24
25 /s/ BABAK SIAVOSHY
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