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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION**

**YASSIR FAZAGA, ALI UDDIN
MALIK, YASSER ABDELRAHIM,**

Plaintiffs,

vs.

**FEDERAL BUREAU OF
INVESTIGATION, ET AL.,**

Defendants.

Case No.: 8:11-cv-00301-CJC(VBKx)

**ORDER GRANTING IN PART
DEFENDANTS’ MOTIONS TO
DISMISS PLAINTIFFS’ FISA CLAIM**

I. INTRODUCTION & BACKGROUND

On February 22, 2011, Plaintiffs, three Muslim residents in Southern California, filed a putative class action suit against the Federal Bureau of Investigation (“FBI”), the United States of America, and seven FBI officers and agents (collectively, “Defendants”) for claims arising from a group of counterterrorism investigations, known as “Operation Flex,” conducted in Plaintiffs’ community with the help of a civilian informant, Craig

1 Monteilh, from 2006 to 2007.¹ Plaintiffs allege that, as part of Operation Flex, the FBI
2 employed Monteilh to gather information in various Islamic community centers in
3 Orange County by presenting himself as a Muslim convert. Plaintiffs allege that
4 Monteilh was paid by the FBI to collect information on Muslims under an assumed
5 identity and “infiltrate[] several mainstream mosques in Southern California.” (First
6 Amended Complaint (“FAC”) ¶ 1.) They further allege that the FBI conducted a
7 “dragnet investigation” using Monteilh to “indiscriminately collect personal information
8 on hundreds and perhaps thousands of innocent Muslim Americans in Southern
9 California” over a fourteen-month period. (*Id.* ¶ 2.) Through these actions, Plaintiffs
10 assert that the FBI gathered hundreds of hours of video and thousands of hours of audio
11 recordings from “the inside of mosques, homes, businesses, and associations of hundreds
12 of Muslims,” including at times where Monteilh was not present with the recording
13 device. (*Id.*) Plaintiffs also assert that Defendants collected hundreds of phone numbers
14 and thousands of email addresses. (*Id.*) Based on these factual allegations, Plaintiffs
15 assert claims for violations of the First Amendment’s Establishment and Free Exercise
16 Clauses, the Religious Freedom Restoration Act, the Fifth Amendment’s Equal
17 Protection Clause, the Privacy Act, the Fourth Amendment, the Foreign Intelligence
18 Surveillance Act (“FISA”), 50 U.S.C. § 1810, and the Federal Tort Claims Act.

19
20 The FBI denies any wrongdoing, asserting that it did not engage in unconstitutional
21 and unlawful practices. Instead, the FBI asserts that it undertook reasonably-measured
22 investigatory actions in response to credible evidence of potential terrorist activity.
23 Defendants now move to dismiss Plaintiffs’ claims. This Order addresses Defendants’
24

25 ¹ Plaintiffs are Yassir Fazaga, Ali Uddin Malik, and Yasser AbdelRahim. The FBI officers are Robert
26 Mueller, Director of the FBI, and Steven M. Martinez, Assistant Director in Charge of the FBI Los
27 Angeles Division, sued in their official capacities. FBI agents are J. Stephen Tidwell, Barbara Walls,
28 Pat Rose, Kevin Armstrong, and Paul Allen, sued in their individual capacities. The Court will
hereinafter refer to the FBI, the United States, Director Mueller, and Assistant Director Martinez as the
“Government.” The Court will hereinafter refer to Agents Tidwell, Walls, Rose, Armstrong, and Allen
as the “Agent Defendants.”

1 motions as to Plaintiffs' FISA claim only.² As to that claim, Defendants' motions are
2 GRANTED with respect to the Government, but DENIED as to the Agent Defendants.

