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12
 13 **UNITED STATES DISTRICT COURT**
 14 **NORTHERN DISTRICT OF CALIFORNIA**

15 IN RE NATIONAL SECURITY AGENCY)	No. M:06-CV-01791-VRW
16 TELECOMMUNICATIONS RECORDS)	GOVERNMENT DEFENDANTS' REPLY IN SUPPORT OF THIRD MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT
17 LITIGATION)	
18 <u>This Document Solely Relates To:</u>)	
19 <i>Al-Haramain Islamic Foundation et al.</i>)	
20 <i>v. Bush, et al.</i> (07-CV-109-VRW))	Date: December 2, 2008
)	Time: 10:00 a.m.
)	Courtroom: 6, 17 th Floor
)	Honorable Vaughn R. Walker
)	

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INTRODUCTION

1 In dismissing plaintiffs' original complaint, the Court permitted plaintiffs another
2 opportunity to establish their standing to proceed under Section 106(f) of the Foreign
3 Intelligence Surveillance Act ("FISA"), 50 U.S.C. § 1806(f),^{1/} if they could show they are
4 "aggrieved persons" under the FISA—that is, the target of or subject to electronic surveillance,
5 *see id.* § 1801(k)—based on *public* evidence and without reliance on the so-called sealed
6 document that has been excluded from this case by the Ninth Circuit. *See In re NSA Telecomm.*
7 *Records Litig., Al-Haramain Islamic Found. v. Bush*, 564 F. Supp. 2d 1109, 1134-35 (N.D. Cal.
8 July 2, 2008). Plaintiffs then filed an amended complaint setting forth various public facts in an
9 attempt to establish their standing. *See* First Amended Complaint ("FAC") (Dkt. 35).^{2/} The
10 Government promptly filed a motion that clearly sought summary judgment by challenging the
11 evidence plaintiffs presented as insufficient to establish their standing under Article III
12 requirements. *See* Government Defendants' Third Motion to Dismiss or, in the Alternative, for
13 Summary Judgment (Dkt. 49) ("Defs. 3d MSJ").

14 Plaintiffs' Opposition ("Pls. Opp.") (Dkt. 50) presents a series of plainly erroneous
15 contentions and seeks to disregard the Court's July 2 decision. First, plaintiffs contend that
16 standing as an "aggrieved person" under the FISA is not the same as Article III standing. But
17 that is wrong—the relevant case law makes clear that Congress intended that "aggrieved
18 persons" would be solely those litigants that meet Article III standing requirements to pursue
19 Fourth Amendment claims. And even if these standing inquiries were distinct, plaintiffs concede
20 (as they must) that they still must establish Article III standing. Plaintiffs argue that, at this stage
21 in the litigation, the Government has made only a so-called "facial" challenge to their allegations
22 of injury in the First Amended Complaint, as to which the Court may assume their allegations of
23 injury are true. That also is wrong; the Government anticipated this very argument and has not
24

25
26 ¹ Hereafter referred to as "Section 1806(f)" of the FISA based on its designation in Title
27 50 of the United States Code.

28 ² Docket numbers herein refer to the docket at 07-cv-00109-VRW).

1 merely contended that plaintiffs’ allegations of injury were insufficient, but has specifically
2 sought summary judgment on the issue of standing by arguing that the public evidence cited by
3 plaintiffs in their First Amended Complaint did not satisfy their burden of establishing standing
4 under Article III requirements. Moreover, by *any* standard, plaintiffs have failed to establish
5 their “aggrieved” status under the FISA or Article III standing. The “evidence” they advance,
6 whether viewed most favorably to plaintiffs, assumed to be true, or given every reasonable
7 inference, does not establish that they were subject to alleged surveillance, let alone the alleged
8 warrantless surveillance in 2004 that they assert occurred in this case

9 Finally, the law does not remotely support plaintiffs’ demand that the Court hold the
10 Government’s motion in abeyance and proceed under Section 1806(f), grant them access to the
11 sealed document, adjudicate the issue of standing under those procedures, and shift the burden of
12 proof to require the Government to confirm or deny information protected by the Government’s
13 successful privilege assertion. Plaintiffs have no answer to the fact that Section 1806(f) does not
14 permit a party to discover whether it has been subject to alleged surveillance—that is precisely
15 why the Court ordered plaintiffs to attempt to establish their standing with public evidence
16 *before* Section 1806(f) could be invoked. *See* 564 F. Supp. 2d at 1134. Further proceedings
17 under Section 1806(f) would inherently risk the improper disclosure of information protected by
18 the Ninth Circuit—indeed, plaintiffs *demand* that such information be disclosed to them. But
19 because plaintiffs have failed to establish their standing based on the public evidence, as the
20 Court directed, this case should now be dismissed before any Section 1806(f) proceedings.

