No. 25A___

In the Supreme Court of the United States

CARTER PAGE, *Applicant*

v.

JAMES B. COMEY; ANDREW MCCABE; KEVIN CLINESMITH; PETER STRZOK; LISA PAGE; JOE PIENTKA, III; STEPHEN SOMMA; BRIAN J. AUSTEN; UNITED STATES DEPARTMENT OF JUSTICE; FEDERAL BUREAU OF INVESTIGATION; UNITED STATES OF AMERICA; JOHN DOE 1-10; AND JANE DOE 1-10

APPLICATION TO EXTEND TIME TO FILE A PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice John G. Roberts, Jr. as Circuit Justice for the United States Court of Appeals for the District of Columbia Circuit:

As a subsequent investigation revealed, the Federal Bureau of Investigation (FBI) made seventeen significant misstatements to the Foreign Intelligence Surveillance Court (FISC) when applying to surveil applicant Dr. Carter Page. Secretly, two agents then leaked information about that surveillance to the press, which led to an April 2017 article in *The Washington Post* on which the government expressly "declined to comment." Two years later, the United States first acknowledged its surveillance abuses as they related to Dr. Page. Less than a year after that acknowledgment, Page sued the government officials responsible for these abuses, raising two claims under the Foreign Intelligence Surveillance Act (FISA). After exhausting administrative remedies, he later added a claim against the United States under the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (PATRIOT) Act.

Over a partial dissent, a panel of the U.S. Court of Appeals for the District of Columbia Circuit affirmed dismissal of Dr. Page's claims, finding all claims against the United States, the Department of Justice, the FBI, and the individual officials involved in the surveillance—the respondents here—time-barred. *Page* v. *Comey*, 137 F.4th 806, 808 (D.C. Cir. 2025) (Appendix A). And the panel based that conclusion on its holding that such claims accrue when the victim merely *suspects*—even without sufficient evidence to survive a motion to dismiss—that he is the victim of the illegal use or disclosure of surveillance-obtained information. *Id.* at 815-817. Under that reasoning, it is virtually impossible for any plaintiff to survive a motion to dismiss when challenging the government's unlawful use or disclosure of confidential, surveillance-obtained information.

That is not the law. Congressionally authorized claims against the government and its agents for abusing surveillance authorities mean nothing if mere suspicion about secret and impossible-to-investigate abuses start the clock. Until that exceptionally important question is properly resolved, Congress' guardrails against surveillance abuse are but a parchment guarantee. In all but the rarest of cases, by the time a person surveilled by the government knows enough to allege sufficient facts to survive a motion to dismiss, the limitations period will have already expired. After all, this Court has held that, "even on a motion to dismiss, it is not enough" to raise speculative allegations. *Smith & Wesson Brands, Inc.* v. *Estados Unidos Mexicanos*, 605 U.S. 280, 296 (2025). Yet, when challenging classified surveillance, that is all anyone has until the government itself acknowledges its activities. And the

D.C. Circuit panel has now endorsed a requirement that parties must start filing complaints that include nothing more than speculation.

To allow this issue and the underlying dispute to be fully considered by this Court, and under Supreme Court Rules 13.5, 22, and 30, Dr. Page requests a 60-day extension, to December 11, 2025, to petition for a writ of certiorari. The petition will present at least one question of vital importance: Whether claims that the government violated FISA or the PATRIOT Act accrue based merely on facts that might lead a victim to suspect unlawful surveillance?

The D.C. Circuit's opinion finding that each of Dr. Page's claims was time-barred issued on May 23, 2025, and Page's petition for rehearing en banc was denied on July 14, 2025. See *Page*, 137 F.4th 806; see also *Page* v. *Comey,* No. 23-5038, 2025 WL 2004959 (D.C. Cir. July 14, 2025) (Appendix B) (rehearing denial). The petition is thus due on October 12, 2025. The Court has jurisdiction under 28 U.S.C. § 1254(1). For the reasons addressed below, the application for an extension should be granted.

BACKGROUND

Dr. Page is a long-time contributor to the Nation's national security efforts. *Page* v. *Comey*, 628 F. Supp. 3d 103, 110 (D.D.C. 2022) (Appendix F).[1] Despite years of service, Dr. Page was an unfortunate target of Operation Crossfire Hurricane, a flawed FBI investigation into whether Donald Trump's 2016 presidential campaign had Russia ties. *Ibid.* Through deliberate lies and incomplete factual assertions, the

[1] The Appendix also includes the district court's order denying Dr. Page's motion to alter or amend the judgment (Appendix C), the memorandum opinion denying that motion (Appendix D), and the order granting the motions to dismiss (Appendix E).

FBI convinced FISC that Dr. Page was a Russian agent, leading FISC to grant four surveillance warrants under the FISA. *Id.* After the initial application, each subsequent extension application built on information obtained from the surveillance authorized by the previous applications. *Id.* at 112-113.

While this surveillance was ongoing, two members of the Crossfire Hurricane team conspired to anonymously leak information obtained through the FBI's secret surveillance of Dr. Page to the media in a public-smear campaign. *Id.* at 113-114. In April 2017, *The Washington Post* published a piece entitled, *FBI Obtained FISA Warrant to Monitor Former Trump Adviser Carter Page,* reporting that the FBI was engaged in surveillance of Page. *Page*, 137 F.4th at 810. But the "White House, the FBI and the Justice Department * * * all 'declined to comment.'" *Id.* at 836 (Henderson, J., concurring in part and dissenting in part) (internal citation omitted). The *New York Times* parroted that story a week later with no new details. *Id.* at 810-811 (majority op.) Neither article said anything about how the FBI used or disclosed information about Dr. Page obtained from that surveillance. *Id.* at 834-835 (Henderson, J., concurring in part and dissenting in part). In June 2017, two months *after* these articles published, the FBI filed its last extension application for surveilling Dr. Page. *Id.* at 811 (majority op.).

Dr. Page suspected from the articles that he had been illegally surveilled. *Ibid.* And often—to combat the onslaught of negative press that came as a result—he said as much. *Ibid.* But because surveillance is done in secret, Dr. Page's suspicions could not be—and were not—validated for another two years. *Id.* at 812.

It was not until 2019 that Dr. Page's suspicions were confirmed through the Office of Inspector General's (OIG) report outlining the FBI's repeated and thorough surveillance abuses against Dr. Page. *Ibid.* The report identified many times when the FBI either omitted facts or lied about Dr. Page to obtain FISA warrants. *Ibid.*

Less than a year after the OIG report, Dr. Page sued. Relevant to the forthcoming petition, Dr. Page brought claims under 50 U.S.C. § 1809(a)(1) challenging the unlawful surveillance against him.[2] *Page*, 628 F. Supp. 3d at 116. He also brought separate claims alleging that various members of Operation Crossfire Hurricane unlawfully "disclose[d] or use[d]" information about him "obtained through electronic surveillance" in violation of 50 U.S.C. § 1809(a)(2). *Id.* at 133. After exhausting administrative remedies, Dr. Page then added a PATRIOT Act claim against the United States in June 2021. *Id.* at 114; see 18 U.S.C. § 2712(b)(1).

The district court found each claim either insufficiently pleaded or untimely, and dismissed. *Page,* 628 F. Supp. 3d at 129, 135. A divided panel affirmed the district court's decision on timeliness grounds. *Page*, 137 F.4th at 817, 820. The panel's decision was based on the presumption that Dr. Page's § 1809(a)(1) illegal-surveillance, § 1809(a)(2) use-and-disclosure, and PATRIOT Act claims accrued when *The Washington Post* article was published. *Id.* at 814-820.

Judge Henderson agreed with the majority that Dr. Page's § 1809(a)(1) claims challenging the surveillance itself accrued with the *Post* article since the *Post* article at least suggested that Dr. Page was being illegally surveilled. *Id.* at 828 (Henderson,

[2] 50 U.S.C. § 1810 gives those aggrieved by the government's violation of § 1809 a private right of action.

J., concurring in part and dissenting in part). But she recognized that Dr. "Page's two FISA claims allege two legally distinct injuries that can accrue at different times." *Id.* at 833. And she dissented from the majority's conclusion that Dr. Page's § 1809(a)(2) claims were untimely because the injury unique to that claim "is not the act of surveillance but the disclosure or use of information obtained through surveillance." *Id.* at 834. Since the *Post* article was silent about whether anyone "disclose[d] or use[d]" information about Dr. Page "obtained through electronic surveillance," Judge Henderson reasoned that the article itself could not have put Dr. Page on notice of that claim. *Id.* at 833. For similar reasons, Judge Henderson dissented from the majority's conclusion that the PATRIOT Act claim, which similarly turns on unlawful use or disclosure of surveillance information rather than on the surveillance itself, had accrued with the *Post* article. *Id.* at 828-832. Dr. Page unsuccessfully petitioned for rehearing en banc. See Appendix B.

REASONS FOR GRANTING AN EXTENSION OF TIME TO FILE A PETITION FOR WRIT OF CERTIORARI

This Application for an extension of 60 days to file a petition should be granted for several reasons:

1. The forthcoming petition has at least a reasonable chance of being granted. This Court has long explained that a cause of action "does not become complete and present for limitations purposes—it does not *accrue*—until the plaintiff can file suit and obtain relief." *Corner Post, Inc.* v. *Board of Governors of Fed. Rsrv. Sys.*, 603 U.S. 799, 810 (2024) (cleaned up). Similarly, the Court has expressly rejected suggestions that a limitations period "commences at a time when the [injured party] could not yet

file suit." *Bay Area Laundry & Dry Cleaning Pension Tr. Fund* v. *Ferbar Corp. of Cal.*, 522 U.S. 192, 200 (1997). As the dissenting justices in *Corner Post* recognized, this means that the accrual standard is generally "context specific." *Corner Post*, 603 U.S. at 853 (Jackson, J., dissenting) (collecting cases).

A "context[-]specific" approach to claim accrual for claims challenging unlawful surveillance and the unlawful use or disclosure of surveillance-obtained information contrary to FISA and the PATRIOT Act would not allow claims to accrue based on speculative concerns. As Judge Henderson explained, "the clandestine nature of FISA surveillance may often preclude FISA's civil cause of action absent a *discovery* accrual rule." *Page*, 137 F.4th at 828 (Henderson, J., concurring in part and dissenting in part) (emphasis added). Under this Court's precedents, she was right.

