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United States District Court  
For the Northern District of California

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

CAROLYN JEWEL, ET AL.,

Plaintiffs,

No. C 08-04373 JSW

v.

NATIONAL SECURITY AGENCY, ET AL.,

Defendants.

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VIRGINIA SHUBERT, ET AL.,

Plaintiffs,

No. C 07-00693 JSW

**ORDER**

v.

BARACK OBAMA, ET AL.,

Defendants.

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This matter comes before the Court upon consideration of the motion for partial summary judgment filed by Plaintiffs Carolyn Jewel, Tash Hepting, Young Boon Hicks, Erik Knutzen and Joice Walton, on behalf of themselves and all others similarly situated (collectively “*Jewel* Plaintiffs” or “Plaintiffs”) and the cross motion to dismiss and for summary judgment filed by Defendants National Security Agency, Keith B. Alexander, Michael V. Hayden, United States of America, George W. Bush, Richard B. Cheney, David S. Addington, the Department of Justice, Alberto R. Gonzales, John D. Ashcroft, John M. McConnell, John D. Negroponte, Michael B. Mukasey, Barack Obama, Eric Holder, Dennis C. Blair, John C. Yoo, and Jack L. Goldsmith (collectively “Defendants”).

1 This matter also comes before the Court in a related case upon consideration of the  
2 motion to dismiss and for summary judgment filed by Defendants Barack Obama, Keith B.  
3 Alexander, the United States of America, and Eric Holder against Plaintiffs Virginia Shubert,  
4 Noha Arafa, Sarah Dranoff, and Hilary Botein, on behalf of themselves and all others similarly  
5 situated (collectively “*Shubert* Plaintiffs” or “Plaintiffs”).

6 The *Jewel* Plaintiffs move for partial summary adjudication seeking to have the Court  
7 reject the Defendants’ state secret defense by arguing that Congress has displaced the state  
8 secretes privilege in this action by the statutory procedure prescribed by 50 U.S.C. § 1806(f) of  
9 the Foreign Intelligence Surveillance Act (“FISA”).

10 The *Shubert* Plaintiffs filed an amended complaint upon remand of the case and the  
11 *Shubert* Defendants move to dismiss for lack of subject matter jurisdiction on the basis that  
12 Congress did not waive sovereign immunity as to the FISA claim and incorporates by reference  
13 the arguments made in the *Jewel* Defendants’ motion.

14 Defendants in both related cases move to dismiss all of Plaintiffs’ statutory claims for  
15 lack of subject matter jurisdiction on the basis that Congress did not waive sovereign immunity  
16 as to the statutory claims. Defendants also move for summary judgment on all counts on the  
17 grounds that Plaintiffs’ claims would risk or require the disclosure of certain information that is  
18 properly protected by the statutory protections and the state secrets privilege asserted in this  
19 action by the Director of National Intelligence and by the National Security Agency.

20 Having thoroughly considered the parties’ papers, Defendants’ public and classified  
21 declarations, the relevant legal authority and the parties’ arguments, the Court GRANTS the  
22 *Jewel* Plaintiffs’ motion for partial summary adjudication by rejecting the state secrets defense  
23 as having been displaced by the statutory procedure prescribed in 50 U.S.C. § 1806(f) of FISA.  
24 In both related cases, the Court GRANTS Defendants’ motions to dismiss Plaintiffs’ statutory  
25 claims on the basis of sovereign immunity. The Court further finds that the parties have not  
26 addressed the viability of the only potentially remaining claims, the *Jewel* Plaintiffs’  
27 constitutional claims under the Fourth and First Amendments and the claim for violation of  
28 separation of powers and the *Shubert* Plaintiffs’ fourth cause of action for violation of the

1 Fourth Amendment. Accordingly, the Court RESERVES ruling on Defendants' motion for  
2 summary judgment on the remaining, non-statutory claims.

3 The Court shall require that the parties submit further briefing on the course of this  
4 litigation going forward.<sup>1</sup>

### 5 BACKGROUND

6 These cases are two in a series of many lawsuits arising from claims that the federal  
7 government, with the assistance of major telecommunications companies, conducted  
8 widespread warrantless dragnet communications surveillance of United States citizens  
9 following the attacks of September 11, 2001. Plaintiffs filed these putative class actions on  
10 behalf of themselves and a class of similarly situated persons described as "millions of ordinary  
11 Americans ... who use[] the phone system or the Internet" and "a class comprised of all present  
12 and future United States persons who have been or will be subject to electronic surveillance by  
13 the National Security Agency without a search warrant or court order since September 12,  
14 2001." (*Jewel* Complaint at ¶¶ 1, 7, and 9; *see also Shubert* Complaint at ¶ 1, 2, 20.)<sup>2</sup>

15 According to the allegations in the *Jewel* Complaint, a program of dragnet surveillance  
16 (the "Program") was first authorized by Executive Order of the President on October 4, 2001.  
17 (*Jewel* Complaint at ¶¶ 3, 39.) Plaintiffs allege that, in addition to eavesdropping on or reading  
18 specific communications, Defendants have "indiscriminately intercepted the communications  
19 content and obtained the communications records of millions of ordinary Americans as part of  
20 the Program authorized by the President." (*Id.* at ¶ 7.) The core component of the Program is a  
21 nationwide network of sophisticated communications surveillance devices attached to the key  
22 facilities of various telecommunications companies that carry Americans' Internet and

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23  
24 <sup>1</sup> The Court DENIES Defendants' request for a stay of this decision. The subject  
25 matter and legal questions presented by this lawsuit are timely. To the extent recent events  
26 involving the public disclosure of relevant, and previously classified, information bear on the  
future course of the litigation, the Court shall require that the parties submit further briefing  
to address these issues.

27 <sup>2</sup> For the remaining facts, the Court refers to the *Jewel* Complaint as it is more  
28 inclusive. The facts pertinent to the Court's analysis are also similarly alleged in the related  
*Shubert* Complaint which was originally filed May 17, 2006, as part of a multi-district  
litigation action also remanded to this Court.

1 telephone communications. (*Id.* at ¶¶ 8, 42.) Plaintiffs allege that Defendants have unlawfully  
2 solicited and obtained the private telephone and internal transactional records of millions of  
3 customers of the telecommunications companies, including records indicating who the  
4 customers communicated with, when those communications took place and for how long,  
5 among other sensitive information. Plaintiffs allege these records include both domestic and  
6 international communications. (*Id.* at ¶ 10.) Plaintiffs sue Defendants “to enjoin their unlawful  
7 acquisition of the communications and records of Plaintiffs and class members, to require the  
8 inventory and destruction of those that have already been seized, and to obtain appropriate  
9 statutory, actual, and punitive damages to deter future illegal surveillance.” (*Id.* at ¶ 14.)