21 ARGUMENT

22 **I. THE GOVERNMENT HAS CHALLENGED ON SUMMARY JUDGMENT THE 23 PUBLIC EVIDENCE PLAINTIFFS ADVANCE AS INSUFFICIENT TO 24 ESTABLISH THEIR STANDING UNDER ARTICLE III.**

25 Plaintiffs’ central argument is that the Government has not challenged plaintiffs’ standing
26 on Article III grounds, and does not seek to challenge the factual basis of plaintiffs’ standing,
27 and, thus, that such an adjudication should be deferred for Section 1806(f) proceedings. *See* Pls.
Opp. (Dkt. 50) at 2, 5. This argument is plainly wrong. The Government’s motion specifically

1 sought summary judgment with respect to whether plaintiffs have established standing as a
2 factual matter under Article III requirements. The Government's Notice of Motion states:

3 First, assuming, *arguendo*, Section 1806(f) of the FISA is applicable to
4 consider plaintiffs' claims set forth in the First Amended Complaint, *the*
5 *Government Defendants are now entitled to summary judgment on the*
6 *grounds that* the evidence set forth in plaintiffs' First Amended Complaint
7 fails to establish that the plaintiffs are "aggrieved persons" as defined in
8 the FISA and, thus, that plaintiffs have standing to adjudicate any claim
9 under Section 1806(f).

10 *See* Defs. Notice of Motion (Dkt. 49) at 2 (emphasis added). We also argued that the
11 "fundamental problem" with the evidence cited in plaintiffs complaint "does not relate to the
12 mere sufficiency of plaintiffs' allegations; rather, *plaintiffs cannot meet their burden of proof at*
13 *the summary judgment stage* to actually establish that they have been subject to the alleged
14 warrantless surveillance. *See* Defs. MSJ (Dkt. 49) at 2 (emphasis added). We thus listed among
15 the "Issues to be Decided":

16 *Whether summary judgment should be granted to the Government*
17 *Defendants and the complaint dismissed on the ground that plaintiffs*
18 *have not established that they are "aggrieved parties" under the*
19 *Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801(k) and, thus,*
20 *that they have standing to challenge alleged warrantless surveillance*
21 *of them at issue in this case?*

22 *See id.* at 3 (emphasis added). We then set forth Article III requirements for standing, including
23 that the burden of proof is on the plaintiffs at the summary judgment stage. *See id.* at 10 ("In
24 response to a summary judgment motion, however, 'the plaintiff can no longer rest on such
25 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts' establishing
26 their standing, which for purposes of the summary judgment motion will be taken to be true
27 unless controverted.") (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) and Fed.
28 R. Civ. Proc. 56(e)). And we specifically argued that Congress incorporated Article III standing
requirements in any determination as to whether a party is an "aggrieved person" under the
FISA. *See id.* at 10, n.3.

We went on to discuss the evidence that plaintiffs describe in their First Amended
Complaint, *see* Defs. MSJ (Dkt. 49) at 11-20, and explained that the "facts cited by plaintiffs *do*
not meet their burden of proof on summary judgment," *see id.* at 14 (emphasis added); *see also*

1 *id.* at 19 (citing *American Civil Liberties Union v. NSA*, 493 F. 3d 644, 691 (6th Cir. 2007)
2 (Gibbons, J.), *cert. denied*, 128 S.Ct. 1334 (2007), for the proposition that, on summary
3 judgment, plaintiffs must set forth by affidavit or otherwise specific facts demonstrating the
4 alleged surveillance). The fact that the Government assumed plaintiffs' public evidence to be
5 true for purposes of summary judgment is precisely how to obtain summary judgment under
6 *Lujan*. See 504 U.S. at 561. As plaintiffs note, the Government did not dispute this evidence
7 with classified information, see Pls. Opp. at 6 (citing Defs. MSJ at 20, n.7), because we are
8 challenging plaintiffs' public evidence as insufficient on summary judgment—and not seeking to
9 create a dispute of fact that could not be resolved on the public record.

10 For these reasons, plaintiffs' effort to avoid the consequences of the Government's
11 motion for summary judgment, as well as their burden of proof at this stage of the litigation, is
12 quite clearly unfounded. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 104 (1998)
13 (party who seeks to invoke the jurisdiction of the court bears the burden of establishing Article
14 III standing); *Lujan*, 504 U.S. AT 561 (same).