While "the pleading standard Rule 8 announces does not require detailed factual allegations, * * * it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009) (cleaned up). The prohibition on such accusations means that "a formulaic recitation of the elements of a cause of action" and "naked assertions devoid of further factual enhancement" "will not do." *Ibid* (cleaned up). In other words, as this Court clarified just last term, when allegations in a complaint are "all speculation," "it is not enough" "even on a motion to dismiss." *Smith & Wesson*, 605 U.S. at 296; *accord Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 555 (2007) ("Factual allegations must be enough to raise a right to relief above the speculative level.")

This Court's pleading requirements, when viewed alongside the standard that claims do not accrue "until the plaintiff can file suit and obtain relief," *Corner Post,* 603 U.S. at 810 (cleaned up), show that Dr. Page's claims did not accrue—as the panel held—with the *Post* article. Instead, they accrued when the government acknowledged that it had surveilled him—and disclosed the circumstances behind that surveillance—in the OIG report. It was that report, and not the anonymously sourced article from the *Post*, that for the first time clarified that Dr. Page's suspicions were correct: The Crossfire Hurricane team had not only illegally surveilled him, but also illegally used and disclosed information obtained from that illegal surveillance in its filings with FISC and in the leak to the media. And it was only after that report issued that Dr. Page could bring non-speculative claims sufficient to survive a motion to dismiss—as even the district court recognized when it wrote that, before the OIG report, it was "far from clear that a diligent investigation would have revealed enough evidence of illegality to avoid filing suit on a hunch." *Page*, 628 F. Supp. 3d at 119 (cleaned up).

It cannot be the case that claims challenging confidential information are too speculative until they are untimely, yet that is the standard that Dr. Page faced here. There is a reasonable likelihood that the Court will grant the forthcoming petition to decide the proper standard for claim accrual in claims challenging secret government surveillance.

2. Resolution of this question is particularly important given the context in which it arises. If claims challenging unlawful surveillance and the improper use or

disclosure of surveillance-acquired information accrue on mere unsubstantiated suspicions, then aggrieved persons will be forced into the untenable position of having to bring claims early based on hunches—only to have those claims dismissed on the merits. This, in turn, will compound past harms by shielding the government and its agents from accountability for serious breaches of the "institutional guardrails designed to safeguard our civil liberties." *Page*, 137 F.4th at 820 (Henderson, J., concurring in part and dissenting in part).

But Congress enacted FISA to ensure electronic surveillance was subject to the Fourth Amendment's robust protections and thus to repair "the public's eroded confidence in the intelligence community." *Id.* at 822. By finding that Dr. Page's claims accrued based on an article on which the government expressly declined to comment, the panel's restrictive decision thwarts those important functions. And it does so not only for Dr. Page, but also for anyone who suspects that the government has its eyes on them.

Concerns about FBI surveillance continue today. Indeed, as Judge Henderson recognized, this case confirms that the FBI may continue to use "oppressive [m]easures" safe in the knowledge that it will—in all but the rarest cases—avoid "[i]nquiry into [its] own misconduct." *Id.* at 821 (citation omitted). Here, that misconduct led to the FBI's surveilling Dr. Page, and then smearing him, because of his political affiliations and despite his dedication to his country. See *id.* at 823-825. As the FISC concluded in its review of the applications to surveil Dr. Page, it was abuses like these stemming from potential violations of the Fourth Amendment that

prompted FISA's enactment. *In re Accuracy Concerns Regarding FBI Matters Submitted to FISC,* 411 F. Supp. 3d 333, 335-336 (FISC 2019). Yet the panel decision guarantees that the government and its agents will forever avoid liability for violating Page's rights and the rights of others like him. This Court's review of the question presented will be necessary so that error will not unlawfully constrain future litigants seeking to challenge unlawful surveillance-related activities.

3. To fully present these issues in a proper petition, an extension of time is warranted. Mr. Schaerr has several other pressing professional obligations that complicate his ability to complete and file the petition by its current due date.

Among those obligations are two other petitions for certiorari. The first, in *Project for Privacy and Surveillance Accountability* v. *United States Department of Justice*, will seek review of the D.C. Circuit's *Glomar* doctrine under which agencies invoking certain exceptions to the Freedom of Information Act's disclosure requirements can refuse to even search for responsive records. It is due on October 16, 2025, although Mr. Schaerr will be seeking an extension in that case as well. The second, in *Family Federation for World Peace and Unification International* v. *Moon*, will seek review of the D.C. Court of Appeal's conclusion that it cannot even decide whether a religious organization is hierarchical such that the First Amendment requires civil courts to defer to its decisions on polity, governance, and doctrine. That petition is due on December 1, 2025, following an extension. See *Family Fed'n for World Peace and Unification Int'l* v. *Moon*, No. 25A329. Mr. Schaerr has also been busy preparing multiple briefs in this Court with immovable deadlines, including in:

- *Miller* v. *Civil Rts. Dep't*, No. 25-233 (filed September 29, 2025); and
- *Gilliam* v. *Gerregano*, No. 25-107 (due October 6, 2025).

And that says nothing of the many other briefs Mr. Schaerr has been preparing in courts across the country that will make his timely preparation of a petition for a writ of certiorari here difficult. Those briefs include an amicus brief filed last night in *In re: The Church of Jesus Christ of Latter-Day Saints Tithing Litigation*, No. 25-4068 (10th Cir.), and an opening brief due on October 27, 2025, in *United States* v. *Haim,* No. 25-20336 (5th Cir.).

4. No apparent prejudice will arise from the requested extension. Having prevailed in getting each of Dr. Page's claims dismissed below, respondents will suffer no disability from an extension.

CONCLUSION

For the foregoing reasons, Dr. Page requests an extension of time to file a petition for a writ of certiorari to and including December 11, 2025.

September 30, 2025

Respectfully submitted,

/s/ Gene C. Schaerr

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APPENDIX

TABLE OF APPENDICES

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 6, 2024 Decided May 23, 2025

No. 23-5038

CARTER PAGE,
APPELLANT

v.

JAMES B. COMEY, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:20-cv-03460)

Gene C. Schaerr argued the cause for appellant. With him on the briefs were *Erik S. Jaffe* and *Brian J. Field*.

David N. Kelley argued the cause for individual appellees. With him on the brief were *Meaghan VerGow*, *Andrew R. Hellman*, *Meredith N. Garagiola*, *Daniel Brovman*, *Brigida Benitez*, *Patrick F. Linehan*, *Brian M. Heberlig*, *Robert J. Katerberg*, *Kaitlin Konkel*, *Christopher C. Muha*, *Aitan D. Goelman*, *Ivano M. Ventresca*, *Joseph R. Palmore*, *James M. Koukios*, and *Alexandra M. Avvocato*.

Benjamin M. Shultz, Attorney, U.S. Department of Justice, argued the cause for government appellees. With him on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, at the time the brief was filed, and *Sharon Swingle*, Attorney.

Before: HENDERSON, PILLARD, and CHILDS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* CHILDS.

Opinion concurring in part and dissenting in part filed by *Circuit Judge* HENDERSON.

CHILDS, *Circuit Judge*: Carter W. Page appeals the district court's dismissal of his second amended complaint for failure to state a claim. *Page v. Comey*, 628 F. Supp. 3d 103 (D.D.C. 2022). Page filed an action against the United States, the Department of Justice (DOJ), the Federal Bureau of Investigation (FBI), as well as current and former known and unknown FBI officials (individual defendants[1]) (collectively Appellees), alleging that the FBI unlawfully obtained four warrants to electronically surveil him pursuant to the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. §§ 1801–1885c, and that Appellees leaked to the press information obtained pursuant to those warrants, giving rise to liability under FISA and the Patriot Act. Page alleged that as the result of the public revelation of this unlawful surveillance he suffered reputational harm, pain and suffering, and lost lucrative business opportunities. Ultimately, the district court

[1] In the second amended complaint, Page identified as individual defendants James Comey, Andrew McCabe, Kevin Clinesmith, Peter Strzok, Lisa Page, Joe Pientka III, Stephen Somma, Brian J. Auten, John Does 1–10, and Jane Does 1–10.

dismissed Page's claims, finding them either time-barred or insufficiently pleaded.

For the reasons below, we are unanimous in affirming dismissal of Page's claims of unlawful surveillance under FISA (*see* 50 U.S.C. § 1809(a)(1)) on the ground that they are conclusively time-barred. We also unanimously affirm the dismissal of the Patriot Act claim against the United States, with the majority concluding that claim, too, is time-barred and the partial dissent resting instead on Page's failure to preserve the claim and its legal insufficiency in any event. Finally, the majority concludes that Page's claim of unlawful disclosure or use of the results of unlawful surveillance under FISA (*see* 50 U.S.C. § 1809(a)(2)) is also time-barred and, in part, insufficiently pleaded.

Judge Henderson dissents only insofar as she would have allowed Page's section 1809(a)(2) disclosure-or-use claim to proceed. She parses that claim into distinct strands. She would hold, first, that the claim that certain defendants used FISA-derived information to apply for ensuing warrant applications should not be dismissed as time-barred without first allowing discovery into whether, once Page knew he was subject to FISA warrants, he knew or reasonably should have inquired into FISA's warrant-renewal requirements. On its merits, she explained, that claim was plausibly pleaded. Second, Judge Henderson analyzes Page's media-leak theory as two distinct claims. The first, that media leaks by defendants Lisa Page and Peter Strzok led to publication of the fact that Carter Page was under FISA surveillance, she would dismiss for failure to state an unlawful-disclosure claim because Page's identity and the fact of surveillance were not themselves information "obtained by" FISA surveillance. As to the second, Judge Henderson reads the complaint to support a reasonable inference that those two leakers also disclosed FISA-acquired information that the

newspapers decided not to mention. She therefore discerns an unlawful-disclosure claim against the pair that she would deem timely.

I.

A.

In this appeal from an order granting a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), the relevant facts are those "alleged in the complaint, any documents either attached to or incorporated in the complaint and matters of which [the court] may take judicial notice." *Hurd v. District of Columbia, Gov't*, 864 F.3d 671, 678 (D.C. Cir. 2017) (quoting *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997)). Unless otherwise noted, the following background is derived from Page's second amended complaint.

"During the 2016 U.S. Presidential election," Page volunteered as a "member of an informal foreign policy advisory committee to then-candidate Donald J. Trump's election campaign." 2d Am. Compl. ¶ 21 (JA027). Page alleged that on July 31, 2016, he became the target of an FBI surveillance program called Operation Crossfire Hurricane. The purpose of Crossfire Hurricane was "to determine whether 'individual(s) associated with the Trump campaign [we]re witting of and/or coordinating activities with the Government of Russia.'" *Id.* ¶ 5 (JA022).