10 The *Jewel* Plaintiffs allege seventeen counts against Defendants for: violation of the  
11 Fourth Amendment (counts 1 and 2); violation of the First Amendment (counts 3 and 4);  
12 violation of FISA, 50 U.S.C. §§ 1809, 1810 (counts 5 and 6); violation of the Wiretap Act, 18  
13 U.S.C. § 2511(1)(a), (b), and (d) (counts 7 through 9); violation of the Electronic  
14 Communications Privacy Act or the Stored Communications Act, 18 U.S.C. § 2703(a), (b), and  
15 (c) (counts 10 through 15); violation of the Administrative Procedure Act, 5 U.S.C. § 701 *et*  
16 *seq.* (count 16); and violation of separation of powers (count 17). The *Shubert* Plaintiffs allege  
17 four causes of action for violations of FISA, the Wiretap Act, the Stored Communications Act,  
18 and the Fourth Amendment.

19 The *Jewel* Complaint was originally filed on September 18, 2008. Defendants moved to  
20 dismiss and alternatively sought summary judgment as to all claims. Defendants contended that  
21 the Court lacked jurisdiction over the statutory claims because the government had not waived  
22 its sovereign immunity. Defendants moved for summary judgment on the remaining claims  
23 based on the argument that the information necessary to litigate the claims was properly subject  
24 to the state secrets privilege. The district court dismissed the claims without leave to amend  
25 based on its finding that Plaintiffs failed to make out the *prima facie* allegations necessary to  
26 establish standing.

27 On appeal, the Ninth Circuit Court of Appeals reversed the district court’s dismissal of  
28 the *Jewel* Complaint on standing grounds. The Ninth Circuit Court of Appeals remanded “with

1 instructions to consider, among other claims and defenses, whether the government’s assertion  
2 that the state secrets privilege bars this litigation.” *Jewel v. National Security Agency*, 673 F.3d  
3 902, 913-14 (9th Cir. 2011). Upon remand, Plaintiffs filed their motion for partial summary  
4 adjudication urging the Court to reject Defendants’ state secret defense. Defendants cross-  
5 moved to dismiss on the basis of sovereign immunity for the statutory claims and for summary  
6 judgment on the assertion of the state secrets privilege.

7 The Court will address additional facts as necessary in the remainder of this Order.

## 8 ANALYSIS

### 9 A. Applicable Legal Standards.

#### 10 1. Motion to Dismiss.

11 A motion to dismiss is proper under Federal Rule of Civil Procedure 12(b)(6) where the  
12 pleadings fail to state a claim upon which relief can be granted. The Court’s “inquiry is limited  
13 to the allegations in the complaint, which are accepted as true and construed in the light most  
14 favorable to the plaintiff.” *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008).  
15 Even under the liberal pleading standard of Federal Rule of Civil Procedure 8(a)(2), “a  
16 plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than  
17 labels and conclusions, and a formulaic recitation of the elements of a cause of action will not  
18 do.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citing *Papasan v. Allain*, 478  
19 U.S. 265, 286 (1986)). Pursuant to *Twombly*, a plaintiff must not merely allege conduct that is  
20 conceivable but must instead allege “enough facts to state a claim to relief that is plausible on  
21 its face.” *Id.* at 570. “A claim has facial plausibility when the plaintiff pleads factual content  
22 that allows the court to draw the reasonable inference that the defendant is liable for the  
23 misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at  
24 556).

#### 25 2. Motion for Summary Judgment.

26 A principal purpose of the summary judgment procedure is to identify and dispose of  
27 factually unsupported claims. *Celotex Corp. v. Cattrett*, 477 U.S. 317, 323-24 (1986).  
28 Summary judgment is proper when the “pleadings, depositions, answers to interrogatories, and

1 admissions on file, together with the affidavits, if any, show that there is no genuine issue as to  
2 any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R.  
3 Civ. P. 56(a). “In considering a motion for summary judgment, the court may not weigh the  
4 evidence or make credibility determinations, and is required to draw all inferences in a light  
5 most favorable to the non-moving party.” *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir.  
6 1997).

7 The party moving for summary judgment bears the initial burden of identifying those  
8 portions of the pleadings, discovery, and affidavits that demonstrate the absence of a genuine  
9 issue of material fact. *Celotex*, 477 U.S. at 323; *see also* Fed. R. Civ. P. 56(c). An issue of fact  
10 is “genuine” only if there is sufficient evidence for a reasonable fact finder to find for the non-  
11 moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). A fact is  
12 “material” if it may affect the outcome of the case. *Id.* at 248. Once the moving party meets its  
13 initial burden, the non-moving party must go beyond the pleadings and, by its own evidence,  
14 “set forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e).

15 In order to make this showing, the non-moving party must “identify with reasonable  
16 particularity the evidence that precludes summary judgment.” *Keenan v. Allan*, 91 F.3d 1275,  
17 1279 (9th Cir. 1996) (quoting *Richards v. Combined Ins. Co.*, 55 F.3d 247, 251 (7th Cir. 1995)  
18 (stating that it is not a district court’s task to “scour the record in search of a genuine issue of  
19 triable fact”); *see also* Fed. R. Civ. P. 56(e). If the non-moving party fails to point to evidence  
20 precluding summary judgment, the moving party is entitled to judgment as a matter of law.  
21 *Celotex*, 477 U.S. at 323; Fed. R. Civ. P. 56(e)(3).

22 **B. State Secrets Privilege.**

23 The state secrets privilege is a common law privilege that permits the government to bar  
24 the disclosure of information if “there is a reasonable danger” that disclosure will “expose  
25 military matters which, in the interest of national security, should not be divulged.” *United*  
26 *States v. Reynolds*, 345 U.S. 1, 10 (1953). The state secrets privilege strikes a delicate balance  
27 “between fundamental principles of our liberty, including justice, transparency, accountability  
28

1 and national security.” *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1073 (9th Cir.  
2 2010).

3 The state secrets privilege has two applications: as a rule of evidentiary privilege,  
4 barring only the secret evidence from exposure during litigation, and as a rule of non-  
5 justiciability, when the subject matter of the lawsuit is itself a state secret, necessitating  
6 dismissal. *See ACLU v. National Security Agency*, 493 F.3d 644, 650 n.2 (6th Cir. 2007). The  
7 first application of evidentiary withholding can serve to remove only certain specific pieces of  
8 evidence or can be applied to compel the removal of a sufficiently broad swath of evidence  
9 which then has the consequence of requiring dismissal of the entire suit. Such a dismissal may  
10 be necessitated by the instances in which the removal of evidence disables a plaintiff from the  
11 ability to establish the *prima facie* elements of a claim without resort to privileged information  
12 or instances in which the removed evidence bars the defendant from establishing a defense. *See*  
13 *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998).

14 The analysis of whether the state secrets privilege applies involves three distinct steps.  
15 First, the Court must ascertain whether the procedural requirements for invoking the privilege  
16 have been satisfied. Second, the Court must make an independent determination whether the  
17 information is privileged. In determining whether the privilege attaches, the Court may  
18 consider a party’s need for access to the allegedly privileged materials. *See Reynolds*, 345 U.S.  
19 at 11. Lastly, the “ultimate question to be resolved is how the matter should proceed in light of  
20 the successful privilege claim.” *El-Masri v. United States*, 479 F.3d 296, 304 (4th Cir. 2007).