15 **II. WHETHER PLAINTIFFS ARE "AGGRIEVED" UNDER THE FISA IS A**
16 **QUESTION OF ARTICLE III STANDING, AND ARTICLE III REQUIREMENTS**
17 **MUST BE SATISFIED IN ANY EVENT.**

18 Plaintiffs' separate contention—that "there are two different types of standing" and that
19 "1806(f) standing is not the same as Article III standing," see Pls. Opp. at 3-4, is also wrong and
20 ultimately unavailing since Article III requirements must be satisfied in any event. As we have
21 previously pointed out,^{3/} it is certainly true that a court should consider, as a prudential limitation
22 on its exercise of jurisdiction, whether a "statutory provision on which the claim rests properly
23 can be understood as granting persons in the plaintiff's position a right to judicial relief." See
24 *Warth v. Seldin*, 422 U.S. 490, 500-01 (1975). But even if a party could show that it falls within
25 an interest protected or regulated by statute, that is not "an affirmative means of establishing
26 standing." *ACLU v. NSA*, 493 F.3d at 677 n.35 (citing *Allen v. Wright*, 468 U.S. 737, 752

27 ³ See Government Defendants' Opposition to Plaintiffs' Motion for Discovery under
28 Section 1806(f) (Dkt. 51) ("Defs. 1806(f) Opp.") at 4-6.

1 (1984); *Valley Forge Christian College v. Americans United for Separation of Church & State,*
2 *Inc.*, 454 U.S. 464, 474-75 (1982)). Instead, the minimum Article III standing requirements still
3 apply and “serve to limit the role of the courts in resolving public disputes.” *See Warth*, 422
4 U.S. at 500. Thus, even if the question of standing as an “aggrieved person” were distinct from
5 the Article III standing inquiry, plaintiffs must still satisfy Article III requirements as well.

6 In any event, contrary to plaintiffs’ contention, *see* Pls. Opp. at 3-5, these standing issues
7 are not distinct. Whether a party can establish that it is “aggrieved” for purposes of the FISA is
8 itself an issue of Article III standing. *See* Defs. 1806(f) Opp. (Dkt. 51) at 4-5. The legislative
9 history of the FISA makes clear that the meaning of an “aggrieved person” is based on standing
10 principles and, specifically, “intended to be *coextensive*, but no broader than, those persons who
11 have *standing* to raise claims under the Fourth Amendment with respect to electronic
12 surveillance.” *See* H.R. Rep. No. 95-1283, 95th Cong. 2d Sess., pt.1, at 66 (1978). Plaintiffs cite
13 this passage, *see* Pls. Opp. (Dkt. 50) at 5, but misconstrue its meaning. “Standing” to raise a
14 claim under the Fourth Amendment means the right to invoke the Article III jurisdiction of the
15 federal courts to vindicate a party’s constitutional rights against an alleged intrusion.

16 In *Alderman v. United States*, 394 U.S. 165, 176 n.9 (1969), for example, the Supreme
17 Court held that an individual lacked standing to invoke the exclusionary rule to suppress
18 evidence that was the product of unlawful surveillance of someone else, holding that an only a
19 person against whom an unlawful search was undertaken was “aggrieved” and, thus, had
20 standing to invoke the authority of the Court to suppress that evidence. *See* 394 U.S. at 173-74.
21 The Court in *Alderman* made clear that the term “aggrieved person” in Fed. R. Crim. P. 41(e)
22 (which was incorporated into the FISA) “is no broader than the constitutional rule,” *see id.* at
23 172 n.6,— and the rule is that “[i]n order to qualify as ‘a person aggrieved by an unlawful search
24 and seizure’ one must have been the victim of a search or seizure, one against whom the search
25 was directed, as distinguished from one who claims prejudice only through the use of evidence
26 gathered as a consequence of a search or seizure directed at someone else.” *See id.* at 173
27 (quoting *Jones v. United States*, 362 U.S. 257, 261 (1960)). For this reason, “it is entirely

1 proper to require” the person challenging the legality of a search to establish “that he himself
2 was the victim of an invasion of privacy.” *Id.*

3 That this rule of standing reflects Article III *constitutional* underpinnings was confirmed
4 by the Supreme Court in *Rakas v. Illinois*, 439 U.S. 128 (1978). There, the issue arose again as
5 to whether certain individuals (passengers in an automobile) had standing to seek suppression of
6 evidence, and in the course of holding that the defendants there did not have the requisite
7 property or privacy interests to challenge the search under the Fourth Amendment, the Court
8 specifically alluded to Article III standing principles underlying the rule set forth in *Jones*:

9 There is an aspect of traditional standing doctrine that was not considered
10 in *Jones* and which we do not question. It is the proposition that a party
11 seeking relief must allege such a personal stake or interest in the outcome
12 of the controversy as to assure the concrete adverseness *which Art. III*
13 *requires.*

14 *Rakas*, 439 U.S. at 132 n.2 (citations omitted) (emphasis added). The Court also went on to
15 “emphasize[] that nothing we say here casts the least doubt on cases which recognize that, as a
16 general proposition, the issue of standing involves two inquiries: first, whether the proponent of
17 a particular legal right has alleged “injury in fact,” and, second, whether the proponent is
18 asserting his own legal rights and interests rather than basing his claim for relief upon the rights
19 of third parties. *Id.* at 139-40 (citing, *inter alia*, *Warth*, 422 U.S. at 499). Thus, there is little
20 doubt that establishing “aggrieved person” status for purpose of alleged Fourth Amendment
21 violations requires satisfaction of Article III standing requirements.

22 Indeed, plaintiffs concede that they ultimately must establish Article III standing to
23 proceed in this case. *See* Pls. Opp. (Dkt. 50) at 15 (“[i]f the Government’s motion is construed
24 as being for summary judgment on plaintiffs’ Article III standing, it is necessarily a *factual*
25 attack—meaning plaintiffs must present evidentiary proof of the elements of Article III standing
26 . . .”) (citing *Lujan*, 504 U.S. at 561). But plaintiffs then contend that this inquiry should be held
27 in abeyance until resolution of their Section 1806(f) motion and disclosure of the sealed
28 document to them, and then should proceed under Section 1806(f) with the burden of proof
shifted to the Government. *See* Pls. Opp. (Dkt. 50) at 13-19. Aside from the impropriety of

1 utilizing Section 1806(f) in this manner (discussed *infra*), the law is clear that the inquiry into
2 whether plaintiffs are “aggrieved” for purposes of the FISA includes whether they have satisfied
3 Article III requirements, and the Government has put this question at issue now on summary
4 judgment with respect to the public evidence on which plaintiffs rely. Plaintiffs’ contention that
5 adherence to Article III requirements to establish whether or not they are “aggrieved persons”
6 under the FISA would require plaintiffs to demonstrate the alleged conduct’s *unlawfulness* in
7 order to have standing, *see* Pls. Opp. at 4, is wrong. In order to establish their standing, plaintiffs
8 must bear the burden of proof to show that they have been the target of or subject to the alleged
9 warrantless surveillance under the TSP as a factual matter. As set forth next, plaintiffs clearly
10 have failed to establish their standing.

11 **III. UNDER ANY STANDARD, PLAINTIFFS HAVE NOT ESTABLISHED THAT**
12 **THEY ARE AGGRIEVED PERSONS UNDER SECTION 1806(f) AND HAVE**
13 **STANDING TO PROCEED UNDER ARTICLE III.**

14 Proceeding from their erroneous procedural theories, plaintiffs then present various
15 arguments as to why public record evidence they have proffered allows them to proceed for now
16 in the face of (i) an alleged “facial” challenge to their standing under Section 1806(f), and (ii) an
17 alleged “facial” challenge to their standing under Article III, before arguing that (iii) a “factual”
18 challenge be deferred. *See* Pls. Opp. at 5-13; 13-15; 15-17. But there is only one question
19 before the Court at this stage: have plaintiffs mustered enough evidence on the public record to
20 establish their Article III standing as aggrieved persons under the FISA in the face of the
21 Government’s summary judgment motion? The answer is clearly “no.” Through their different
22 permutations of argument, plaintiffs acknowledge that their evidence does not actually establish
23 that they were subject to the alleged warrantless surveillance that they challenge in this case.
24 Instead, plaintiffs seek proceed with this lawsuit based on “reasonable inferences” and “logical
25 probabilities.” But plaintiffs cannot satisfy Article III standing requirements based on conjecture
26 or speculation. And even if the relevant question at this stage in the litigation were whether
27 plaintiffs’ allegations were sufficient to withstand a “facial” attack on the complaint, and
28 whether inferences from public facts were “reasonable” or “logical probabilities”—*i.e.*,

1 approaches we do not concede apply in the current summary judgment posture— plaintiffs still
2 would not have established their standing. Under any standard, the evidence plaintiffs present
3 does not sufficiently allege the injury at issue, or give rise to a reasonable inference that such an
4 injury exists, let alone factually establish that injury as plaintiffs must at this stage. *See* Defs. 3d
5 MSJ (Dkt. 49) at 11-20; Defs. 1806(f) Opp. (Dkt. 51) at 14-19.