In August 2016, the Central Intelligence Agency (CIA) informed members of the Crossfire Hurricane team that Page had been a CIA "operational contact" from 2008 to 2013, assisting in countering Russian and other foreign intelligence activity. *Id.* ¶ 11 (JA023). Several weeks later, the CIA sent

an investigative referral to FBI Director James Comey (Comey) and Deputy Assistant Director of Counterintelligence Peter Strzok (Strzok) conveying that presidential candidate "Hillary Clinton had approved a plan concerning U.S. Presidential candidate Donald Trump and Russian hackers hampering U.S. elections as a means of distracting the public from her use of a private mail server." *Id.* ¶¶ 12, 167 (JA024, JA054–JA055). A few weeks later, on September 19, 2016, the FBI received information from Christopher Steele, a Confidential Human Source, that "falsely alleged unlawful communications and activities involving . . . Page and two Russians with close ties to Russian President Vladimir Putin." *Id.* ¶¶ 9, 14 (JA023–JA024). However, the CIA had identified this information from Steele as possibly containing false allegations. In addition, the FBI became aware of several other facts that raised questions regarding Steele's credibility, including: (1) that the Democratic Party and/or the Clinton campaign supposedly paid Steele to perform "political opposition research," and (2) that the CIA had reportedly warned the FBI of a "potential political scheme" involving a disinformation effort to report a connection between the Trump campaign and Russia. *Id.* ¶¶ 9, 15, (JA023, JA025). Steele eventually provided similar information to public news media regarding the investigation.

On September 23, 2016, Michael Isikoff published an article in *Yahoo! News* titled "U.S. intel officials probe ties between Trump adviser and Kremlin." Michael Isikoff, *U.S. intel officials probe ties between Trump adviser and Kremlin*, *Yahoo! News* (Sept. 23, 2016), https://perma.cc/T2GE-M22D. The article stated that in July 2016, Page "[spoke] at a commencement address for the New Economic School, an institution funded in part by major Russian oligarchs close to Putin." *Id.* Additionally, the article stated that "U.S. intelligence agencies ha[d] also received reports that Page met

with another top Putin aide while in Moscow—Igor Diveykin." *Id.* "In response to [this] article, on September 25, 2016, . . . Page sent a letter to . . . Comey in which he categorically denied that he had any such communications with the Russian individuals and documented his previous cooperation with the CIA and the FBI to combat Russian spying." 2d Am. Compl. ¶¶ 15, 81 (JA025, JA039). Upon the receipt and sharing of Page's letter with the Crossfire Hurricane team the following day, Strzok wrote to FBI lawyer Lisa Page that "[a]t a minimum, the letter provides [the team] a pretext to interview" Page. *Id.* ¶ 147 (JA051).

On October 21, 2016, the FBI submitted its first FISA warrant application to the Foreign Intelligence Surveillance Court (FISC), relying on the *Yahoo! News* article and other allegedly false and misleading information. Under 50 U.S.C. § 1805(a)(2)(A), the FISC has authority to issue orders for electronic surveillance when presented with evidence that there is probable cause to believe that a target is an "agent of a foreign power."

After a second FISA warrant application had been submitted on January 12, 2017, two FBI agents—one of whom was individual defendant Stephen Somma—conducted an "ambush interview" of Page, followed by four additional interviews in March 2017. 2d Am. Compl. ¶¶ 122, 210 (JA047, JA063). In total, the five interviews lasted roughly ten hours. Page opines that he "was candid and cooperative with the agents, and his answers undermined any contention that he was acting as an agent of a foreign power." *Id.* ¶¶ 122, 210 (JA047, JA063). On April 7, 2017, the FBI submitted a third FISA warrant application to continue its surveillance of Page.

A few days later, on April 10, 2017, Strzok purportedly texted Lisa Page to devise a plan to leak information about the

Crossfire Hurricane investigation to the news media. The following day, the *Washington Post* published a story entitled, "FBI obtained FISA warrant to monitor former Trump adviser Carter Page." JA095–JA100; *see also* 2d Am. Compl. ¶ 221 (JA068). The article, which reported on information provided by "law enforcement and other U.S. officials" who "were not authorized to discuss details of a counterintelligence probe," stated that "[t]he FBI and the Justice Department obtained [a] warrant targeting Carter Page's communications after convincing a Foreign Intelligence Surveillance Court judge that there was probable cause to believe Page was acting as an agent of a foreign power, in this case Russia." JA095; 2d Am. Compl. ¶ 221(a) (JA068).

The *Washington Post* story quoted Page as saying that "[t]his confirms all of my suspicions about unjustified, politically motivated government surveillance" and that "[he] ha[s] nothing to hide." JA096. According to the *Post*, Page "compared surveillance of him to the eavesdropping that the FBI and Justice Department conducted against civil rights leader Martin Luther King Jr." *Id.* Page "dismissed what he called 'the dodgy [Steele] dossier' of false allegations" and maintained that he wanted to testify before Congress to clear his name, JA98, because any information he provided to the Russians was "innocuous," *i.e.*, "basic immaterial information and publicly available research documents." JA100. Page also stated in his defense that he had assisted the government in an earlier espionage case against a Russian national.

Ten days later, on April 22, 2017, the *New York Times* published an article entitled "Comey Tried to Shield the F.B.I. From Politics. Then He Shaped an Election." Matt Apuzzo, Michael S. Schmidt, Adam Goldman, and Eric Lichtblau, *Comey Tried to Shield the F.B.I. From Politics. Then He Shaped an Election*, N.Y. TIMES (Apr. 22, 2017),

https://perma.cc/YC6A-UGBY. The *New York Times* article focused on the investigation of Hillary Clinton's emails. The article mentioned Page, stating that he "gave a speech in Moscow criticizing American foreign policy" and that he "had previously been under F.B.I. scrutiny years earlier, as he was believed to have been marked for recruitment by Russian spies." 2d Am. Compl. ¶ 224(a) (JA069). This was the *Times* article's only explicit reference to Page.

On April 27, 2017, Page was interviewed by former CNN news anchor Chris Cuomo, wherein Page acknowledged having read both the *Washington Post* and the *New York Times* articles. *Page v. Comey*, Case No. 1:20-cv-03460, ECF No. 88-10, at 9 (D.D.C. Sept. 17, 2021). In response to questioning regarding whether the FBI had probable cause to surveil him, Page expressed his eagerness to obtain full disclosure about the warrant applications because "there [had] been terrific reporting in various news outlets, including '[the] Washington Post', [and] '[the] New York Times' based on various leaks and some of them have exactly pointed back to that dodgy dossier." *Id.*

Approximately a month later, on May 22, 2017, Page again acknowledged and explicitly cited to the *Washington Post* article in a letter to Congressmen K. Michael Conaway and Adam Schiff, responding to a request to voluntarily appear before the United States House of Representatives Permanent Select Committee on Intelligence (House Intelligence Committee).[2] In the letter, Page stated that the Clinton campaign had engaged in illegal activities and leaks, and he could "help set the record straight . . . following the false evidence, other illegal activities as well as additional extensive lies distributed by the Clinton campaign and their transnational

[2] The Joint Appendix only contains three pages from Carter's twenty-three-page submission.

associates." JA101. Page referenced the "unfortunate front-page *Washington Post* article about the civil rights abuses committed against me which you might have seen: 'Applications for FISA warrants' . . . filled with a potpourri of falsehoods from the Clinton/Obama regime which fabricated this travesty from the outset." JA102.

Page's letter welcomed the invitation to testify before the House Intelligence Committee on the "civil rights injustices" against him. He informed the Committee that public access to the FISA warrants in advance of his testimony would be "essential" to dispel "the continued delusional charade regarding Russia's connections with the new Administration." JA102–JA103. Page contrasted the "proper legal procedures of disclosure currently underway" with the "recent misleading illegal leaks," plainly referring to the government leaks reported in the *Washington Post* article. JA 101. Thereafter, on June 29, 2017, the FBI submitted the fourth and final FISA warrant application.

On November 2, 2017, Page testified before the House Intelligence Committee. Page stated that he was a victim of two felonies: the leaking of both his identity and classified information in relation to the FISA warrant documented in the *Washington Post* article. *Testimony of Carter Page: Hearing Before the Permanent Select Comm. on Intelligence*, 115th Cong. (2017) (*Page Testimony*), https://perma.cc/74C9-RWZ9 at 16–17, 21–22. During his testimony, Page referenced the surveillance activities taken against him by the FBI. In his opening statement, Page stated that "the alleged U.S. cyber operations of wiretap against myself . . . marked a new low with this baseless domestic interference in our democracy prior to the 2016 election." *Id.* at 35. Page further observed that although neither he nor the Committee "kn[e]w the details about how [he] was illegally hacked and wiretapped," they

should "soon" learn the information because of his and the Committee's requests for information. *Id.* During questioning by Congressman Gowdy, Page again referenced the *Washington Post* article, stating that someone leaked his interviews with the FBI to the *Post*. *Id.* at 59. Page's congressional testimony also incorporated his May 22, 2017 letter in which he observed that "[b]ased on revelations in the press thus far, [he] was the primary known person allegedly put under the most intensive surveillance by the Obama Administration as part of their 2016 domestic political intelligence operation." *Id.* at 15.

In March 2018, the DOJ's Office of Inspector General (OIG) initiated a review of the FBI's surveillance of Page. The OIG published a report on December 9, 2019, in which it observed that the FBI's factual misstatements and omissions regarding Page "taken together resulted in FISA applications that made it appear that the information supporting probable cause was stronger than was actually the case." OIG, *Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation* (Dec. 2019), https://perma.cc/8TGE-VGTK at xiii.

B.

On November 27, 2020, Page filed a complaint in the United States District Court for the District of Columbia, alleging eight causes of action, including four claims of FISA violations against the individual defendants; one claim against individual defendants seeking damages under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971); one claim against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671–2680; one claim against the DOJ for violating the Privacy Act, 5 U.S.C. § 552a; and one claim against both the FBI and DOJ for

violating the Privacy Act. Page amended his complaint on April 15, 2021, but did not make any substantive changes to his allegations. After attempting to comply with mandatory prerequisites,[3] Page filed a second amended complaint on June 8, 2021, adding a claim against the United States for a violation of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (Patriot Act), 18 U.S.C. § 2712.