21 With regard to the first step, to ascertain whether the procedural requirements have been  
22 met, the assertion of the privilege belongs exclusively to the government. The head of the  
23 department which has control over the matter must properly assert a formal and timely claim of  
24 privilege, after actual personal consideration by that officer. *See Reynolds*, 345 U.S. at 7-8.  
25 Such an invocation must be made only after “serious, considered judgment, not simply [as] an  
26 administrative formality.” *United States v. W.R. Grace*, 526 F.3d 499, 507-08 (9th Cir. 2008)  
27 (en banc). “The formal claim must reflect the certifying official’s personal judgment ... [and]  
28 must be presented in sufficient detail for the court to make an independent determination of the

1 validity of the claim of privilege and the scope of the evidence subject to the privilege.”

2 *Jeppesen*, 614 F.3d at 1080.

3         Second, the reviewing court must “make an independent determination whether the  
4 information is privileged.” *Al-Haramain*, 507 F.3d at 1202. The court must “sustain a claim of  
5 privilege when it is satisfied, ‘from all the circumstances of the case, that there is a reasonable  
6 danger that compulsion of the evidence will expose ... matters which, in the interest of national  
7 security, should not be divulged.’” *Jeppesen*, 614 F.3d at 1081 (quoting *Reynolds*, 345 U.S. at  
8 10). In making this determination, the Court must strike the appropriate balance “between  
9 protecting national security matters and preserving an open court system.” *Al-Haramain*, 507  
10 F.3d at 1203. “This inquiry is a difficult one, for it pits the judiciary’s search for truth against  
11 the Executive’s duty to maintain the nation’s security.” *El-Masri*, 479 F.3d at 304. In  
12 evaluating the need for secrecy, the court must defer to the Executive on matters of foreign  
13 policy and national security. *See Jeppesen*, 614 F.3d at 1081-82. However, the assertion of the  
14 state secrets doctrine does not “represent a complete surrender of judicial control over access to  
15 the courts.” *El-Masri*, 479 F.3d at 312. Rather, in order to ensure that the doctrine is not  
16 asserted more frequently and sweepingly than necessary, “it is essential that the courts continue  
17 critically to examine instances of its invocation.” *Ellsberg v. Mitchell*, 709 F.2d 51, 58 (D.C.  
18 Cir. 1983). However, should the court find that the materials must not be divulged, “the  
19 evidence is absolutely privileged, irrespective of the plaintiffs’ countervailing need for it.” *See*  
20 *Jeppeson*, 614 F.3d at 1081 (citing *Reynolds*, 345 U.S. at 11).

21         Lastly, the third step in the analysis requires that the court determine how the matter  
22 should proceed once it has sustained a claim of privilege. “The court must assess whether it is  
23 feasible for the litigation to proceed without the protected evidence and, if so, how.” *Jeppesen*,  
24 614 F.3d at 1082. When the government successfully invokes the state secrets privilege, “the  
25 evidence is completely removed from the case.” *Kasza*, 133 F.3d at 1166. The court is then  
26 tasked with disentangling the nonsensitive information from the privileged evidence. Often,  
27 after the privileged evidence is excluded, “the case will proceed accordingly, with no  
28 consequences save those resulting from the loss of evidence.” *Al-Haramain*, 507 F.3d at 1204

1 (quoting *Ellsberg*, 709 F.3d at 64). However, there “will be occasions when, as a practical  
2 matter, secret and nonsecret information cannot be separated. In some cases, therefore, ‘it is  
3 appropriate that the courts restrict the parties’ access not only to evidence which itself risks the  
4 disclosure of a state secret, but also those pieces of evidence or areas of questioning which press  
5 so closely upon highly sensitive material that they create a high risk of inadvertent or indirect  
6 disclosures.’” *Jeppesen*, 614 F.3d at 1082 (quoting *Bareford v. Gen. Dynamics Corp.*, 973 F.2d  
7 1138, 1143-44 (5th Cir. 1992); *see also Kasza*, 133 F.3d at 1166 (“[I]f seemingly innocuous  
8 information is part of a . . . mosaic, the state secrets privilege may be invoked to bar its  
9 disclosure and the court cannot order the government to disentangle this information from other  
10 [*i.e.*, secret] information.”)

11       Thereafter, the case may proceed with the omission of the secret or closely entangled  
12 evidence. Alternatively, if application of the state secrets bars too much, the court may be  
13 required to dismiss the action in its entirety. Such instances include when, without the secret  
14 evidence, a plaintiff is unable to prove the *prima facie* elements of a claim with nonprivileged  
15 evidence. *See Kasza*, 133 F.3d at 1166. Or the privilege may apply to bar information that  
16 would otherwise give the defendant a valid defense to the claim, thus requiring dismissal. *See*  
17 *id.* Lastly, the court may be compelled to dismiss when, although the claims and defenses may  
18 be stated without reference to privileged evidence, “it may be impossible to proceed with the  
19 litigation because – privileged evidence being inseparable from nonprivileged information that  
20 will be necessary to the claims or defenses – litigating the case to a judgment on the merits  
21 would present an unacceptable risk of disclosing state secrets.” *Jeppesen*, 614 F.3d at 1083  
22 (citations omitted); *see also Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 279-80 (4th Cir.  
23 1980) (en banc) (per curiam) (Phillips, J., specially concurring and dissenting) (concluding that  
24 “litigation should be entirely foreclosed at the outset by dismissal of the action” if it appears  
25 that “the danger of inadvertent compromise of the protected state secrets outweighs the public  
26 and private interests in attempting formally to resolve the dispute while honoring the  
27 privilege”).  
28

1           Alternatively, the state secrets privilege may be invoked to bar litigation of the matter in  
2 its entirety where “the trial of which would inevitably lead to the disclosure of matters which  
3 the law itself regards as confidential, and respecting which it will not allow the confidence to be  
4 violated.” *Totten v. United States*, 92 U.S. 105, 107 (1875). Where the very subject matter of  
5 the lawsuit is a matter of state secret, the action must be dismissed without reaching the  
6 question of evidence. *See Al-Haramain*, 507 F.3d at 1197 (citations omitted); *see also Sterling*  
7 *v. Tenet*, 416 F.3d 338, 345 (4th Cir. 2005) (holding that dismissal is proper where “sensitive  
8 military secrets will be so central to the subject matter of the litigation that any attempt to  
9 proceed will threaten disclosure of the privileged matters.”)

10           Here, having reviewed the materials submitted for review and having considered the  
11 claims alleged and the record as a whole, the Court finds that Defendants have timely invoked  
12 the state secrets doctrine. Defendants contend that Plaintiffs’ lawsuits should be dismissed as a  
13 result of the application of the privilege because the state secrets information is so central to the  
14 subject matter of the suit that permitting further proceedings would jeopardize national security.  
15 Given the multiple public disclosures of information regarding the surveillance program, the  
16 Court does not find that the very subject matter of the suits constitutes a state secret. Just as in  
17 *Al-Haramain*, and based significantly on the same set of facts in the record here, the Court finds  
18 that although there are certainly details that the government has not yet disclosed,

19           because of the voluntary disclosures made by various officials since December 2005,  
20 the nature and purpose of the [Terrorist Surveillance Program], the ‘type’ of persons  
21 it targeted, and even some of its procedures are not state secrets. In other words, the  
22 government’s many attempts to assuage citizens’ fears that they have not been  
surveilled now doom the government’s assertion that the very subject matter of this  
litigation, the existence of a warrantless surveillance program, is barred by the state  
secrets privilege.