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4 **II. ANALYSIS**

5
6 **A. FISA**

7
8 Plaintiffs bring their FISA claim pursuant to Section 1810 of Title 50 of the United
9 States Code. Section 1810 provides:

10
11 An aggrieved person, other than a foreign power or an agent of a foreign
12 power, as defined in section 1801(a) or (b)(1)(A) of this title, respectively,
13 who has been subjected to an electronic surveillance or about whom
14 information obtained by electronic surveillance of such person has been
15 disclosed or used in violation of section 1809 of this title shall have a cause
of action against any person who committed such violation and shall be
entitled to recover —

16 (a) actual damages, but not less than liquidated damages of \$1,000 or
17 \$100 per day for each day of violation, whichever is greater;

18 (b) punitive damages; and

19 (c) reasonable attorney's fees and other investigation and litigation
20 costs reasonably incurred.

21
22 50 U.S.C. § 1810. An aggrieved person means "a person who is the target of an
23 electronic surveillance or any other person whose communications or activities were
24 subject to electronic surveillance." *Id.* § 1801(k). A person is defined as "any individual,
25 including any officer or employee of the Federal Government, or any group, entity,
26

27
28 ² Defendants' motions to dismiss Plaintiffs' other claims based on the state secrets privilege are addressed in the Court's separate, concurrently-issued Order. The factual background and procedural history of this case are discussed in greater detail in that Order.

1 association, corporation, or foreign power.” *Id.* § 1801(m). FISA defines electronic
2 surveillance as:

3
4 (1) the acquisition by an electronic, mechanical, or other surveillance device
5 of the contents of any wire or radio communication sent by or intended to be
6 received by a particular, known United States person who is in the United
7 States, if the contents are acquired by intentionally targeting that United
8 States person, under circumstances in which a person has a reasonable
9 expectation of privacy and a warrant would be required for law enforcement
10 purposes;

11 (2) the acquisition by an electronic, mechanical, or other surveillance device
12 of the contents of any wire communication to or from a person in the United
13 States, without the consent of any party thereto, if such acquisition occurs in
14 the United States, but does not include the acquisition of those
15 communications of computer trespassers that would be permissible under
16 section 2511(2)(i) of Title 18;

17 (3) the intentional acquisition by an electronic, mechanical, or other
18 surveillance device of the contents of any radio communication, under
19 circumstances in which a person has a reasonable expectation of privacy and
20 a warrant would be required for law enforcement purposes, and if both the
21 sender and all intended recipients are located within the United States; or

22 (4) the installation or use of an electronic, mechanical, or other surveillance
23 device in the United States for monitoring to acquire information, other than
24 from a wire or radio communication, under circumstances in which a person
25 has a reasonable expectation of privacy and a warrant would be required for
26 law enforcement purposes.

27 *Id.* § 1801(f). Section 1809 criminalizes two types of conduct:

28 A person is guilty of an offense if he intentionally—

(1) engages in electronic surveillance under color of law except as
authorized by this chapter, chapter 119, 121, or 206 of Title 18 or any
express statutory authorization that is an additional exclusive means
for conducting electronic surveillance under section 1812 of this
title; or

1 (2) discloses or uses information obtained under color of law by
2 electronic surveillance, knowing or having reason to know that the
3 information was obtained through electronic surveillance not
4 authorized by this chapter, chapter 119, 121, or 206 of Title 18, or any
5 express statutory authorization that is an additional exclusive means
6 for conducting electronic surveillance under section 1812 of this title.

7 *Id.* § 1809(a). A person may assert, as a defense to prosecution under this section, that he
8 “was a law enforcement or investigative officer engaged in the course of his official
9 duties and the electronic surveillance was authorized by and conducted pursuant to a
10 search warrant or court order of a court of competent jurisdiction.” *Id.* § 1809(b).