On September 17, 2021, each of the individual defendants separately moved to dismiss Page's FISA and *Bivens* claims. That same day, the United States, the FBI, and the DOJ moved to dismiss the FTCA, Privacy Act, and Patriot Act claims.

C.

In the district court, Appellees sought to dismiss Page's second amended complaint on the grounds that his claims were time-barred by the statute of limitations and that he failed to state a claim upon which relief may be granted. *Page*, 628 F. Supp. 3d at 115. The United States also moved to dismiss Page's FTCA claim and one of his Privacy Act claims on the basis that the district court lacked jurisdiction over them. *Id.* In addressing whether Page's FISA claims were time-barred, the district court found that a three-year general statute of limitations under D.C. law was applicable due to FISA's silence on the issue. *Id.* at 116–17. Notwithstanding its finding that "by April 11, 2017, Page knew that he was subject to surveillance by the FBI and DOJ," *id.* at 118, the district court held that in the context of the discovery rule, "it is far from clear that a diligent investigation would have revealed enough

[3] Seeking to exhaust his administrative remedies under the Patriot Act pursuant to 18 U.S.C. § 2712(b)(1), Page presented an administrative claim to the DOJ on September 30, 2020, which it denied on April 22, 2021.

evidence of illegality to avoid filing suit on a hunch." *Id.* at 119 (internal quotation marks and brackets omitted).

For the same reasons, the district court declined to dismiss Page's *Bivens* and Patriot Act claims on statute of limitations grounds. *Id.* at 129, 134. Instead, the district court disposed of Page's FISA and Patriot Act claims on the basis that Page failed to plead sufficient facts to state a plausible claim for relief. *Id.* at 129, 134. The district court dismissed Page's *Bivens* claim holding that "an extension of the *Bivens* remedy to this new context is unwarranted." *Id.* at 129 (internal quotation marks omitted). As to Page's Privacy Act claims, the district court found that Page "has neither exhausted his administrative remedies nor filed a timely claim." *Id.* at 140. The district court dismissed Page's remaining Patriot Act and abuse of process claims on the grounds that he failed to state a claim under the Patriot Act and that his abuse of process claim "is not cognizable under D.C. law." *Id.*

Page timely appealed dismissal of his FISA claims and his Patriot Act claim.

II.

We have appellate jurisdiction pursuant to 28 U.S.C. § 1291. "We review the district court's dismissal *de novo* and may affirm its judgment on any basis supported by the record." *Elec. Priv. Info. Ctr. v. IRS*, 910 F.3d 1232, 1236 (D.C. Cir. 2018) (citation omitted). On *de novo* review, we generally take as true all plausibly pleaded factual allegations and draw all reasonable inferences in the plaintiff's favor. *See, e.g.*, *Hettinga v. United States*, 677 F.3d 471, 476 (D.C. Cir. 2012).

III.

Appellees contend that Page did not timely file his claims in accordance with the applicable statutes of limitation. Upon its review, the district court determined that "the complaint does not conclusively show that Page was sufficiently on notice of his claims before November 27, 2017." *Page*, 628 F. Supp. 3d at 119. On *de novo* review, we hold that Page's second amended complaint on its face is conclusively time-barred.

A.

"Limitations periods are intended to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights." *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 352 (1983). Accordingly, statutes of limitations "afford[] plaintiffs what the legislature deems a reasonable time to present their claims [while simultaneously] protect[ing] defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, . . . fading memories, disappearance of documents, or otherwise." *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (citations omitted).

At the motion to dismiss stage under Rule 12(b)(6) of the Federal Rules of Civil Procedure, "dismissal is appropriate on statute of limitations grounds 'only if the complaint on its face is conclusively time-barred.'" *Commonwealth Land Title Ins. Co. v. KCI Techs., Inc.*, 922 F.3d 459, 464 (D.C. Cir. 2019) (citation omitted). This face-of-the-complaint principle, although rarely explained, limits a court's consideration to materials properly before it. In this Circuit, a "court may consider the facts alleged in the complaint, [and] documents attached thereto or incorporated therein, ..." *Stewart v. Nat'l Educ. Ass'n*, 471 F.3d 169, 173 (D.C. Cir. 2006). The

incorporation-by-reference doctrine "permits courts to consider documents not attached to a complaint if they are 'referred to in the complaint and integral to the plaintiff's claim.'" *Real World Media LLC v. Daily Caller, Inc.*, No. CV 23-1654, 2024 WL 3835351, at *3 (D.D.C. Aug. 14, 2024) (*quoting Banneker Ventures, LLC v. Graham,* 798 F.3d 1119, 1133 (D.C. Cir. 2015) (cleaned up)). Additionally, a court may consider those portions of "documents upon which the plaintiff's complaint necessarily relies even if the document is produced not by the plaintiff in the complaint but by the defendant in a motion to dismiss." *Terveer v. Billington*, 34 F. Supp. 3d 100, 110 (D.D.C. 2014) (*quoting Ward v. D.C. Dep't of Youth Rehab. Servs.,* 768 F. Supp. 2d 117 (D.D.C. 2011)).

A court may also consider "matters of which it may take judicial notice," *Stewart*, 471 F.3d at 173, because that information "is not subject to reasonable dispute," Fed. R. Evid. 201(b). Courts have acknowledged the appropriateness of taking judicial notice of the public availability of newspaper articles and the existence of specified congressional testimony. *E.g.*, *Washington Post v. Robinson*, 935 F.2d 282, 291 (D.C. Cir. 1991) ("This court may take judicial notice of the existence of newspaper articles in the Washington, D.C., area . . . ."); *Muller-Paisner v. TIAA*, 289 F. App'x 461, 466 n.5 (2d Cir. 2008) ("[C]ongressional testimony is an appropriate subject for judicial notice as a public record for the fact that the statements were made.").

Therefore, for purposes of our *de novo* review of the district court's decision dismissing Page's FISA and Patriot Act claims, we consider not only the allegations of the second amended complaint, but also the publication of the April 11, 2017 *Washington Post* article, the April 22, 2017 *New York Times* article, and his November 2, 2017 testimony before the House Intelligence Committee, which transcript included

Page's May 22, 2017 letter to Congressmen Conaway and Schiff. To determine if Page's claims are time-barred, we must assess, first, the applicable limitations period, and second, the time at which his claims accrued.

B.

Page's FISA claims center on four warrant applications submitted to the FISC, which he alleges the FBI knowingly supported with insufficient evidence. "FISA is concerned with foreign intelligence surveillance." *United States v. Belfield*, 692 F.2d 141, 148 (D.C. Cir. 1982). "The statute is meant to 'reconcile national intelligence and counterintelligence needs with constitutional principles in a way that is consistent with both national security and individual rights.'" *Id.* (quoting S. Rep. No. 95–701, 95th Cong., 2d Sess. 16 (1978)). FISA ensures individual privacy "'through its provisions for in-depth oversight . . . by all three branches of government and . . . an expanded conception of minimization that differs from that which governs law-enforcement surveillance.'" *Id.* (quoting Allan S. Schwartz, *Oversight of Minimization Compliance Under the Foreign Intelligence Surveillance Act: How the Watchdogs Are Doing Their Job*, 12 Rutgers L.J. 405, 408 (1981)). Section 110 of FISA (50 U.S.C. § 1810) creates civil liability for individuals who violate Section 1809 by engaging in unauthorized surveillance and/or disclosing/using the information so obtained. 50 U.S.C. § 1809(a).

The district court correctly noted that "FISA's civil cause of action does not contain a statute of limitations." *Page*, 628 F. Supp. 3d at 116. Generally, "[w]hen a federal action contains no statute of limitations, courts will ordinarily look to analogous provisions in state law as a source of a federal limitations period." *Loumiet v. United States*, 828 F.3d 935, 947 (D.C. Cir. 2016) (quoting *Doe v. DOJ*, 753 F.2d 1092,

1114–15 (D.C. Cir. 1985)); *see also Richards v. Mileski*, 662 F.2d 65, 68 (D.C. Cir. 1981) ("In this instance, as no specific statute of limitations has ever been enacted by Congress for such claims, the appropriate local statute of limitations is borrowed."). The individual defendants contend that the appropriate limitations period is found either in D.C.'s one-year statute of limitations for libel and invasion of privacy, or in the two-year statute of limitations set forth in the Wiretap Act and the Stored Communications Act—two federal laws that, like FISA, regulate surveillance. *See* D.C. Code § 12-301(4); 18 U.S.C. §§ 2707(f) [Stored Communications Act], 2520(e) [Wiretap Act]. Page maintains that the analogous limitations period is instead found in D.C.'s three-year statute of limitations for "actions . . . *for which a limitation is not otherwise specifically prescribed*." D.C. Code § 12-301(a)(8) (emphasis added). Though recognizing the contrary inclination of our partially dissenting colleague, Partial Dissent at 13–14, we assume without deciding that the longer period applies because Page's FISA claims accrued before November 27, 2017—more than three years before he filed his November 27, 2020 complaint—and are therefore barred under even the most generous of the potentially applicable limitations periods.

"State law dictates the statute of limitations, but the timing of the accrual of . . . claims is a question of federal law." *Loumiet*, 828 F.3d at 947. "In federal courts 'the general rule of accrual' in cases in which the injury is 'not of the sort that can readily be discovered when it occurs' is that a cause of action accrues and the limitations period begins to run only when 'the plaintiff discovers, or with due diligence should have discovered, the injury that is the basis of the action.'" *Sprint Commc'ns Co. v. FCC*, 76 F.3d 1221, 1226 (D.C. Cir. 1996) (quoting *Connors v. Hallmark & Son Coal Co.*, 935 F.2d 336, 341–42 (D.C. Cir. 1991)). Importantly, accrual is not delayed just because the plaintiff does not yet have "access to or

constructive knowledge of *all* the facts required to support [a] claim." *Id.* at 1228 (emphasis added).