6 As we have previously set forth,^{4/} the sum and substance of plaintiffs’ factual allegations
7 are that: (i) the Terrorist Surveillance Program (“TSP”) targeted communications with
8 individuals reasonably believed to be associated with al Qaeda; (ii) in February 2004, the
9 Government blocked the assets of AHIF-Oregon based on its association with terrorist
10 organizations; (iii) in March and April of 2004, plaintiffs Belew and Ghafoor talked on the
11 phone with an officer of AHIF-Oregon in Saudi Arabia (Mr. al-Buthe) about, *inter alia*, persons
12 linked to bin-Laden; (iv) in the September 2004 designation of AHIF-Oregon, the Office of
13 Foreign Assets Control (“OFAC”) of the Treasury Department cited the organization’s direct
14 links to bin-Laden as a basis for the designation; (v) the OFAC designation was based in part on
15 classified evidence; and (vi) the FBI stated it had used surveillance in an investigation of the Al-
16 Haramain Islamic Foundation. *See* Pls. Opp. at 8, 12, 14. Plaintiffs specifically allege that
17 interception of their conversations in March and April 2004 formed the basis of the September
18 2004 designation, *see id.* at 8, and that any such interception was electronic surveillance as
19 defined by the FISA conducted without a warrant under the TSP. *See* Pls. 1806(f) Motion (Dkt.
20 46) at 17-18.^{5/}

21 As a factual matter, these allegations, and the evidence on which they are based,

22
23 ⁴ *See* Defs. 3d MSJ (Dkt. 49) at 6-8 and Defs. 1806(f) Opp. (Dkt. 51) at 14-19.

24 ⁵ Plaintiffs also continue to baldly mischaracterize statements made in oral argument by
25 counsel as alleged “evidence” that “lawyers” were allegedly special targets under the TSP. *See*
26 Pls. Opp. at 14, n. 9. We have explained that this statement addressed allegations made by the
27 particular attorney-plaintiffs in the *ACLU* action whose standing was later rejected by the Sixth
28 Circuit. *See* Defs. 3d MSJ (Dkt. 49) at 18-19. In any event, statements of counsel in briefs or
oral argument are not evidence. *EOTT Energy Operating Ltd. Partnership v. Winterthur Swiss
Ins. Co.*, 257 F.3d 992, 999 (9th Cir. 2001).

1 obviously do not establish that plaintiffs were subject to surveillance at all, let alone electronic
2 surveillance as defined by the FISA or any alleged surveillance conducted without a warrant.
3 *See* Defs. 3d MSJ (Dkt. 49) at 11-20. Even as a matter of allegation, the public record
4 information from which plaintiffs draw inferences is insufficient to establish standing. Labeling
5 speculative inferences as “reasonable” or even “logically probable” does not render them less
6 speculative. Viewed individually or as a whole, the mere fact that the TSP targeted al Qaeda,
7 and that AHIF-Oregon was designated for providing support to al Qaeda or bin-Laden, and that
8 plaintiffs allegedly had a phone conversation with an AHIF-Oregon officer who mentioned bin-
9 Laden associates, does not sufficiently allege, let alone establish, facts that these plaintiffs have
10 been the target of or subject to surveillance, never mind the alleged warrantless surveillance
11 under the TSP at issue here. Indeed, the public evidence neither adequately supports an
12 allegation nor factually establishes that plaintiffs have been the target of or subject to electronic
13 surveillance for purposes of the FISA, *see* 50 U.S.C. § 1801(k), even if that definition is
14 considered in isolation from Article III requirements, as plaintiffs contend it should.