11 **B. Sovereign Immunity**

12
13 The Government moves to dismiss Plaintiffs’ FISA claim pursuant to Federal Rule
14 of Civil Procedure Rule 12(b)(1) on the ground that the claim is barred by sovereign
15 immunity. “The United States, including its agencies and employees, can be sued only to
16 the extent that it has expressly waived its sovereign immunity.” *Kaiser v. Blue Cross of*
17 *Cal.*, 347 F.3d 1107, 1117 (9th Cir. 2003) (citing *United States v. Testan*, 424 U.S. 392,
18 399 (1976)). “[A]ny lawsuit against an agency of the United States or against an officer
19 of the United States in his or her official capacity is considered an action against the
20 United States.” *Balser v. Dep’t of Justice, Office of the U.S. Tr.*, 327 F.3d 903, 907 (9th
21 Cir. 2003) (citing *Sierra Club v. Whitman*, 268 F.3d 898, 901 (9th Cir. 2001)). “[S]uits
22 against officials of the United States . . . in their official capacity are barred if there has
23 been no waiver” of sovereign immunity. *Sierra Club*, 268 F.3d at 901. Absent a waiver
24 of sovereign immunity, courts have no subject matter jurisdiction over cases against the
25 government. *United States v. Mitchell*, 463 U.S. 206, 212 (1983). “A waiver of the
26 Federal Government’s sovereign immunity must be unequivocally expressed in statutory
27 text . . . and will not be implied.” *Lane v. Pena*, 518 U.S. 187, 192 (1996). Waiver of
28

1 sovereign immunity is to be strictly construed in favor of the sovereign. *Id.*; *United*
2 *States v. Nordic Village, Inc.*, 503 U.S. 30, 33–34 (1992).

3
4 On August 7, 2012, the Ninth Circuit held that Congress “deliberately did not
5 waive [sovereign] immunity with respect to § 1810” and thus a plaintiff may not bring a
6 suit for damages against the government under that provision. *Al-Haramain Islamic*
7 *Found., Inc. v. Obama*, __F.3d__, 2012 WL 3186088, at *8 (9th Cir. 2012). The Ninth
8 Circuit reversed the district court’s decision that Congress implicitly waived sovereign
9 immunity for Section 1810. *Id.* at *3–*8. The Ninth Circuit held that the district court’s
10 finding was erroneous for three reasons.

11
12 First, the Ninth Circuit concluded that the district court erred in finding an implicit
13 waiver because the Supreme Court has held that sovereign immunity cannot be waived
14 by implication. *Id.* at *3 (quoting *Mitchell*, 445 U.S. at 538). The waiver must be
15 “‘unequivocally expressed.’” *Id.* (quoting *Mitchell*, 445 U.S. at 538).

16
17 Second, the Ninth Circuit found that a conclusion that Congress intended to
18 implicitly waive sovereign immunity was unwarranted given that Congress had expressly
19 waived sovereign immunity, and permitted civil actions for damages against the United
20 States, for other sections of FISA. *Id.* at *4–*6 (citing 18 U.S.C. § 2712). Section 2712
21 of Title 18 of the United States Code, enacted as part of the Patriot Act, permits actions
22 against the United States to recover money damages for violations of Sections 1806(a),
23 1825(a), and 1845(a) of FISA. A person may, therefore, bring a suit against the
24 government if the government (1) uses or discloses information obtained from electronic
25 surveillance conducted pursuant to the FISA subchapter on electronic surveillance
26 without consent and without following FISA’s minimization procedures or without a
27 lawful purpose, 50 U.S.C. § 1806(a); (2) uses or discloses information from a physical
28 search conducted pursuant to the FISA subchapter on physical searches without consent

1 and without following the minimization procedures or without a lawful purpose, *id.* §
2 1825(a); or (3) uses or discloses information obtained from a pen register or trap and
3 trace device installed pursuant to the FISA subchapter on such devices without following
4 the requirements of Section 1845, *id.* § 1845(a). Congress clearly knew how to waive
5 sovereign immunity for certain violations of FISA. It decided, in its wisdom, not to do so
6 for violations of Section 1810.

7
8 Third, the Ninth Circuit explained that “the relationship between [Section] 1809
9 and [Section] 1810” further demonstrates that Congress did not intend to permit an action
10 against the government for violations of Section 1810. Specifically, the Ninth Circuit
11 explained that because of this relationship, to impose official capacity liability under
12 Section 1810, it “must also suppose that a criminal prosecution may be maintained
13 against an office, rather than an individual, under [Section] 1809.” *Id.* at *7. The Ninth
14 Circuit found that imposing such “unprecedented” official capacity liability for criminal
15 violations, in essence “imposing criminal penalties against an office for the actions of the
16 officeholder,” would be “‘patently absurd.’” *Id.* at *7 (citing *United States v. Singleton*,
17 165 F.3d 1297, 1299–3000 (10th Cir. 1999)).