23 507 F.3d at 1200; *see also Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 986-88, 991 (N.D. Cal.  
24 2006) (holding that the existence of a program of monitoring the contents of certain telephone  
25 communications was no longer a state secret as a result of the public statements made by the  
26 President and the Attorney General). Accordingly, the Court does not find dismissal  
27 appropriate based on the subject matter of the suits being a state secret. *See Totten*, 92 U.S. at  
28 107.

1           However, here, the Court finds there would be significant evidence that would be  
2 properly excluded should the case proceed. The Court has thoroughly and critically reviewed  
3 Defendants' public and classified declarations and is persuaded that the evidence submitted thus  
4 far that the government seeks to protect from disclosure contain valid state secrets "which, in  
5 the interest of national security, should not be divulged." *Reynolds*, 345 U.S. at 10; *see also*  
6 *Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899, 917 (N.D. Ill. 2006) (finding state secrets privilege  
7 applies because requiring the telephone company to confirm or deny whether it had disclosed  
8 large quantities of telephone records to the federal government could give adversaries valuable  
9 insight into the government's intelligence programs and "requiring such disclosures would  
10 therefore adversely affect our national security" and "are barred by the state secrets privilege").  
11 The Court finds the state secrets privilege would apply to bar disclosure of significant materials  
12 relating to the alleged Program. However, it may not set out precisely which matters the  
13 privilege covers lest the Court jeopardize the secrets it is bound to protect. *See Jeppesen*, 614  
14 F.3d at 1086 (citing *Black v. United States*, 62 F.3d 1115, 1119 (8th Cir. 1995) ("Care in  
15 protecting state secrets is necessary not only during a court's review of the evidence, but in its  
16 subsequent treatment of the question in any holding; a properly phrased opinion should not strip  
17 the veil from state secrets even if ambiguity results in a loss of focus and clarity.")).

18           Having concluded that Defendants have successfully invoked the state secrets privilege  
19 with regard to significant evidence tending to confirm or negate the factual allegations in  
20 Plaintiffs' complaints, the question the Court must address is how to proceed. If the state  
21 secrets defense applies to bar disclosure altogether of much of the evidence sought in this suit,  
22 Plaintiffs may neither be able to establish standing to sue nor state a *prima facie* case.  
23 Defendants would similarly be without accessible evidence to establish a defense without  
24 disclosure of the evidence subject to the privilege. *See Kasza*, 133 F.3d at 1166. However, the  
25 Court finds that, as a matter of law, the FISA procedural mechanism prescribed under 50 U.S.C.  
26 § 1806(f) preempts application of the state secrets privilege.

1     **C.     FISA and Preemption.**

2             On remand, the Court of Appeals has required this Court to consider “the government’s  
3     assertion that the state secrets privilege bars this litigation.” *Jewel*, 673 F.3d at 913-14. The  
4     Ninth Circuit, in a previous matter relating to the Program, also remanded to the district court to  
5     consider “whether FISA preempts the state secrets privilege and for any proceedings collateral  
6     to that determination.” *Al-Haramain*, 507 F.3d at 1206. In its opinion on remand in the *Al-*  
7     *Haramain* matter, this district court found that “FISA preempts the state secrets privilege in  
8     connection with electronic surveillance for intelligence purposes ...” *In re National Security*  
9     *Agency Telecommunications Records Litigation* (“*In re N.S.A. Telecommunication Records*  
10    *Litig.*”), 564 F. Supp. 2d 1109, 1111 (N.D. Cal. 2008). The undersigned agrees and finds that  
11    the *in camera* review procedure in FISA applies and preempts the determination of evidentiary  
12    preclusion under the state secrets doctrine. Section 1806(f) of FISA displaces the state secrets  
13    privilege in cases in which electronic surveillance yields potentially sensitive evidence by  
14    providing secure procedures under which courts can consider national security evidence that the  
15    application of the state secrets privilege would otherwise summarily exclude.

16             **1.     FISA.**

17             Congress enacted FISA to curb the problem of unchecked domestic surveillance and  
18    intelligence-gathering abuses undertaken by the executive branch in the post-World War II era.  
19    *See* S. Rep. No. 95-604, at 8 (Congress enacted FISA in response to “revelations that  
20    warrantless surveillance in the name of national security ha[d] been seriously abused.”). The  
21    misconduct was exposed by a Congressional task force known as the Church Committee, which  
22    produced a series of investigative reports documenting unlawful surveillance pursued in the  
23    name of national security. The Church Committee concluded that “the massive record of  
24    intelligence abuses over the years” had “undermined the constitutional rights of citizens . . .  
25    primarily because checks and balances designed by the framers of the Constitution to assure  
26    accountability have not been applied.” *Book II: Intelligence Activities and the Rights of*  
27    *Americans*, S. Rep. No. 94-755, at 291. Accordingly, the Committee urged “fundamental  
28

1 reform,” that would “cover[] the field by . . . provid[ing] the exclusive legal authority for  
2 domestic security activities,” including “warrantless electronic surveillance.” *Id.* at 299.

3 Under FISA, before engaging in domestic surveillance, the Executive branch must seek  
4 authorization from a special court charged with finding probable cause that the target is an  
5 agent of a foreign power as defined by the statute. *See* 50 U.S.C. §§ 1804-05. FISA also  
6 establishes a system of review of Executive conduct by setting out specific procedures courts  
7 must follow to evaluate evidence where disclosure could endanger national security. *See* 50  
8 U.S.C. § 1806(f).

9 Section 1806(f) reads in pertinent part:

10 ... whenever any motion or request is made by an aggrieved person pursuant to any  
11 other statute or rule of the United States or any State . . . to discovery or obtain  
12 applications or orders or other materials relating to electronic surveillance . . . the  
13 United States district court ... shall, notwithstanding any other law, if the Attorney  
14 General files an affidavit under oath that disclosure or an adversary hearing would  
harm the national security of the United States, review in camera and ex parte the  
application, order, and such other materials relating to the surveillance as may be  
necessary to determine whether the surveillance of the aggrieved person was  
lawfully authorized and conducted.

15 *Id.*

16 Section 1806(f) of FISA applies “notwithstanding any other law” and is the “exclusive”  
17 procedure for reviewing sensitive surveillance materials gathered by the Executive under FISA  
18 and other surveillance statutes. *See id.*; *see also* 18 U.S.C. § 2712(b)(4) (designating Section  
19 1806(f) as “the exclusive means by which materials [designated as sensitive by the government]  
20 shall be reviewed” in suits against the United States under FISA, the Wiretap Act, and the  
21 Electronic Privacy Protection Act). Once invoked, the review procedure requires courts to  
22 review the potentially sensitive surveillance materials *ex parte* and *in camera*. 50 U.S.C.  
23 § 1806(f).