In *Hobson v. Wilson* we held that, when a claim is fraudulently concealed, its limitation period begins to run at the time the claimants have reason to know of both their injury and the unlawfulness of the defendant's conduct. 737 F.2d 1, 33–41 (D.C. Cir. 1984). There, we observed that plaintiffs were put on sufficient notice more than three years before they sued when they read an article describing an unlawful FBI investigation of which they knew or had reason to know they were targets. *Id.* at 38–39. We explained that if plaintiffs *either* simply read the article about an unlawful FBI scheme *or* simply knew of an FBI investigation targeting them without any reason to think it was unlawful, the information would not suffice to provide notice of their claims. *Id.* at 38–39. However, we emphasized that in reading the article describing the FBI investigation as unlawful and knowing they were the subjects of that investigation, the *Hobson* plaintiffs had enough "timely information to claim that *they* were victims of unconstitutional FBI activities." *Id.*

Page does not contest that, by April 11, 2017—the publication date of the *Washington Post* article describing the FBI's surveillance of Page and quoting Page's description of the surveillance as "unjustified" and "politically motivated"—he "knew that he was subject to surveillance by the FBI and DOJ, and he suspected that the allegations, and the ensuing warrants, were baseless." *Page*, 628 F. Supp. 3d at 118. Nonetheless, Page contends that his claims did not accrue until he received confirmation from the OIG report that the warrants contained significant errors.

Our precedent does not require a plaintiff to have access to a warrant's supporting affidavit before claim accrual starts. In

Richards v. Mileski, we held that it was "irrelevant" to consider when the government agency would have made relevant documents available to the plaintiff; instead, we concluded that "[t]he test of due diligence measures the plaintiff's efforts to uncover his cause of action against what a reasonable person would have done in his situation *given the same information*." 662 F.2d at 71 (emphasis added). In *Sprint Communications Company v. FCC*, we explained that once a prospective plaintiff is put on notice that they may have an actionable claim, they are "required to make a diligent inquiry into the facts and circumstances that would support th[e] claim." 76 F.3d at 1228. Finally, in *Sparshott v. Feld Entertainment, Inc.*, we held that "there is no need that someone actually 'discover' or be aware of the violation." 311 F.3d 425, 429 (D.C. Cir. 2002) (emphasis in original). "Rather, the question is whether the person had a *reasonable opportunity* to discover [it]." *Id.* (emphasis in original).

Page's argument erroneously focuses on his lack of access to the affidavits, rather than whether he took reasonable measures to uncover his cause of action once he learned of the defendants' alleged wrongful conduct. We disagree that Page did not have "notice of the basis for his claims until the [OIG] Report was issued in December 2019." Reply Br. 3. Rather, by spring of 2017, Page knew all the essential facts on which he relies in support of his FISA claims that defendants surveilled him in violation of 50 U.S.C. § 1809(a)(1) and "disclosed or used" results of that surveillance in violation of § 1809(a)(2).

Relying on the discovery rule and our precedent, we hold that Page had actual or inquiry notice of his FISA claims for unauthorized surveillance and disclosure by April 2017. (Judge Henderson would assume without deciding that the discovery rule applies to Page's FISA claims, Partial Dissent at

16, but because we read our precedent to embrace that rule, we apply it here.) In his second amended complaint, Page alleged that the individual defendants surveilled him knowing that there was no probable cause to do so, and then unlawfully used or disclosed the information gathered from that surveillance. 2d Am. Compl. ¶ 142 (JA 50).

As previously noted, the April 11, 2017 *Washington Post* article quoted Page himself describing the surveillance as "unjustified" and "politically motivated." JA096. Those statements show that he had concluded by April of 2017 that the FBI was unlawfully subjecting him to surveillance without probable cause.

The *Post* article also reported that the FBI had renewed the initial warrant "more than once," JA097, thereby informing readers, including Page, that the FBI had submitted multiple warrant renewal applications. FISA requires warrant renewal applications to describe information gathered from previous surveillance. That requirement is readily available public information—especially to a person like Carter Page with multiple advanced degrees and prior interest in CIA operations.[4] The statute declares that:

> Each application for an order approving electronic surveillance . . . shall include . . . a statement of the *facts concerning all previous applications* that have been made to any judge .

[4] Page alleges that he earned a Master's degree in National Security from Georgetown, an MBA from New York University, and a PhD from the School of Oriental and African Studies University of London, in addition to serving in the Navy in "intelligence-related billets" and serving as an International Affairs Fellow at the Council on Foreign Relations. 2d Am. Compl. ¶ 21 (JA026–JA027).

. . .

50 U.S.C. § 1804(a)(8) (emphasis added). And it specifies that "an application for an extension of an order under this subchapter for a surveillance targeted against a United States person," such as the surveillance of Page, must include:

> *a summary statement of the foreign intelligence information obtained* pursuant to the original order (and any preceding extension thereof) as of the date of the application for extension, *or a reasonable explanation of the failure to obtain such information*.

Id. § 1804(a)(11) (emphasis added). Page himself highlights this requirement to support his FISA claims. *See* 2d Am. Compl. ¶¶ 229, 230 (JA 70). The statute's command plus the *Post* report of repeated renewals sufficed to put Page on notice that the FBI "used or disclosed" information gathered under the initial warrant in its ensuing applications in contravention of 50 U.S.C. § 1809(a)(2).

Given the direct quotations from Page in the *Post* article together with FISA's express terms, nothing more is needed to show the claim is time-barred. But Page's May 22, 2017 letter to the House Intelligence Committee provides helpful confirmation that, when he spoke to the *Post* the previous month about the "unjustified" and "politically motivated" surveillance, he thought the government had intentionally misrepresented his connection to Russia and surveilled him in reliance on that pretense. [5] Page's letter described the warrants

[5] Our dissenting colleague posits that we cannot rely on Page's May 22, 2017, letter to the House Intelligence Committee because the letter is a matter outside of the pleadings, Partial Dissent at 22–23,

as "filled with a potpourri of falsehoods from the Clinton/Obama regime which fabricated this travesty from the outset." JA102. The letter also confirms that he believed the *Post* article was based on "illegal" leaks from within the government. Therefore, Page's May 22, 2017 letter reiterating his awareness reflected in the April 11, 2017 article confirms that Page knew of the unlawfulness of the FISA warrants and his resultant injury more than three years before he filed his FISA claims on November 27, 2020.[6] These facts are materially indistinguishable from those supporting the time bar in *Hobson*, 737 F.2d at 39. Far from requiring him to file suit "on a hunch," the stated concern of the *Hobson* court, Page–who had both read the *Post* and *Times* articles and knew he was the subject of alleged illegal government surveillance–had sufficient notice by April 2017 to bring FISA claims. *See id.*

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and Appellees forfeited and/or waived reference to it, Partial Dissent at 28 n.11. However, matters judicially noticed are not considered matters outside the pleadings. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) ("[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice."). Moreover, D.C. Circuit precedent does not foreclose our discretion to consider "forfeited" issues. *Molock v. Whole Foods mkt. Grp., Inc.*, 952 F.3d 293, 298–99 (D.C. Cir. 2020) (quoting *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439 (1993)). Forfeiture binds parties, not the court. *Miguel-Pena v. Garland*, 94 F.4th 1145, 1158 (10th Cir. 2024) (citation omitted). Accordingly, in our evaluation of whether Page had notice of his FISA claims, we are not required to ignore Page's Congressional testimony or his May letter, which occurred more than three years before he filed his complaint.

[6] Page did not argue judicial deception or any other basis to toll the statute of limitations.

Our partially dissenting colleague discerns in Page's complaint a distinct claim of which he was not aware in early 2017, and so is not time-barred: that Peter Strzok and Lisa Page's media leaks included FISA-obtained information. Partial Dissent at 30, 35–37. We do not read the complaint to state any such claim. The dissent's sole citation (*id*. at 35–36) is to snippets of a sentence in the complaint that lumps together distinct "use or disclose" theories and four different defendants:

> On information and belief, Defendants, known and unknown to Dr. Page, but including but not limited to, Comey, McCabe, Strzok, and Page, leaked information and records concerning Dr. Page, including but not limited to the existence of the FISA Warrants, the contents of the warrant applications, and the results of the Warrants, that were protected from disclosure under the FISA and the Privacy Act to media outlets, including the New York Times, the Washington Post, and possibly others.

2d. Am. Compl. ¶ 226 (JA 69–70). But the complaint elsewhere attributes distinct actions to those individual defendants. It describes Comey and McCabe as applying for further FISA warrants—necessarily using information obtained from earlier surveillance and disclosing it to the FISA court in "obtaining each subsequent renewal warrant." 2d. Am. Compl. ¶ 229 (JA 70); *see id.* ¶¶ 152–154, 162–63 (JA 52–53, 54). And, according to the complaint, Lisa Page and Peter Strzok were the media leakers. *See* 2d. Am. Compl. ¶¶ 196, 220-225 (JA 60, 67–69). Page alleges that they leaked to the *Washington Post* and the *New York Times* the existence of and putative bases for FISA warrants to surveil him—allegations later confirmed by the OIG Report. But the complaint includes

no plausible factual allegations supporting any inference that Page or Strzok leaked the FISA warrants' results. In other words, "Page's bare allegation that the defendants disclosed the results of this surveillance to the media, without any further detail, does not raise his 'right to relief above the speculative level.' *Twombly*, 550 U.S. at 555." *Page*, 628 F. Supp. 3d at 129.

To the extent such a theory is thought to be pleaded in the summary sentence quoted above, it hangs on a naked assumption: Despite a lack of factual allegations, Strzok and Lisa Page leaked not just the warrants' existence, putative basis, and Page's identity, as the *Post* reported, but FISA-obtained information, too. In sum, as to the distinct theory our colleague discerns and concludes is timely, the reality that the complaint adds no more factual support to the assumed broader leak than Page either knew or had reason to know in 2017 only confirms that no such timely claim exists.

C.

Page's Patriot Act claim arises under 18 U.S.C. § 2712, which permits actions against the United States to recover money damages for violations of specified sections of FISA. *Id.* § 2712(a). The Patriot Act expanded the investigatory tools federal law enforcement agents can employ to allow for easier exchange of information and cooperation between units. *See* Patriot Act, H.R. 3162, 107th Congress (2001–2002). The Patriot Act contains its own statute of limitations, providing:

> Any action against the United States under this section shall be forever barred unless it is presented in writing to the appropriate Federal agency within 2 years after such claim accrues or unless action is begun within 6 months after the date of mailing, by certified or registered

> mail, of notice of final denial of the claim by the agency to which it was presented.

18 U.S.C. § 2712(b)(2). Although the D.C. Circuit has not passed on this particular provision, we have interpreted an identically worded provision in the FTCA, 28 U.S.C. § 2401(b).[7] We held the FTCA provision "requires the claimant both to file the claim with the agency within two years after accrual of the claim and then to file a complaint in the District Court within six months after the agency denies the claim." *Schuler v. United States,* 628 F.2d 199, 201 (D.C. Cir. 1980). "Were we to read the 'or' in the section as really intending the disjunctive, a claimant who filed a claim with the agency within two years would then be able to bring it to a District Court at any remote future time after the agency denied him relief." *Id. See Sanchez v. United States*, 740 F.3d 47, 50 n.6 (1st Cir. 2014) ("We read this disjunctive language as setting out two deadlines, both (not just either) of which must be satisfied. Otherwise, there would effectively be no deadline at all.").