15 Rather, the only reasonable inference to draw from plaintiffs’ public evidence is that it is
16 *possible* that plaintiffs may have been targets of the TSP because they claim to have spoken with
17 an individual associated with an entity associated with al-Qaeda and, thus, were theoretically
18 more likely than others to be subject to the TSP. But that is not sufficient either to allege or
19 factually establish an injury that supports Article III standing in the face of a motion to dismiss
20 or for summary judgment. *See ACLU*, 493 F.3d at 653 (“reasonable . . . well founded belief” of
21 interception under the TSP on the ground, *inter alia*, that plaintiffs represented individuals
22 suspected by the Government of being associated with al Qaeda, and talked to those individuals
23 overseas in connection with that representation, and, thus, were “the types of people targeted by
24 the NSA” under the TSP established only mere possibility of TSP surveillance and not sufficient
25 to establish standing); *see also United Presbyterian Church v. Reagan*, 738 F.2d 1375, 1380
26 (D.C. Cir. 1984) (greater likelihood or risk than the populace at large of being the type of person
27 subject to surveillance insufficient to establish standing). Accordingly, even if on summary

1 judgment the Court must construe all facts and inferences drawn from those facts in a light most
2 favorable to the non-moving party, *see* Pls. Opp. (Dkt. 50) at 16, the Court cannot fill in
3 speculative gaps by creating new facts that do not exist in the public record on which plaintiffs
4 rely.

5 In particular, the speculative inferences plaintiffs draw from parts of the public record
6 simply cannot sustain their standing. For example, their contention that FBI Deputy Director
7 Pistole “was admitting the commission of surveillance . . . in 2004—at precisely the time of” the
8 plaintiffs’ alleged March/April 2004 telephone discussions with Mr. al-Buthe, which made
9 reference to persons linked to bin-Laden, and “immediately prior” to the September 2004
10 designation, *see* Pls. Opp. (Dkt. 50) at 12-13, is nothing more than self-serving conjecture that is
11 not reflected in or established by Mr. Pistole’s statement. *See* Defs. 3d MSJ at 16-17 (full
12 relevant quote) and Exhibit 13 to Defs. 3d MSJ (Dkt. 49-4) at 5-6. That statement refers to the
13 “Al Haramain Islamic Foundation” based in Saudi Arabia, which had “branches all over the
14 world,” including a “U.S. Branch” in established in Oregon in 1997, and indicates further that
15 the FBI discovered links in 2000 between “Al-Haramain” and al Qaeda, that “Al-Haramain” sent
16 money to Chechnya to support al Qaeda fighters, and that “surveillance” was used in the FBI
17 investigation. *See id.* It is impossible to reasonably infer, let alone establish, from anything in
18 this statement that *plaintiffs* have been subject to the alleged surveillance, since it does not
19 indicate when, where, how, or against whom any surveillance was utilized by the FBI, let alone
20 what kind of surveillance or under what authority. Similarly, the Treasury Department’s
21 September 2004 press statement on the designation of AHIF-Oregon calls attention to
22 connections found by the United Nations between AHIF’s other worldwide branches and al
23 Qaeda, *see* Exhibit 9 to Defs. MSJ (Dkt. 49-3 at 208), and in any event its reference to direct
24 links between AHIF-Oregon and bin-Laden does not support a “reasonable inference,” let alone
25 establish, that the designation was based on the alleged surveillance of the plaintiffs.^{6/}

26
27 ⁶ As plaintiffs note, *see* Pls. Opp. (Dkt. 50) at 12, n.5, they have filed a separate lawsuit
28 challenging the designation of AHIF-Oregon as a “Specially Designated Global Terrorist”
 (“SDGT”) and, in particular, the use of evidence allegedly derived from the alleged surveillance
 Government Defendants’ Reply in Support of Third Motion to Dismiss or for Summary Judgment
 Al-Haramain v. Bush (07-cv-109-VRW) (MDL 06-cv-1791-VRW)

1 Accordingly, plaintiffs' contention that standing may be found where there are "equally
2 probable inferences" to be drawn from circumstantial evidence, *see* Pls. Opp. (Dkt. 50) at 10, is
3 unavailing. As the very authority on which plaintiffs rely indicates, "an inference is not
4 reasonable 'if it is only a guess or possibility,' for such an inference is not based on the evidence
5 but is pure conjecture or speculation." *Daniels v. Twin Oaks Nursing Home*, 692 F.2d 1321,
6 1324 (11th Cir. 1983) (citation omitted). Assuming, *arguendo*, that rules regarding when
7 inferences can properly be drawn from circumstantial evidence are applicable to a question of
8 Article III standing, *Daniels* confirms that reliance on conjecture, and the mere possibility of
9 injury, is not sufficient.⁷