24 The purpose of this provision is to permit courts to determine whether any particular  
25 surveillance was lawfully authorized and executed. The provision, which permits courts to  
26 review the potentially sensitive materials, strikes a balance between executive action and  
27 judicial oversight. The legislative history makes clear that Congress intended to formulate a  
28 balanced legislative solution to the national security problems raised in litigation over possibly

1 unlawful executive surveillance programs. The Senate Judiciary Committee explained that  
2 litigants were not to evade the provision by invoking other laws or jurisprudential doctrines:

3       The Committee wishes to make clear that the procedures set in [subsection  
4       1806(f)] apply whatever the underlying rule or statute referred to in [a party's]  
5       motion. This is necessary to prevent the carefully drawn procedures in [section  
6       1806(f)] from being bypassed by the inventive litigant using a new statute, rule  
7       or judicial construction.

8 S. Rep. No. 95-604, at 57; *see also* S. Rep. No. 95-701, at 63 (“When the procedure is so  
9 triggered, however, the Government must make available to the court a copy of the court order  
10 and accompanying declaration upon which the surveillance was based.”); *see also* H. Rep. No.  
11 95-1283(I), at 91 (when the legality of surveillance is at issue, “it is this procedure  
12 ‘notwithstanding any other law’ that must be used to resolve the question”).

## 13       **2. Preemption.**

14       Based on the legislative history and the plain language of FISA, this Court finds that  
15 FISA preempts the common law doctrine of the state secrets privilege. Federal common law  
16 applies “[u]ntil the field has been made the subject of comprehensive legislation.” *City of*  
17 *Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 314 (1981). When it passed FISA, Congress  
18 expressly indicated its intention to replace judge-made federal common law rules:

19       [T]he development of the law regulating electronic surveillance for national  
20 security purposes has been uneven and inconclusive. This is to be expected where  
21 the development is left to the judicial branch in an area where cases do not  
22 regularly come before it. Moreover, the development of standards and restrictions  
23 by the judiciary with respect to electronic surveillance for foreign intelligence  
24 purposes accomplished through case law threatens both civil liberties and the  
25 national security because the development occurs generally in ignorance of the  
26 facts, circumstances, and techniques of foreign intelligence electronic surveillance  
27 not present in the particular case before the court . . . . [T]he tiny window to this  
28 area which a particular case affords provides inadequate light by which judges  
may be relied upon to develop case law which adequately balances the rights of  
privacy and national security.

H. Rep. No. 95-1283, at 21.

It is clear Congress intended for FISA to displace federal common law rules such as the  
state secrets privilege with regard to matters within FISA’s purview. The legislative history  
indicates that Congress intended to “occupy the field through the establishment of a  
comprehensive regulatory program supervised by an expert administrative agency.”  
*Milwaukee*, 452 U.S. at 317. Through explicit provisions of FISA, Congress “established a

1 comprehensive, detailed program to regulate foreign intelligence surveillance in the domestic  
2 context.” *In re N.S.A. Telecommunications Records Litig.*, 564 F. Supp. 2d at 1118. In  
3 particular, § 1806(f) “is Congress’s specific and detailed description for how courts should  
4 handle claims by the government that the disclosure of material relating to or derived from  
5 electronic surveillance would harm national security.” *Id.* at 1119. The specific description  
6 leaves no room for application of the state secrets privilege and is, in effect, a “codification of  
7 the state secrets privilege for purposes of relevant cases under FISA, as modified to reflect  
8 Congress’s precise directive to the federal courts for the handling of materials and information  
9 with purported national security implications.” *Id.* The Court agrees that “FISA preempts or  
10 displaces the state secrets privilege, but only in cases within the reach of its provisions.” *Id.* at  
11 1124. As in *In re National Security Agency Telecommunications Records Litigation*, Plaintiffs’  
12 allegations here of warrantless wiretapping and surveillance programs similarly fall within  
13 those provisions.

14 However, because the Court finds that Defendants have not waived sovereign immunity  
15 for its statutory claims, Plaintiffs’ claims under FISA fail.

16 **D. Waiver of Sovereign Immunity for Plaintiffs’ Statutory Claims.**

17 Defendants also move to dismiss Plaintiffs’ statutory claims on the grounds that  
18 sovereign immunity has not been waived. “Absent a waiver, sovereign immunity shields the  
19 Federal Government and its agencies from suit.” *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994);  
20 *see also United States v. Mitchell*, 463 U.S. 206, 212 (1983) (“It is axiomatic that the United  
21 States may not be sued without its consent and that the existence of consent is a prerequisite for  
22 jurisdiction.”). Plaintiffs bear the burden to establish a waiver of sovereign immunity. *Prescott*  
23 *v. United States*, 973 F.2d 696, 701 (9th Cir. 1992)

24 **1. Statutory Claims for Damages.**

25 Plaintiffs bring statutory claims for damages under FISA, the Wiretap Act, and the  
26 Stored Communications Act (“SCA”). Section 223 of the Patriot Act amended the SCA and  
27 added the following provision which waives sovereign immunity for three specific provisions of  
28 FISA and more generally for violations of the SCA and the Wiretap Act.

1 Any person who is aggrieved by any willful violation of this chapter or of  
2 chapter 119 of this title or of sections 106(a), 305(a), or 405(a) of the Foreign  
Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 *et seq.*) may commence  
3 an action in United States District Court against the United States to recover  
money damages.

4 18 U.S.C. § 2712. *See* Pub. L. No. 107-56 § 223, 115 Stat. 272 (2001).

5 Plaintiffs do not bring any claims under these three enumerated provisions of FISA.  
6 Plaintiffs sue Defendants for violating 50 U.S.C. § 1809, and they rely on 50 U.S.C. § 1810 to  
7 provide a waiver of sovereign immunity in order to sue for damages. However, as Plaintiffs  
8 concede, the Ninth Circuit has explicitly rejected the proposition that § 1810 may be construed  
9 as a waiver of sovereign immunity to sue for damages. *See Al-Haramain v. Obama*, 690 F.3d  
10 1089 (9th Cir. 2012) (holding that 50 U.S.C. § 1810 does not waive sovereign immunity against  
11 the United States for damages). Therefore, Plaintiffs' claim for damages under FISA against  
12 the United States and against the individual federal defendants in their official capacity is  
13 barred.

14 However, the waiver of sovereign immunity for damages claims against the United  
15 States contained with § 2712 for claims under the SCA and the Wiretap Act is much broader.  
16 While the waiver in § 2712 is limited to three specific provisions of FISA, the waiver for claims  
17 under the SCA and the Wiretap Act is not similarly restricted to individual provisions within  
18 those statutes. Nevertheless, Defendants contend that the waiver is limited to claims under the  
19 SCA and the Wiretap Act for the use and disclosure of information obtained from electronic  
20 surveillance, not just its collection. Defendants argue that plain language and the legislative  
21 history of Section 223 of the Patriot Act supports this limitation. The Court finds this argument  
22 unpersuasive.