The Patriot Act not only employs limitations language identical to the FTCA but adopted it decades after *Schuler* had interpreted it as we do today. *See Smith v. City of Jackson,*

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[7] Section 2401(b) states:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. § 2401(b).

Miss., 544 U.S. 228, 260 (2005) (O'Connor, J., concurring) (emphasizing that like language appearing in separate statutes is a "strong indication" that they should be interpreted alike, particularly where judicial interpretation of one statute precedes Congress' adoption of the second) (citing *U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 626 (1992) ("Congress' use of the same language . . . indicates a likely adoption of our prior interpretation of that language.")); *Shirk v. U.S. ex. rel. Dep't of Interior*, 773 F.3d 999, 1004 (9th Cir. 2014) ("A basic principle of interpretation is that courts ought to interpret similar language in the same way, unless context indicates that they should do otherwise."). Accordingly, we hold that, for statute of limitations purposes, Page was required to present his Patriot Act claim to the FBI within two years after the claim accrued and file the resulting lawsuit within six months after notice of the FBI's denial of the claim. Our partially dissenting colleague disagrees with our use of *Schuler* and the other cases that rely on it. Partial Dissent at 18–21. However, *Schuler* is precedent of this Circuit and stare decisis requires us to follow it unless "the court [e]n banc has overruled it," which it has not. *Brewster v. Comm'r of Internal Revenue*, 607 F.2d 1369, 1373–74 (D.C. Cir. 1979).

Page successfully met the six-month filing requirement. As alleged in the second amended complaint, the FBI issued the final denial of Page's administrative claim on April 22, 2021. Page filed his second amended complaint—the first complaint to include his Patriot Act claim—on June 8, 2021, well within the six-month deadline provided in 18 U.S.C. § 2712(b)(2). But Page failed to file his administrative claim with the FBI within two years of its accrual.

Under the Patriot Act, accrual occurs "on the date upon which the claimant first has a reasonable opportunity to discover the violation." 18 U.S.C. § 2712(b)(2). Page asserts

that he presented his Patriot Claim to the FBI in a letter dated September 30, 2020. Therefore, if Page had notice of facts and circumstances supporting the discoverability of a Patriot Act claim before September 30, 2018, Page's claim is barred by the statute of limitations.

Page's allegations and their documentary support show that, as of April 2017, Page had ample bases to discover the FISA violation supporting his Patriot Act claim. In his second amended complaint, Page alleged that the FBI and DOJ violated the Patriot Act by using the surveillance information gathered on him for unlawful purposes, including to obtain further surveillance without probable cause. 2d. Am. Compl. ¶¶ 229, 230 (JA 70). As explained above, by April 2017, Page was on notice of that claim. The April 11, 2017, *Washington Post* article confirmed the existence of two warrant applications:

> The government's application for the surveillance order targeting Page included a lengthy declaration that laid out investigators' basis for believing that Page was an agent of the Russian government and knowingly engaged in clandestine intelligence activities on behalf of Moscow . . . [and s]ince the 90-day warrant was first issued, it has been renewed more than once by the FISA court.

JA097.

And, as explained above, *see supra* Section III.B., in addition to knowing that the FBI and DOJ had secured at least one renewal warrant, Page knew or could have known from the FISA statute itself that any warrant renewal application had to disclose the information gathered on him from previous surveillance. *See* 50 U.S.C. § 1804(a)(8). As such, Page had

sufficient information by April 2017 to advance his theory that the FBI and DOJ violated the Patriot Act by using surveillance information gathered on him to obtain subsequent warrant renewals. Page later acknowledged as much by asserting in his May 22, 2017, letter to the House Intelligence Committee that U.S. government operatives leaked his identity and revealed classified information regarding "the completely unjustified FISA warrant against [Page]" documented in the *Washington Post* article. *Page Testimony*, https://perma.cc/74C9-RWZ9 at 16–17, 21–22. These events confirm that Page discovered the basis for his Patriot Act claim by April 2017, significantly more than two years before he submitted it to the FBI. As a result, the statute of limitations bars Page's claim under the Patriot Act.

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For the foregoing reasons, we affirm the district court's dismissal of Carter Page's FISA and Patriot Act claims pursuant to Federal Rule of Civil Procedure 12(b)(6) as time-barred.

So ordered.

KAREN LECRAFT HENDERSON, *Circuit Judge*, concurring in part and dissenting in part: In my view, this case involves the Government running roughshod over institutional guardrails designed to safeguard our civil liberties. The several defendants now evade liability, not because they are guiltless, but because the Court finds Carter Page's claims time barred. Although I agree in part with that conclusion, I cannot join the majority in full because I am convinced that one of Page's claims is timely and, accordingly, he is entitled to his day in court.

I. BACKGROUND

A. FISA's History

I begin by summarizing the history of the Foreign Intelligence Surveillance Act (FISA)—history that is particularly pertinent to this case. With the advent of electronic surveillance, the Government struggled to strike a balance between two ancient and competing interests: the need for a "vigorous executive" capable of "secrecy[] and dispatch" in the national security realm, The Federalist No. 70 (A. Hamilton) (Clinton Rossitier ed., 1961), versus the risk that the President's "Minions" would use "dangerous or oppressive Measures" and "shelter themselves" from "Inquiry into their own misconduct in Office." George Mason, *Objections to the Constitution of Government Formed by the Convention* (1787). In the early twentieth century, the United States Supreme Court held that domestic wiretapping and surveillance fell outside the ambit of the Fourth Amendment absent a physical trespass into a constitutionally protected area. *Olmstead v. United States*, 277 U.S. 438, 464–66 (1928). Under this framework, "the Fourth Amendment was inapplicable to non-trespassory electronic surveillance . . . [and] . . . warrants were not required." *Zweibon v. Mitchell*, 516 F.2d 594, 617 (D.C. Cir.

1975) (*en banc*). And so, the Executive expanded the scope of warrantless electronic surveillance, which "was generally accomplished without a physical trespass." *Id.* at 617–18.

That regime was upended in *Katz v. United States*, the decision that replaced the Fourth Amendment's trespass model with the now prevailing reasonable-expectation-of-privacy test and held that the Government must obtain a warrant before employing electronic surveillance during a criminal investigation. 389 U.S. 347, 353, 356–57 (1967). But the *Katz* Court reserved judgment on whether its holding applied "in a situation involving the national security"—that is, when the Government's reason for surveillance was not traditional criminal enforcement but intelligence gathering. *Id.* at 358 n.23. The Congress responded to *Katz* by passing the Omnibus Crime Control and Safe Streets Act of 1968 (OCCSSA). Title III of OCCSSA, known as the Wiretap Act, established procedures for judicial authorization of electronic surveillance by law enforcement but disclaimed regulation of the President's ability to intercept "[t]he contents of any wire or oral communication" if the purpose was "to obtain foreign intelligence information . . . or to protect national security information against foreign intelligence activities." Pub. L. No. 90-351, Title III, § 802, 82 Stat. 197, 212, 214 (1968) (then-codified at 18 U.S.C. § 2511(3)).

Five years later, in *United States v. U.S. District Court* (the "*Keith*" case) the Supreme Court narrowed the national security carve-out recognized in *Katz*. 407 U.S. 297 (1972). It first interpreted § 2511(3) of the Wiretap Act as agnostic on "the President's electronic surveillance power," neither endorsing nor denying its existence. *Id.* at 303. It then held that the Fourth Amendment applies to "domestic security surveillance" if the target has no "significant connection with a foreign power, its agents or agencies." *Id.* at 309 n.8, 320–22.

The *Keith* Court, like its predecessor, declined to pass on the "scope of the President's surveillance power with respect to the activities of foreign powers, within or without this country." *Id.* at 308.

In the mid-1970s, courts continued to grapple with the existence and scope of a national-security exception to the Fourth Amendment. After *Keith*, three federal circuits held that the President's foreign affairs powers allowed the Government to conduct warrantless electronic surveillance to monitor domestically an agent of a foreign power. *See United States v. Brown*, 484 F.2d 418, 426 (5th Cir. 1973); *United States v. Butenko*, 494 F.2d 593, 608 (3d Cir. 1974); *United States v. Buck*, 548 F.2d 871, 875–76 (9th Cir. 1977). Our Court bucked the trend and—in a fractured plurality opinion—implied that "wiretapping in the area of foreign affairs should [not] be exempt from prior judicial scrutiny." *Zweibon*, 516 F.2d at 651.[1]

Around the same time, the Congress and the media brought to light a cascade of abuses committed by the intelligence community. Presidents from Franklin Roosevelt onward had authorized ever-expanding warrantless electronic surveillance rooted in claims of inherent executive power. S. Rep. No. 95-604, at 7–9 (1977). Because of the need for secrecy, this surveillance was conducted without legislative or judicial oversight. S. Rep. No. 95-217, at 1 (1977). Although the surveillance began as a tool for matters "involving the

[1] The eight judges of the *en banc* Court filed five separate opinions. A four-judge plurality "suggest[ed]" that domestic surveillance of an agent of a foreign power required a warrant but did "not rest [their] decision" thereon. *Id.* Two judges declined to speak to the issue and the remaining two believed that the plurality's dicta was wrong. *Id.* at 681, 686, 688–89, 705–06.

defense of the nation," it drifted into domestic affairs. *Keith*, 407 U.S. at 310 n.10.

In 1975, the Congress formed a select committee chaired by Maryland Senator Frank Church to investigate the Executive's alleged misuse of its vast surveillance apparatus. The Church Committee uncovered abuses that "infringed upon" the "rights of United States citizens." S. Rep. No. 94-755, at 12 (1976). The revelations spurred the Congress to create the first Senate Select Committee on Intelligence, which concluded that responsibility for surveillance "must be shared by the three branches of Government." S. Rep. No. 95-217, at 1.