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11
12 at issue in this case and purportedly reflected in the sealed document. *See* Complaint (Dkt. 1) ¶
13 45 in *Al-Haramain Islamic Foundation et al. v. Dep't. of Treasury*, (07-cv-1115-KI) (D. Or.)
14 (alleging that the inadvertently disclosed classified document related to intercepted
15 communications between Mr. Al-Buthe and plaintiffs' attorneys in Washington, D.C.). On
16 November 6, 2008, Judge King of the District of Oregon issued a decision that, *inter alia*,
17 granted summary judgment for the Government with respect to OFAC's February 2008
18 redesignation of AHIF-Oregon, which did not rely on the classified sealed document. *See Al-*
19 *Haramain Islamic Foundation et al. v. Dep't. of Treasury*, slip. op. at **20-26 (Dkt. 95), 07-cv-
20 1115-KI (Nov. 6, 2008, D. Or.). Judge King also dismissed plaintiffs' challenge in that case to
21 the alleged use of alleged surveillance evidence. *See id.* at 16-17 n. 7. The court found that
22 OFAC's 2008 re-designation was supported by other evidence indicating that AHIF-Oregon, as a
23 branch of AHIF of Saudi Arabia, had supported other SDGTs, including that Mr. Al-Buthe had
24 personally delivered \$150,000 to AHIF from AHIF-Oregon's bank account for support of the
25 Chechen mujahideen. *See id.* at ** 25-26. The court also found that OFAC reached a rational
26 conclusion that AHIF-Oregon was under Mr. Al-Buthe's ownership or control, and that "[t]here
27 is evidence in the classified record to give the government reasonable concern about Al-Buthe's
28 activities." *See id.* at * 25. The court did not enter final judgment pending further briefing on
other issues. *See id.* at * 62.

23 ⁷ *Daniels* concerned whether circumstantial evidence supported an inference of
24 negligence in a case involving the death of a patient who wandered off from a nursing home, and
25 the court rejected as insufficient inferences that were drawn from circumstantial evidence in that
26 case. *See* 692 F.2d at 1326-27; *see also Poppell v. City of San Diego*, 149 F.3d 961, 954 (9th
27 Cir. 1998) (in a case where "motive-based constitutional claims" of malicious and selective
28 prosecution "depends entirely on inferences," the court noted that "[t]he essential requirement is
that mere speculation not be allowed to do duty for probative facts after making due allowance
for all reasonably possible inferences favoring the party whose case is attacked.") (citation
omitted) (emphasis added).

1 **IV. SECTION 1806(F) DOES NOT PERMIT PLAINTIFFS TO DISCOVER**
2 **WHETHER OR NOT THEY HAVE BEEN SUBJECT TO THE ALLEGED**
3 **SURVEILLANCE IN AN ATTEMPT TO ESTABLISH STANDING.**

4 Recognizing that they have not and cannot establish their standing as a factual matter
5 based on the public record they advance, plaintiffs are left to argue that they should not be
6 required to do so. Rather, they request that any factual adjudication of whether they have Article
7 III standing be held “in abeyance” until after the Court decides their motion under Section
8 1806(f) to grant them access to the sealed document, and then that the Court should proceed to
9 hold an evidentiary hearing “under secure conditions as provided by Section 1806(f)” if
10 necessary, whereby the burden of proof can be shifted to the Government to disprove their
11 standing. *See* Pls. Opp. (Dkt. 50) at 15-21. This approach has it exactly backwards, disregards
12 the Court’s July 2 Order, and is contrary to law.

13 First, of course, the Court held that plaintiffs must establish whether they are aggrieved
14 persons *before* any proceedings under Section 1806(f). *See Al-Haramain*, 564 F. Supp. 2d at
15 1134. The Court also held that plaintiffs cannot use the classified sealed document to attempt to
16 establish their standing, but must do so based on public information only. *See id.*

17 Second, the Government has clearly challenged the factual basis of plaintiffs’ standing
18 based on the public evidence proffered. That issue is before the Court now. Plaintiffs’
19 procedural arguments for avoiding the issue are meritless, and there is nothing to hold in
20 “abeyance”—plaintiffs were obligated to satisfy their burden of proof on standing based on
21 public evidence, and, since they have not done so, summary judgment should be entered for the
22 Government.^{8/}

23 ⁸ Plaintiffs contend that any factual challenge to their standing necessarily means there is
24 a dispute of fact precluding summary judgment. *See* Pls. Opp. (Dkt. 50) at 15-16. That is not so
25 with respect to the Government’s pending motion, which seeks summary judgment based on
26 plaintiffs’ failure to establish their standing as a factual matter with public evidence. And with
27 respect to whether there are any disputed facts concerning the sealed document or related
28 materials on which plaintiffs seek to rely, *see id.* at 15 and n.8, that information is not before the
Court under the July 2 Order, and for the reasons set forth herein, any application of Section
1806(f) to adjudicate the issue of standing would not be proper and could not occur without
risking the very harm to national security identified by the Ninth Circuit. *See Al-Haramain
Islamic Foundation et al. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007) (finding the basis for the
Government Defendants’ Reply in Support of Third Motion to Dismiss or for Summary Judgment
Al-Haramain v. Bush (07-cv-109-VRW) (MDL 06-cv-1791-VRW)