23 In construing the provisions of a statute, courts must “first look to the language of the  
24 statute to determine whether it has a plain meaning.” *Satterfield v. Simon & Schuster, Inc.*, 569  
25 F.3d 946, 951 (9th Cir. 2009); *see also United States v. Chaney*, 581 F.3d 1123, 1126 (9th Cir.  
26 2009) (“It is well settled that statutory interpretation begins with the plain language of the  
27 statute.”) (internal quotation marks and citation omitted). “The preeminent canon of statutory  
28 interpretation requires us to presume that [the] legislature says in a statute what it means and

1 means in a statute what it says there. Thus, our inquiry begins with the statutory text, and ends  
2 there as well if the text is unambiguous.” *McDonald v. Sun Oil Co.*, 548 F.3d 774, 780 (9th Cir.  
3 2008) (quoting *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004)) (internal  
4 quotation marks omitted).

5 The plain language of § 2712(a) does not limit the waiver of sovereign immunity for  
6 damage claims under the SCA and the Wiretap Act to claims for the use and disclosure of  
7 information. In § 2712(a), Congress specifically limited the waiver for damage claims to three  
8 specific sections of FISA and easily could have done the same with respect to the Wiretap Act  
9 and the SCA. The fact that Congress did not similarly limit the waiver to specific sections  
10 within the Wiretap Act and the SCA has significance. To ignore this distinction would be to  
11 ignore the plain language and structure of the statute. *Cf. TRW Inc. v. Andrews*, 534 U.S. 19, 31  
12 (2001) (“It is a cardinal principle of statutory construction that a statute ought, upon the whole,  
13 to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous,  
14 void, or insignificant.”) (internal quotation marks and citation omitted); *United States v. Novak*,  
15 476 F.3d 1041, 1048 (9th Cir. 2007) (“We avoid whenever possible statutory interpretations  
16 that result in superfluous language.”).

17 Defendants argue that reading Section 223 of the Patriot Act as a whole demonstrates  
18 that the waiver of sovereign immunity by Section 2712(a) is limited to claims regarding the use  
19 and disclosure of information. In support of this argument, Defendants rely upon the fact that  
20 Section 223 was titled “Civil Liability for Certain Unauthorized Disclosures” and upon the fact  
21 that other provisions of Section 223 specifically addressed claims for the use and disclosure of  
22 information. However, the Court finds this argument unpersuasive. Neither the title of the  
23 Section 223, nor the fact that Section 223 includes additional provisions that address claims  
24 regarding the use and disclosure of information, alters the clear and unambiguous statutory  
25 language. Again, the Court emphasizes that Section 2712 explicitly limits the waiver to specific  
26 provisions of FISA and does not limit the waiver to specific provisions within the Wiretap Act  
27 or the SCA. If Congress intended to limit the waiver to claims regarding the use and disclosure  
28 claims within all three statutes, it could have done so. The Court cannot ignore the fact that

1 Congress chose to do so with respect to one of these statutes and did not with respect to the  
2 other two. *See Botosan v. Paul McNally Realty*, 216 F.3d 827, 832 (9th Cir. 2000) (“The  
3 incorporation of one statutory provision to the exclusion of another must be presumed  
4 intentional under the statutory canon of *expressio unius*.”)

5 Next, Defendants invite the Court to read limitations into the waiver of sovereign  
6 immunity from the legislative history of this statutory provision. “[E]ven where the plain  
7 language appears to settle the question, we may nonetheless look to the legislative history to  
8 determine whether there is clearly expressed legislative intention contrary to that language that  
9 overcomes the strong presumption that Congress has expressed its intent in the language it  
10 chose.” *Amalgamated Transit Union Local 1309, AFL-CIO v. Laidlaw Transit Services, Inc.*,  
11 435 F.3d 1140, 1146 (9th Cir. 2006). In addition, the Ninth Circuit has stated that the “plain  
12 meaning rule . . . does not require a court to operate under an artificially induced sense of  
13 amnesia about the purpose of legislation, or to turn a blind eye towards significant evidence of  
14 Congressional intent in the legislative history.” *Amalgamated Transit Union Local 1309, AFL-*  
15 *CIO v. Laidlaw Transit Services, Inc.*, 448 F.3d 1092, 1093 (9th Cir. 2006) (quoting *Heppner v.*  
16 *Aleyeska Pipeline Serv. Co.*, 665 F.2d 868, 871 (9th Cir. 1981)). Upon review of the legislative  
17 history, the Court does not find “clearly expressed legislative intention contrary to that language  
18 that overcomes the strong presumption that Congress has expressed its intent in the language it  
19 chose.” *Amalgamated Transit Union*, 435 F.3d at 1146. Accordingly, the Court finds that  
20 Section 2712 waives sovereign immunity for Plaintiffs’ claims for damages under the Wiretap  
21 Act and the SCA.

## 22 2. Statutory Claims for Injunctive Relief.

23 Section 2712 is inapplicable to Plaintiffs’ claims for injunctive relief. Section 2712 only  
24 applies to claims for damages. Therefore, Plaintiffs must turn elsewhere to establish a waiver of  
25 sovereign immunity. To do so, Plaintiffs rely on Section 702 of the Administrative Procedure  
26 Act (“APA”) and on the common law *ultra vires* exception set forth in *Larson v. Domestic &*  
27 *Foreign Commerce Corporation*, 337 U.S. 682 (1949).

28

a. **The Administrative Procedures Act.**

Section 702 of the APA provides:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party . . . . Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C § 702. Defendants contend that Section 702 is inapplicable because it does not “confer[] authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.” *See id.* Defendants argue that Section 223 of the Patriot Act is such a statute.

“[W]hen Congress has dealt in particularity with a claim and [has] intended a specified remedy’ – including its exceptions – to be exclusive, that is the end of the matter; the APA does not undo the judgment.” *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, --- U.S. ---, 132 S. Ct. 2199, 2205 (2012) (quoting *Block v. North Dakota ex rel. Board of Univ. and School Lands*, 461 U.S. 273, 286, n.22 (1976)) (“*Pottawatomi Indians*”). Section 223 of the Patriot Act amended the Wiretap Act, the SCA, and FISA to allow suits against the United States for damages. The question presented here is whether, by granting authority to sue the United States for damages, the Patriot Act impliedly limited the authority to sue the United States for other types of relief, such as injunctive or declaratory relief. The Court finds that it does.

With respect to the SCA and the Wiretap Act, Section 223 of the Patriot Act not only granted consent to sue the United States for damages, but it also explicitly deleted the United States from the provisions that permit an aggrieved person to sue for recovery and obtain relief, including “preliminary and other equitable or declaratory relief.” *See* Pub. L. No. 107–56 § 223, 115 Stat. 272 (2001) (amending 18 U.S.C. § 2520(a) and 18 U.S.C. § 2707(a) to insert

1 “other than the United States”). Therefore, the Court finds the intent of Congress in passing  
2 Section 223 of the Patriot Act was to forbid injunctive and declaratory relief against the United  
3 States under the SCA and the Wiretap Act.