18
19 The Ninth Circuit’s decision in *Al-Haramain* is dispositive here. Sovereign
20 immunity is not waived for violations of Section 1810. Consequently, Plaintiffs’ Section
21 1810 claim against the Government is DISMISSED WITH PREJUDICE.

22 23 **C. Qualified Immunity**

24
25 The Agent Defendants move under Federal Rule of Civil Procedure 12(b)(6) for
26 dismissal of Plaintiffs’ FISA claim arguing that they are entitled to qualified immunity.
27 A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the claims asserted
28 in the complaint. The issue on a motion to dismiss for failure to state a claim is not

1 whether the claimant will ultimately prevail, but whether the claimant is entitled to offer
2 evidence to support the claims asserted. *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249
3 (9th Cir. 1997). When evaluating a Rule 12(b)(6) motion, the district court must accept
4 all material allegations in the complaint as true and construe them in the light most
5 favorable to the non-moving party. *Moyo v. Gomez*, 32 F.3d 1382, 1384 (9th Cir. 1994).
6 Rule 12(b)(6) is read in conjunction with Rule 8(a), which requires only a short and plain
7 statement of the claim showing that the pleader is entitled to relief. Fed. R. Civ. P.
8 8(a)(2). Dismissal of a complaint for failure to state a claim is not proper where a
9 plaintiff has alleged “enough facts to state a claim to relief that is plausible on its face.”
10 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In keeping with this liberal
11 pleading standard, the district court should grant the plaintiff leave to amend if the
12 complaint can possibly be cured by additional factual allegations. *Doe v. United States*,
13 58 F.3d 494, 497 (9th Cir. 1995).

14
15 “Qualified immunity shields federal and state officials from money damages unless
16 a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional
17 right, and (2) that the right was ‘clearly established’ at the time of the challenged
18 conduct.” *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011) (quoting *Harlow v.*
19 *Fitzgerald*, 457 U.S. 800, 818 (1982)). The district court may address the two prongs in
20 any order. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

21
22 The doctrine of qualified immunity was established to protect government officials
23 “from liability for civil damages insofar as their conduct does not violate any clearly
24 established statutory or constitutional rights of which a reasonable person would have
25 known.” *Harlow*, 457 U.S. at 818. A right is clearly established if “it would be clear to a
26 reasonable officer that his conduct was unlawful in the situation he confronted.” *Saucier*
27 *v. Katz*, 533 U.S. 194, 202 (2001), *overruled on other grounds by Pearson*, 555 U.S. at
28 236–37. Law may be clearly established “notwithstanding the absence of direct

1 precedent. . . . Otherwise, officers would escape responsibility for the most egregious
2 forms of conduct simply because there was no case on all fours prohibiting that particular
3 manifestation of unconstitutional [or unlawful] conduct.” *Deorle v. Rutherford*, 272 F.3d
4 1272, 1285–86 (9th Cir. 2001). “Rather, what is required is that government officials
5 have ‘fair and clear warning’ that their conduct is unlawful.” *Deveraux v. Abbey*, 263
6 F.3d 1070, 1075 (9th Cir. 2001) (quoting *United States v. Lanier*, 520 U.S. 259, 271
7 (1997)).