The legal and political tumult of the 1970s led to a protracted legislative struggle to rein in the President. The Foreign Intelligence Surveillance Act resulted from those efforts. FISA aimed to resolve the legal haze of *Keith* and the public's eroded confidence in the intelligence community with one "basic premise"—"that a court order for foreign intelligence electronic surveillances can be devised that is consistent with . . . the fourth amendment." S. Rep. No. 95-701, at 9 (1978). FISA "was a surprisingly simple statute" that "banned the Government from conducting 'electronic surveillance' without a FISA warrant," absent one of a narrow list of exceptions. Orin S. Kerr, *Updating the Foreign Intelligence Surveillance Act*, 75 U. Chi. L. Rev. 225, 230 (2008). The warrant was to be issued by the newly created Foreign Intelligence Surveillance Court (FISC), the Congress's mechanism for balancing secrecy and accountability. The FISC lies at the heart of FISA's grand bargain: the Executive Branch agreed to legal oversight and restraint in exchange for procedural safeguards implemented behind a veil of secrecy. "Unlike most other courts, [the] FISC holds its proceedings in secret and does not customarily publish its decisions." *ACLU*

v. United States, 142 S. Ct. 22, 23 (2021) (Gorsuch, J., dissenting from the denial of certiorari). The Congress would police the FISA process through two newly formed intelligence committees that themselves conduct a significant share of their business behind closed doors.

FISA thus resolved the lingering *Keith* exception and remedied the intelligence community's rudderless surveillance through a series of internal and external checks. *See* 50 U.S.C. §§ 1804(a) (executive oversight procedures), 1805(a) (judicial oversight), 1808 (congressional oversight) (1978). Foreign intelligence surveillance now requires a warrant and that warrant is subject to Executive Branch attestation, judicial approval and post-hoc congressional oversight.

Sadly, the closed nature of the process allowed a mix of complacency and duplicity to unspool FISA's tightly wound safeguards. One early pressure point arising in the FISA process was the Government's purpose for surveilling: foreign intelligence surveillance is the domain of FISA but traditional law enforcement is subject to Title III procedures. *Compare* 50 U.S.C. § 1804(a) *with* 18 U.S.C. §§ 2516–18; *see also U.S. Telecom Ass'n v. FCC*, 227 F.3d 450, 453 (D.C. Cir. 2000). Whereas a Title III warrant requires a probable cause of criminal activity determination, FISA requires only probable cause that a target is acting as a foreign power's agent. Before procuring a warrant, then, FISA required the Executive Branch to certify "that the purpose of the surveillance is to obtain foreign intelligence information." Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, § 104(a)(7)(B), 92 Stat 1783, 1789. To police the FISA/Title III line, in the mid-1990s the Attorney General constructed a "wall" between the intelligence community and the Department of Justice (DOJ). Under DOJ's 1995 policy, federal prosecutors avoided giving even the "appearance" that they were "directing or

controlling" an investigation if FISA applied or was even being contemplated. *See* Memorandum from the Att'y Gen. on Procedures for Contacts Between the FBI and the Criminal Division Concerning Foreign Intelligence and Foreign Counterintelligence Investigations (July 19, 1995), https://perma.cc/X42F-QESR.

In 2001, the FISC presiding judge unearthed a series of FBI affidavits that claimed adherence to the wall when in fact information had leaked from the FBI to federal prosecutors. The issue was not the merits of the wall; indeed, the Congress would later amend FISA to remove the wall. *See* USA Patriot Act of 2001, Pub. L. No. 107–56, § 218, 115 Stat. 272, 291 (amending 50 U.S.C. § 1804(a) from "the purpose" to "a significant purpose" to allow for greater information sharing across the Executive); *In re Sealed Case*, 310 F.3d 717, 736–46 (FISC Rev. 2002) (upholding the amended language). Rather, the concern was the Executive's disregard for its own procedural buffers and its sometimes-doubtful representations to the court. It initially "confess[ed] error in some 75 FISA applications . . . related to misstatements and omissions of material facts," a number that only grew with time. *In re All Matters Submitted to Foreign Intel. Surveillance Ct.*, 218 F. Supp. 2d 611, 620–21 (FISC 2002), *abrogated on other grounds by In re Sealed Case*, 310 F.3d 717. In response, the FISC presiding judge convened the full FISC and issued an order banning one FISA affiant from ever again appearing before the court. Bernard Horowitz, *FISA, the "Wall," and Crossfire Hurricane: a Contextualized Legal History*, 7 Nat. Sec. L. J. 1, 64–65 (2020) (recounting this history).

In response to the lapses recounted above, the FBI implemented what became known as the "Woods procedures," a series of internal checks requiring the FBI agent responsible for a FISA warrant application to maintain a "Woods File"—

supporting documentation for every factual assertion contained in the FISA warrant application. *In re Accuracy Concerns Regarding FBI Matters Submitted to the FISC*, No. 19-02, 2020 WL 1975053, at *1 (FISC Apr. 3, 2020).

B. Carter Page Warrants

As the majority describes it, the FBI made some "factual misstatements and omissions regarding Page." Maj. Op. 10. Assuming the facts as alleged to be true, as we must at this litigation stage, *see Mills v. Anadolu Agency NA, Inc.*, 105 F.4th 388, 395 (D.C. Cir. 2024), I find the record far more troubling. According to Page, the FBI engaged in serious Woods File breaches: it failed to scrutinize the conflicting motives of its primary source, Christopher Steele; it concealed information from the FISC that cast doubt on Steele's credibility; and it omitted Page's past work for the Central Intelligence Agency (CIA) in its FISA application.[2] It is solely because of these breaches that the FISC authorized the Government's surveillance of Page. Ordinarily, these facts would be allegations we would simply assume to be true. But we need not rely on assumptions. In 2019, the Justice Department's Office of the Inspector General (OIG) issued a report cataloging the delicts. *See* OIG, *Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation* (Dec. 2019), https://perma.cc/8TGE-VGTK (OIG Report).

[2] In addition to his work for the CIA, Page served in the United States Navy, led a distinguished career at a leading financial institution and taught courses on energy and politics at New York University. After graduating from the United States Naval Academy, Page obtained a Master's degree from Georgetown, an MBA from NYU and a PhD from the School of Oriental and African Studies University of London.

The OIG found that the FBI *ex industria* concealed exculpatory information regarding Page from the FISC while embellishing more negative information. The FBI suspected Page of involvement in Russia's infamous 2016 election interference based on a report prepared by Steele. *Id.* at vii. Yet the "FBI did not have information corroborating the specific allegations against Carter Page in Steele's reporting when it relied upon his reports in the first FISA application or subsequent renewal applications." *Id.* at viii. Indeed, the FBI "obtained [] information raising significant questions about the reliability of" Steele yet said nary a word to the FISC. *Id.* at vi. On the contrary, it "overstated" Steele's reliability. *Id.* at viii.

The OIG identified several "instances in which factual assertions relied upon in the [] FISA application[s] were inaccurate, incomplete, or unsupported." *Id.* In one of the most glaring acts of defiance, an FBI lawyer, Kevin Clinesmith, altered emails to indicate that Page was "not a source" for the CIA when he had in fact acted as a source in the past. *Id.* at 7–8; *see also United States v. Clinesmith*, No. 20-cr-165, ECF Nos. 8–9, (D.D.C. Aug. 19, 2020). All in all, the OIG identified *seventeen* significant errors in the Page FISA applications. *See* OIG Report at viii–xii. As the Government itself now belatedly concedes, but for those errors it could not have sustained its surveillance of Page. *See* Gov't Br. 6 (acknowledging that "in light of th[e]se errors, in the last two renewal applications, if not earlier, there was insufficient predication to establish probable cause to believe that Page was acting as an agent of a foreign power") (quotations omitted).

It would be egregious enough if this conduct were the work of a few wayward defalcators. But the OIG found that similar shortcomings infected the entire FISA process. On the heels of the Page fiasco, the OIG conducted a random audit of 29 other FISA applications to ascertain their compliance with

the Woods File procedures. Every reviewed application contained Woods violations. Twenty-five files contained inadequately supported claims or errors and four applications had *no* Woods File. OIG, *Audit of the Federal Bureau of Investigation's Execution of its Woods Procedures for Applications Filed with the Foreign Intelligence Surveillance Court Relating to U.S. Persons* ii (Sept. 2021), https://perma.cc/3LKS-72CP. The Justice Department informed the FISC that these 29 applications contained 209 errors and the OIG identified an additional 209 instances in which the Woods Files did not support claims made in the warrant applications. *Id.* at ii, 7–8. A broader audit of every FISA application made between January 2015 to March 2020 produced yet another 179 instances "where the required Woods File was missing, destroyed, or incomplete." *Id.* In other words, the manifest failures in the Page FISA process were not an aberration but par for the course for the FBI.

C. The Page Leaks

But the FBI did not stop at misleading the FISC. Page was not only unlawfully surveilled—the surveillance then became public fodder due to a steady drip of leaks to the media that painted Page as a foreign agent; in particular, a Russian agent. First, the FBI's informant, Christopher Steele, disclosed selected portions of his subsequently discredited investigation to the media, including that Page had met with sanctioned Russian individuals. Second, two FBI employees, Lisa Page and Peter Strzok, executed a scheme to leak to the media that Page was the subject of a FISA warrant. In a series of crass text messages sent via their government devices, Strzok and Lisa Page shared their mutual enmity for Page and crowed about their "media leak strategy" to tarnish his reputation.[3] The

[3] Deputy FBI Director Andrew McCabe allegedly put his imprimatur on the Page media leak operation. Indeed, McCabe was

Deputy Attorney General later released these text messages because he believed that they "were so inappropriate and intertwined with their FBI work that they raised concerns about political bias influencing official duties." Declaration of Rod J. Rosenstein, *Strzok v. Barr*, No. 1:19-cv-2367, ECF No. 38-1, (D.D.C. Jan. 17, 2020). The leaks had their predictable effect. For years Page has been branded with the false label of "agent of a hostile foreign power."

II. ANALYSIS

Despite our Government's appalling conduct, I agree with my colleagues' conclusion that Page cannot prevail on all but one of his claims. His FISA claims cannot be brought against the Government defendants—the Department of Justice, the FBI and the United States—and his Patriot Act claim—which can lie against governmental agencies—is, I believe, forfeited and, in any event, is without merit as discussed *infra*.[4] As for Page's first FISA claim against the individual defendants, I reach the same result that my colleagues do but on slightly different analyses. And, most importantly, I do not agree that Page's second FISA claim is time-barred; I believe that Page states a timely and plausible claim for relief and would therefore reverse the district court's dismissal of that claim.