4 Although the additional evidence on Congressional intent regarding the SCA and the  
5 Wiretap Act noted above is lacking, the Court finds that the Patriot Act must still be read to  
6 restrict the authority to sue the United States to suits for damages for the three specific statutory  
7 provisions listed in § 2712. Significantly, any ambiguities must be read in favor of the United  
8 States’ immunity from suit. *See Federal Aviation Administration v. Cooper*, --- U.S. ---, 132 S.  
9 Ct. 1441, 1448 (2012) (“Any ambiguities in the statutory language are to be construed in favor  
10 of immunity . . .”). Moreover, the Court notes that the Patriot Act’s grant of authority to sue  
11 under FISA is more restricted than the grant of authority to sue under the Wiretap Act and the  
12 SCA. Thus, it would be inconsistent to hold that the waiver of sovereign immunity is broader  
13 with respect to FISA than to the Wiretap Act and the SCA.

14 Relying on *Pottawatomie Indians*, Plaintiffs argue that the exception to the waiver of  
15 sovereign immunity in Section 702 does not bar their FISA claim for injunctive relief because  
16 they are “bringing a different claim, seeking different relief” from the specific FISA provisions  
17 listed in § 2712(a). 132 S. Ct. at 2209. Plaintiffs’ reliance on this case is misplaced. In  
18 *Pottawatomie Indians*, the Court held that the ban on bringing suit under the Quiet Title Act  
19 (“QTA”) did not apply because the plaintiff was not bringing a claim under that statute. *Id.* at  
20 2208 (finding that the plaintiff was “not bringing a QTA suit at all”). Here, Plaintiffs  
21 indisputably bring claims under FISA. Thus, the issue is whether FISA, by allowing suits  
22 against the United States only for damages based on three provisions of that statute, impliedly  
23 bans suits against the United States that seek injunctive relief under any provision of FISA. The  
24 Court finds that it does. Accordingly, Plaintiffs cannot rely on ss 702 of the APA for a waiver  
25 of sovereign immunity.

26 **b. The *Ultra Vires* Doctrine.**

27 Next, Plaintiffs seek to invoke the *ultra vires* exception to sovereign immunity of federal  
28 officials as set forth in *Larson*. Under this doctrine, “[i]f an employee of the United States acts

1 completely outside of his governmental authority, he has no immunity.” *United States v.*  
2 *Yakima Tribal Court* (“*Yakima Tribal Court*”), 806 F.2d 853, 859 (9th Cir. 1986); *see also*  
3 *Larson*, 337 U.S. at 689-90.

4       There is some question as to whether this doctrine survived the 1976 amendments to the  
5 APA. The Ninth Circuit has commented that “Congress observed that before the amendment to  
6 § 702 [of the APA], litigants seeking ... non-monetary relief were forced to resort to the ‘legal  
7 fiction’ of naming individual officers, rather than the government, as defendants, ... an approach  
8 that was ‘illogical’ and ‘becloud[ed] the real issue whether a particular governmental activity  
9 should be subject to judicial review, and, if so, what form of relief is appropriate.’” *See The*  
10 *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 524 (9th Cir. 1989) (quoting H.  
11 Rep. No. 1656, at 5, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6121, 6125, 6128-29).  
12 The Ninth Circuit found it “significant that Congress referred disapprovingly to the *Ex parte*  
13 *Young* fiction, which permitted a plaintiff to name a government official as the defendant in  
14 equitable actions to redress government misconduct, on the pretense that the suit was not  
15 actually against the government.” *Id.* at 525-26 (citing *Larson*, 337 U.S. at 689-91). The  
16 Circuit Court stated that “Congress’ plain intent in amending § 702 was to waive sovereign  
17 immunity for all such suits, thereby eliminating the need to invoke the *Young* fiction.” *Id.* at  
18 526; *see also Equal Employment Opportunity Commission v. Peabody Western Coal Co.*, 610  
19 F.3d 1070, 1085 (9th Cir. 2010) (noting that in *Presbyterian Church (U.S.A.)*, the Circuit Court  
20 “explained that after § 702 was amended in 1976, it replaced the *Ex parte Young* fiction as the  
21 doctrinal basis for a claim for prospective relief[]” and that “since 1976 federal courts have  
22 looked to § 702 of the [APA] to serve the purposes of the *Ex parte Young* fiction in suits against  
23 federal officers.”)

24       Nevertheless, there is case law in the Ninth Circuit, post-dating the amendments to the  
25 APA in 1976, that applies the *ultra vires* doctrine or at least suggests its continued existence.  
26 *See, e.g., Yakima Tribal Court*, 806 F.2d at 859 (“If an employee of the United States acts  
27 completely outside his governmental authority, he has no immunity.”) (citing *Larson*, 337 U.S.  
28 at 689); *De Lao v. Califano*, 560 F.2d 1384, 1391 (9th Cir. 1977) (noting that courts have

1 recognized two exceptions to sovereign immunity when suits are brought against government  
2 officials, including the *ultra vires* doctrine). The Ninth Circuit has declined to address whether  
3 the *ultra vires* doctrine set forth in *Larson* exists in light of the waiver provided by Section 702  
4 of the APA and has noted that the decisions in this area are “hopelessly inconsistent.” *Beller v.*  
5 *Middendorf*, 632 F.2d 788, 797 (9th Cir. 1980), *overruled on other grounds by Bowers v.*  
6 *Hardwick*, 478 U.S. 186 (1986). While noting the confusion, the Ninth Circuit declined to  
7 attempt a reconciliation. *Id.* In the absence of clear authority holding that the *ultra vires*  
8 doctrine is no longer viable, the Court will not dismiss Plaintiffs’ statutory claims for injunctive  
9 relief to the extent they are premised on the *ultra vires* doctrine because the 1976 amendments  
10 to the APA invalidated this doctrine.

11         However, to the extent the *ultra vires* doctrine survives, its scope is quite narrow. First,  
12 the Court notes that an *ultra vires* claim may only be asserted against officers in their individual  
13 or personal capacity. *See Larson*, 337 U.S. at 689. Moreover, a claim that an officer was  
14 acting *ultra vires* “is different from the situation where an employee acting as a government  
15 agent, commits an act that is arguably a mistake of fact or law.” *Yakima Tribal Court*, 806 F.2d  
16 at 859. An “[u]ltra vires claim[] rest[s] on the official’s lack of delegated authority.” *Id.* at 860.  
17 As the Supreme Court explained in the context of addressing the viability of the *ultra vires*  
18 doctrine against state officials, the *ultra vires* exception to sovereign immunity is “very  
19 narrow.” *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 114 n.25 (1984). An  
20 officer “may be said to act *ultra vires* only when he acts ‘without any authority whatever.’” *Id.*  
21 at 102 n.11 (quoting *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 697, 716  
22 (1982)) (White, J., concurring in judgment in part and dissenting in part) (finding that the test is  
23 whether there was no “colorable basis for the exercise of authority by state officials”). “[A]n  
24 *ultra vires* claim rests on ‘the officer’s lack of delegated power. A claim of error in the exercise  
25 of that power is therefore not sufficient.” *Id.* (quoting *Larson*, 337 U.S. at 690).