8
9 The Agent Defendants are not entitled to dismissal of Plaintiffs’ FISA claim based
10 on qualified immunity. Plaintiffs have pleaded sufficient facts to demonstrate that, taken
11 in the light most favorable to them, they are “aggrieved persons” and that the Agent
12 Defendants violated a clearly established statutory right created by FISA. FISA
13 constitutes clearly established law governing electronic surveillance, including that of the
14 kind engaged in by the Agent Defendants. Sections 1809 and 1810 clearly prohibit “the
15 installation or use of an electronic, mechanical, or other surveillance device in the United
16 States for monitoring to acquire information, other than from a wire or radio
17 communication, under circumstances in which a person has a reasonable expectation of
18 privacy and a warrant would be required for law enforcement purposes,” 50 U.S.C. §
19 1801(f), “under color of law except as authorized by [FISA], chapter 119, 121, or 206 of
20 Title 18 or any express statutory authorization that is an additional exclusive means for
21 conducting electronic surveillance under section 1812 [of FISA].” 50 U.S.C. §
22 1809(a)(1).

23
24 The Agent Defendants argue that they are entitled to qualified immunity because it
25 was not clearly established that Plaintiffs were “aggrieved persons.” Specifically, the
26 Agent Defendants argue that Plaintiffs did not have a clearly established reasonable
27 expectation of privacy with respect to the situations in which they were electronically
28 surveilled. The Court disagrees. FISA’s “aggrieved person” status is coextensive with

1 standing under the Fourth Amendment for claims involving electronic surveillance. *See*
2 *ACLU v. Nat'l Sec. Agency*, 493 F.3d 644, 658 n.16 (6th Cir. 2007) (citing H.R. Rep. No.
3 95-1283, at 66 (1978)). Thus, the law regarding the reasonable expectation of privacy in
4 the Fourth Amendment context governs here and is clearly established. A person has a
5 reasonable expectation of privacy where he “has shown that ‘he seeks to preserve
6 [something] as private’ ” and his “subjective expectation of privacy is ‘one that society is
7 prepared to recognize as ‘reasonable.’ ” *Smith v. Maryland*, 442 U.S. 735, 740 (1979)
8 (citing *Katz v. United States*, 389 U.S. 347, 351, 361 (1967)). Notably, “[p]rivacy does
9 not require solitude,” *United States v. Taketa*, 923 F.2d 665, 673 (9th Cir. 1991), and
10 even open areas may be private places so long as they are not “so open to [others] or the
11 public that no expectation of privacy is reasonable,” *O’Connor v. Ortega*, 480 U.S. 709,
12 718 (1987).

13
14 As noted by Plaintiffs in their opposition:

15
16 The complaint sets forth detailed allegations that Defendants planted
17 electronic listening devices in one Plaintiff’s home and another’s office, that
18 their informant left recording devices to capture intimate religious discussion
19 at the mosque, that the informant routinely took video in mosques and in
20 private homes, and that the informant acted pursuant to broad instructions to
gather as much information on Muslims as possible.

21 (Pls. Combined Opp’n, at 64; *see also* FAC ¶¶ 95, 209, 127, 137, 192, 193, 202, 211.)

22 The FAC alleges that this surveillance often took place outside the presence of the
23 informant and was all conducted without a warrant. (FAC ¶¶ 86–137.) A reasonable
24 officer knows that there is a reasonable expectation of privacy in one’s home, office, and
25 in certain discrete areas of a mosque as described in the FAC, (*id.*). *See Kylllo v. United*
26 *States*, 533 U.S. 27 (2001) (finding a reasonable expectation of privacy exists in one’s
27 home); *O’Connor v. Ortega*, 480 U.S. 709 (finding that a reasonable expectation of
28 privacy can exist in a person’s work place and office); *Mockaitis v. Harclerod*, 104 F.3d

1 1522 (9th Cir. 1997) (finding a reasonable expectation of privacy arising out of religious
2 customs of confidentiality such as confession), *overruled on other grounds by United*
3 *States v. Antoine*, 318 F.3d 919 (9th Cir. 2003).³

4
5 Agent Rose argues that she is entitled to qualified immunity because Plaintiffs
6 have failed to plausibly allege that she violated FISA based on *Ashcroft v. Iqbal*. Again,
7 the Court disagrees. In *Iqbal*, the Supreme Court held that a supervisor may not be held
8 liable for a constitutional violation on the basis of *respondeat superior* or vicarious
9 liability, but instead, a plaintiff must allege sufficient facts to plausibly allege liability
10 based upon the supervisor's individual conduct. *Ashcroft v. Iqbal*, 556 U.S. 662, 675–76
11 (2009). Contrary to Agent Rose's assertion, Plaintiffs do allege intentional and wrongful
12 conduct on her part. The FAC alleges:

13
14 Upon information and belief, Defendant Pat Rose was, at all times
15 relevant to this action, employed by the FBI and acting in the scope of her
16 employment as a Special Agent. Upon information and belief, Agent Rose
17 was assigned to the FBI's Santa Ana branch office, where she supervised the
18 FBI's Orange County national security investigations and was one of the
19 direct supervisors of Agents Allen and Armstrong. Upon information and
20 belief, Defendant Rose was regularly apprised of the information Agents
21 Armstrong and Allen collected through Monteilh; directed the action of the
22 FBI agents on various occasions based on that information; and actively
23 monitored, directed, and authorized the actions of Agents Armstrong and
24 Allen and other agents at all times relevant in this action, for the purpose of
surveilling Plaintiffs and other putative class members because they were
Muslim. Agent Rose also sought additional authorization to expand the
scope of the surveillance program described [in the FAC], in an effort to
create a Muslim gym that the FBI would use to gather yet more information
about the class.

25 ³ Agent Defendants also argue that they are entitled to qualified immunity because it was not clearly
26 established that they could be liable under Section 1810 in their individual capacity, based upon the
27 Northern District's ruling that Section 1810 imposed only official capacity liability that was reversed by
28 *Al-Haramain*. The Court disagrees. Regardless of the nature of the remedy permitted by Section 1810,
both that section and Section 1809 clearly establish that the conduct allegedly engaged in by the
individual defendants was unlawful. The qualified immunity analysis focuses on the legality of the
conduct, not the remedy available to a plaintiff or the procedure for seeking that remedy.

1 (FAC ¶ 22.) The FAC further alleges that all of the Agent Defendants, including Agent
2 Rose, “maintained extremely close oversight and supervision of Monteilh” and “because
3 they made extensive use of the results of his surveillance, they knew in great detail the
4 nature and scope of the operation, including the methods of surveillance Monteilh used
5 and the criteria used to decide his targets, and continually authorized their ongoing use.”
6 (*Id.* ¶ 138.) These allegations amount to intentional, individual conduct on the part of
7 Agent Rose that, taken in the light most favorable to Plaintiffs, demonstrates a violation
8 of Section 1810 that satisfies the pleading requirements of *Iqbal*.

9
10 Finally, Agents Tidwell and Walls assert that Plaintiffs’ FISA claim should be
11 dismissed because it fails to allege that they engaged in the alleged surveillance activity
12 with the intent to violate the law. Dismissal on this basis is unsupported by the plain
13 language of FISA or judicial precedent interpreting Section 1809. Section 1809 imposes
14 liability for those who “intentionally engage in electronic surveillance under color of law
15 except as authorized.” 50 U.S.C. § 1809. The statute requires that Agents Tidwell and
16 Walls intended to conduct unauthorized electronic surveillance. The FAC makes clear
17 that the Agents did intentionally engage in such surveillance without authorization. More
18 is not required.⁴

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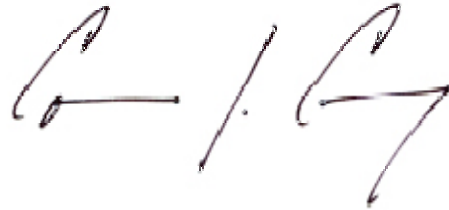
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28 ⁴ The Court, however, declines at this time to rule on the issue of whether Plaintiffs’ FISA claim should be dismissed under the state secrets privilege, as that issue was not before the Court.

1 **III. CONCLUSION**

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3 For the foregoing reasons, with respect to Plaintiffs' FISA Section 1810 claim, the
4 Government's motion to dismiss is GRANTED and the Agent Defendants' motions to
5 dismiss are DENIED.

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8 DATED: August 14, 2012



10 CORMAC J. CARNEY
11 UNITED STATES DISTRICT JUDGE
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