1 Third, again as the Government has previously set forth, Section 1806(f) does not apply
2 to adjudicating factual disputes concerning whether a person is “aggrieved” under the FISA. *See*
3 Defs. 3d MSJ (Dkt. 49) at 20-23; *see also* Defs. 2d MSJ (Dkt. 17) at 15-22. That provision does
4 not shift the burden of proof to the Government to disclose information concerning intelligence
5 sources and methods. *See* Defs. 1806(f) Opp. (Dkt. 51) at 7-14. The burden of proof with
6 respect to standing is on plaintiffs and plaintiffs alone, and if they cannot meet it because
7 information is properly protected as privileged, the case must be dismissed. *See id.* at 14; *see*
8 *also Al-Haramain*, 507 F.3d at 1205; *ACLU*, 493 F.3d at 683.^{9/}

9 Finally, if this case is not dismissed now for lack of standing, serious constitutional
10 questions concerning application of Section 1806(f) will arise in light of the Court’s July 2 ruling
11 that the state secrets privilege is preempted by the FISA and any attempt to apply Section
12 1806(f) in further proceedings. The evidentiary proceedings that plaintiffs demand would not
13 only risk improper disclosure of information successfully upheld as privileged, plaintiffs demand
14 that they be used improperly to *require* disclosure to them—and not just disclosure of the sealed
15 document, but disclosure of whether or not plaintiffs had been subject to surveillance and, if so,
16 whether any such surveillance occurred under the TSP or the FISA. Such a course would quite
17 clearly be erroneous. *See* Defs. 1806(f) Opp. (Dkt. 51) at 22-23. And even apart from plaintiffs’
18 demand for access to state secrets, proceedings under Section 1806(f) that may be purely *ex*
19 *parte*, *in camera* still would inherently risk the improper disclosure of privileged information.
20 *See id.* at 20; Defs. 3d MSJ (Dkt. 49) at 20-21.^{10/}

21 _____
22 Government’s privilege assertion to be “exceptionally well documented” in “[d]etailed
23 statements.”)

24 ⁹ The authority cited by plaintiffs for shifting the burden of proof where facts are held
25 within the exclusive control of the Government is inapposite, *see* Defs. 1806(f) Opp. (Dkt. 51) at
26 14, n.8, and does not apply to either the state secrets privilege or proceedings under Section
27 1806(f).

28 ¹⁰ Plaintiffs’ contention that the Court could proceed to determine the lawfulness of any
alleged surveillance based on facts purportedly presented to the Court in the state secrets
privilege is meritless. Section 1806(f) applies solely where the lawfulness of alleged
surveillance must be determined in connection with the use of evidence of acknowledged

1 These concerns can and should be avoided by finding that plaintiffs have failed to
2 establish their standing with public evidence, as they were directed by the Court. Otherwise, the
3 Government submits that further appellate review would be warranted to avoid destruction of a
4 national security privilege already upheld in this case that would result from attempting to
5 proceed under statutory provisions that do not apply and cannot safely be applied in the
6 circumstances presented here.^{11/}

7 CONCLUSION

8 For the foregoing reasons, as well as those set forth in the Government Defendants' Third
9 Motion to Dismiss or, in the Alternative, for Summary Judgment, the Court should dismiss the
10 First Amended Complaint or, in the alternative, grant summary judgment for the Government
11 Defendants.

12 Dated: November 14, 2008

Respectfully Submitted,

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23 surveillance to decide an issue of suppression or taint, and the Government may choose not to
24 rely on such evidence in order to protect intelligence sources and methods. *See* Defs. 1806(f)
Opp. (Dkt. 51) at 21-22, n.14.

25 ¹¹ Plaintiffs' contention that certification under 28 U.S.C. § 1292(b) would be untimely at
26 this stage because the Government did not seek to appeal the Court's July 2 decision is specious.
27 The Court's Order dismissed the plaintiffs' lawsuit. There was nothing for the Government to
28 appeal and no need to appeal. If the Court decides to proceed under Section 1806(f), further
review would be warranted, but that circumstance would not arise if the Court entered summary
judgment for the Government dismissing this case for lack of standing.

s/ Anthony J. Coppolino
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