26         In *Pennhurst*, the trial court’s undisputed findings were that the residents of the state  
27 facility were “often physically abused or drugged by staff members . . . .” *Pennhurst*, 465 U.S.  
28 at 92. The Supreme Court held that the “[p]etitioners’ actions in operating [the] mental health

1 institution plainly were not beyond their delegated authority” and that the “essence” of the  
 2 respondents’ claims was that the petitioners failed to provide services adequately. *Id.* at 102  
 3 n.11.

4 Here, it is undisputed that Defendants have authority to conduct electronic surveillance.  
 5 In Count 5 for declaratory, injunctive and other equitable relief, Plaintiffs contend that  
 6 Defendants conducted electronic surveillance improperly, without following the proper  
 7 procedures, and in violation of FISA, the Wiretap Act and the SCA. In essence, Plaintiffs  
 8 contend that the individual defendants erred in their exercise of their authority to conduct  
 9 electronic surveillance. Such a claim does not fit within the narrow exception to sovereign  
 10 immunity under the *ultra vires* doctrine.

11 The bolstered by The fact that Plaintiffs are challenging a government-wide “program”  
 12 bolsters the Court’s conclusion that Plaintiffs may not proceed under the narrow *ultra vires*  
 13 exception. “[T]he key question in addressing the sovereign immunity of the United States is  
 14 ‘whether the relief sought in a suit nominally addressed to the officer is relief against the  
 15 sovereign.’” *Aminoil U.S.A., Inc. v. California State Water Resources Control Board*, 674 F.2d  
 16 1227, 1234 (9th Cir. 1982) (quoting *Larson*, 337 U.S. at 687). Here, Plaintiffs seek to obtain  
 17 relief from the sovereign itself, under the guise of suing officials in their personal capacity.  
 18 Plaintiffs allege that beginning in early October 2011, then-President Bush, in concert with the  
 19 other individual defendants, authorized “a range of surveillance activities inside of the United  
 20 States without any statutory authorization or court approval.” (*Jewel* Complaint at ¶ 39.)  
 21 Plaintiffs label this alleged activity as “the Program.” (*Id.*; *see also* Complaint at ¶ 42  
 22 (“The Program of domestic surveillance authorized by the President and conducted by  
 23 Defendants . . .”). Plaintiffs seek to halt this alleged governmental “Program.” Plaintiffs  
 24 cannot obtain effective relief from “the Program” by suing Defendants in their personal  
 25 capacity.<sup>3</sup>

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26  
 27 <sup>3</sup> The Court’s conclusion that Defendants are essentially seeking relief from the  
 28 Government is further bolstered by the fact that Plaintiffs have not substituted in the current  
 officials whom they seek to sue in their personal capacity. Pursuant to Federal Rule of Civil  
 Procedure 25, an action against an officer in her or her official capacity does not abate when

1 The Court concludes that Plaintiffs' statutory claims for injunctive relief may not  
 2 proceed under the *ultra vires* doctrine. Therefore, the Court finds that sovereign immunity has  
 3 not been waived and grants Defendants' motion to dismiss on Plaintiffs' statutory claims for  
 4 injunctive relief.

### 5 CONCLUSION

6 For the foregoing reasons, the Court GRANTS Plaintiffs' motion for partial summary  
 7 adjudication by rejecting the state secrets defense as having been displaced by the statutory  
 8 procedure prescribed in 50 U.S.C. § 1806(f) of FISA. The Court GRANTS Defendants'  
 9 motions to dismiss Plaintiffs' statutory claims on the basis of sovereign immunity (counts 5-16  
 10 of the *Jewel* Complaint and causes of action 1-3 of the *Shubert* Complaint). The Court  
 11 RESERVES ruling on the Defendants' motions for summary judgment on the remaining, non-  
 12 statutory, claims (counts 1-4 of the *Jewel* Complaint and the fourth cause of action in the  
 13 *Shubert* Complaint).

14 The Court shall require that the parties submit briefing on both the scope of FISA  
 15 preemption on the Plaintiffs' constitutional claims, specifically, whether the scope of the  
 16 preemption only provides a procedural mechanism for the review of submitted evidentiary  
 17 materials or whether the scope of FISA preemption is broader to foreclose altogether the  
 18 substantive constitutional claims. Should the Court permit the constitutional claims to proceed  
 19 and find that § 1806(f) merely provides the mechanism for review of submitted materials,  
 20 Plaintiffs shall be tasked with the burden to establish standing to sue without resulting in  
 21 impermissible damage to ongoing national security efforts. *See Clapper v. Amnesty*

22 \_\_\_\_\_  
 23 that officer ceases to hold office while the action is pending. Instead, "[t]he officer's  
 24 successor is automatically substituted as a party." *See* Fed. R. Civ. P. 25(d). Although the  
 25 text of Rule 25 applies only to actions against officers in their official capacity, Plaintiffs rely  
 26 on the notes to the amendment to Rule 25 in 1961. The notes provide that "[t]he amended  
 27 rule will apply to all actions brought by public officers for the government..." and to "actions  
 28 to prevent officers from acting in excess of their authority or under authority not validly  
 conferred...." *See* Fed. R. Civ. P. 25. Advisory Committee's Notes (citing *Ex parte Young*,  
 209 U.S. 123). The advisory committee explain that the Rule "will apply whenever effective  
 relief would call for corrective behavior by the one then having official status and power,  
 rather than one who has lost that status and power through ceasing to hold office." *Id.* (citing  
*Larson*, 337 U.S. at 682). Because the notes do provide that the officers' successors will be  
 substituted in automatically when they are sued under the *ultra vires* doctrine as set forth in  
*Ex parte Young* and *Larson*, the Court substitutes in the current office holders.

1 *International USA*, 133 S. Ct. 1138, 1149 n.4 (2013) (noting that, pursuant to hypothetical *in*  
2 *camera* proceedings permitted under § 1806(f), “the court’s postdisclosure decision about  
3 whether to dismiss the suit for lack of standing would surely signal to the terrorist whether his  
4 name was on the list of surveillance targets.”) Although the Court finds, at this procedural  
5 posture, that Plaintiffs here do not allege the attenuated facts of future harm which barred  
6 standing in *Clapper*, the potential risk to national security may still be too great to pursue  
7 confirmation of the existence or facts relating to the scope of the alleged governmental  
8 Program.

9 Further, the Court shall require briefing on the impact on the Defendants’ assertion of  
10 such a risk following the recent disclosure of the government’s continuing surveillance  
11 activities and the statement by the Director of National Intelligence that certain information  
12 related to the “business records” provision of FISA should be declassified and immediately  
13 released to the public.

14 In order to facilitate this process and set the schedule for such further briefing, the Court  
15 shall conduct a case management conference on August 23, 2013 at 1:30 p.m. The parties shall  
16 submit a joint case management statement by no later than August 16, 2013.

17 **IT IS SO ORDERED.**

18 Dated: July 8, 2013

19   
20 \_\_\_\_\_  
21 JEFFREY S. WHITE  
22 UNITED STATES DISTRICT JUDGE  
23  
24  
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