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later fired from the FBI after personally authorizing a leak of other "sensitive information" to, as the OIG found, "enhanc[e] [his] reputation." OIG, *A Report of Investigation of Certain Allegations Relating to Former FBI Deputy Director Andrew McCabe* 1–2, 33–34 (Feb. 2018), https://perma.cc/8TZK-9GZM. When questioned about the leaks, McCabe "lacked candor" with the FBI Director and—under oath—again "lacked candor" with the FBI's Inspection Division and OIG. *Id.* More colloquially, McCabe leaked, then lied.

[4] *See* discussion II.B.

A. FISA Section 1809(a)(1)

I begin where the majority does: with Page's § 1809(a)(1) claim. My colleagues conclude that Page's first FISA claim is time-barred but "assume without deciding" which of the parties' three proffered limitations periods governs. Maj. Op. 16. And they decide that the federal discovery rule controls in determining when a FISA claim first accrues. *Id.* I would resolve the question they assume and assume the question they decide.

1. Limitations Period/Accrual Rule

FISA contains no statute of limitations, "a void which is commonplace in federal statutory law." *Bd. of Regents v. Tomanio*, 446 U.S. 478, 483 (1980). In the absence of congressional preemption, the applicable state limitations statute applies of its own force; that is, the court "'borrow[s]' the most closely analogous state limitations period." *Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409, 414 (2005). The parties advance a slew of options for the governing limitations period. In my view, only one—D.C. Code § 12-301(8)—has merit.

The individual defendants argue that we should use the two-year limitations period found in both the Wiretap Act and the Stored Communications Act because those laws "work in tandem with FISA and share its objective[s]," and because a resort to state law would result in "forum shopping and inconsistent judgments." Red Br. 52–53 (internal quotations omitted).[5] The Wiretap Act, Pub L. No. 90-351, Title III, § 802, 82 Stat. 197, 212, 18 U.S.C. § 2510 *et seq.*, governs prospective surveillance of the contents of oral, wire or

[5] For clarity, I refer to the individual defendants' brief as the Red Brief and to the Government's brief as the Gov't Brief.

electronic communications. Its counterpart, the Stored Communications Act, Pub. L. No. 99-508, Title II, § 201, 100 Stat. 1848, 1860, 18 U.S.C. § 2701 *et seq.*, governs acquisition of the contents or metadata of those communications. In other words, the Wiretap Act applies when the Government actively intercepts communications and the Stored Communications Act applies when the Government seeks to retrieve stored communications. It can be the difference between listening in on a live telephone call and retrieving a one-month log of a cellphone's intercepted text messages.

The three statutes are *in pari materia*—they relate "to the same subject matter," employ contiguous statutory terms and form discrete pieces of a uniform whole: the means by which the Government may lawfully conduct electronic surveillance of its citizens. 2B Singer & Singer, *Sutherland Statutes & Statutory Construction* (7th ed. Nov. 2024 update) § 51:1–3. For this reason, the individual defendants argue that the Court should apply the two-year limitations period prescribed for the Wiretap Act and for the Stored Communications Act to FISA. With respect, I disagree.

I do agree that state statutes of limitations apply of their own force unless legitimately displaced by an act of the Congress. Perhaps because this doctrine became the inaptly named "borrowing doctrine," courts thought it equally proper to "borrow" statutes of limitations from other *federal* laws. *See, e.g.*, *Haggerty v. USAir, Inc.*, 952 F.2d 781, 786–88 (3d Cir. 1992); *Smith v. Int'l Org. of Masters, Mates & Pilots*, 296 F.3d 380, 382 (5th Cir. 2002). But properly understood, "the borrowing doctrine involves no borrowing at all." *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 163 (1987) (Scalia, J., concurring in the judgment). Instead, "state statutes of limitations . . . apply as a matter of state law" to "federal statutory causes of action" if the Congress has not

otherwise prescribed. *Id.* at 161. A court that applies a state statute of limitations is engaged in a quintessentially judicial role: the application of law to facts. But a court treads on legislative terrain when it "borrows" what it views as a sufficiently analogous federal limitations period from one statute and applies it to another. To do so "is not a construction of a statute, but, in effect, an enlargement of it by the court." *Rotkiske v. Klemm*, 589 U.S. 8, 14 (2019). Accordingly, the Supreme Court has termed it "the rare case" in which it is appropriate to "borrow [an] analogous federal limitations period in the absence of an expressly applicable one." *Graham Cnty.*, 545 U.S. at 415; *see N. Star Steel Co. v. Thomas*, 515 U.S. 29, 34–35 (1995) (describing it as "a closely circumscribed and narrow exception to the general rule" that state law applies) (alterations omitted). And here, FISA's close relationship to the Wiretap and Stored Communications Acts and its express omission of a statute of limitations does not support "borrowing" either of the latter limitations periods; instead, the negative inference is just as justified, if not more so. If a statute "omits words used in a prior statute on a similar subject," that omission is considered deliberate and indicative of a "different intent." 2B *Sutherland* § 51:2.

In the alternative, the individual defendants ask that we apply D.C.'s one-year statute of limitation for claims alleging "libel, slander" or "other invasion of privacy claims." D.C. Code § 12-301(4); *see Greenpeace, Inc. v. Dow Chem. Co.*, 97 A.3d 1053, 1062 (D.C. 2014) (extending § 12-301(4) to privacy torts). Section 12-301(4) claims apply to private tortfeasors; FISA governs only those who engage in conduct "under color of law." 50 U.S.C. § 1809(a)(1), (2); *see Payne v. District of Columbia*, 559 F.2d 809, 817 n.32 (D.C. Cir. 1977) (explaining that "injuries inflicted by officers acting under color of law are significantly different in kind from those resulting from acts of private persons"). We have also held that

D.C.'s catchall three-year limitations period applies to analogous Fourth Amendment *Bivens* actions. *See Banks v. Chesapeake & Potomac Tel. Co.*, 802 F.2d 1416, 1429 (D.C. Cir. 1986); D.C. Code § 12-301(8) (setting a three-year limitation for any claim "not otherwise specifically prescribed"). Accordingly, I agree with my colleagues that § 12-301(8)'s three-year limitation applies—not because I assume it but because the law commands it.

Although I believe the limitations period is straightforward, the accrual rule presents a closer question that I would not resolve today. Section 12-301(8)'s three-year limitation runs from "the time the right to maintain the action accrues." As the majority explains, the accrual rule for a federal claim—even when applying a state limitations period—is a question of federal law. *See Albright v. Oliver*, 510 U.S. 266, 280 n.6 (1994).

A claim accrues "when the plaintiff has a complete and present cause of action—*i.e.*, when she has the right to file suit and obtain relief." *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 603 U.S. 799, 809 (2024) (internal quotations omitted). A claim for retrospective relief becomes complete, and thus accrues, at the moment of injury. This is called the "incident of injury rule," *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 670 & n.4 (2014), and constitutes the "standard rule" for accrual. *Rotkiske*, 589 U.S. at 13; *Graham County*, 545 U.S. at 418 (same). Sometimes, however, courts employ a "discovery rule," under which the limitations period begins "when the plaintiff discovers, or with due diligence should have discovered, the injury that forms the basis for the claim." *Petrella*, 572 U.S. at 670 n.4. The discovery rule "arose in 18th-century fraud cases as an 'exception' to the standard rule," *Gabelli v. SEC*, 568 U.S. 442, 449 (2013), and has since been expanded by the Supreme Court to only "two

contexts, latent disease and medical malpractice." *TRW Inc. v. Andrews*, 534 U.S. 19, 27 (2001).

The majority posits that the discovery rule is "the general rule" in federal courts, at least "in cases in which the injury is 'not of the sort that can readily be discovered when it occurs.'" Maj. Op. 16 (quoting *Sprint Commc'ns Co. v. FCC*, 76 F.3d 1221, 1226 (D.C. Cir. 1996)). I respectfully disagree. The majority relies on our decision in *Sprint Communications*, which in turn relies on *Connors v. Hallmark & Son Coal Co.*, 935 F.2d 336, 341–42 (D.C. Cir. 1991). In *Connors*, then-Judge Ruth Bader Ginsburg concluded that courts of appeals had coalesced around the view that "the discovery rule is to be applied in all federal question cases in the absence of a contrary directive from Congress." 935 F.2d at 342 (quotation omitted). I believe that consensus may no longer be good law.

The Supreme Court has "observed that lower federal courts 'generally apply a discovery accrual rule when a statute is silent on the issue'" but it has conspicuously "not adopted that position as [its] own." *TRW Inc.*, 534 U.S. at 27 (quoting *Rotella v. Wood*, 528 U.S. 549, 555 (2000)).[6] On the contrary, the Court has cautioned against an "expansive approach to the discovery rule" and termed its broad use a "bad wine of recent vintage." *Rotkiske*, 589 U.S. at 14 (quoting *TRW Inc.*, 534 U.S. at 37 (Scalia, J., concurring in the judgment)). *Rotkiske* "expressly rejected" the "default presumption that all federal limitations periods run from the date of discovery." *Id.* at 12. Granted, the clandestine nature of FISA surveillance may often preclude FISA's civil cause of action absent a discovery accrual rule. But no party here challenged the applicability of

[6] Notably, *TRW Inc.* was authored by Justice Ginsburg. Justice Ginsburg cited to her *Connors* decision but drew a contrast between the default rule as developed in the circuit courts and the default rule applied by the Supreme Court. *Id.* at 27–28.

the discovery rule and so we lack the benefit of adversarial briefing on the matter. I would accordingly assume without deciding that the discovery accrual rule applies here.

With these reservations noted, I agree that Page's § 1809(a)(1) claim alleging that the individual defendants engaged in unlawful surveillance is untimely for the reasons explained by the majority.

B. The Patriot Act

1. The Plain Text

The Patriot Act provides that:

> Any action against the United States under this section shall be forever barred unless it is presented in writing to the appropriate Federal agency within 2 years after such claim accrues ***or*** unless action is begun within 6 months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented. The claim shall accrue on the date upon which the claimant first has a reasonable opportunity to discover the violation.

18 U.S.C. § 2712(b)(2) (emphasis added). Section 2712(b)(2) is plainly disjunctive: a plaintiff must *either* present his claim to the agency within two years *or* bring an action within six months of final agency denial.

The Patriot Act's statute of limitation echoes the Federal Tort Claims Act (FTCA), which provides that:

> (a) [E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.
> (b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. § 2401. Both the Patriot Act and the FTCA impose two distinct procedural requirements: administrative exhaustion and timely filing. No action can be filed against the United States "unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency." 28 U.S.C. § 2675(a). The agency then has six months to resolve an administrative claim, after which the agency's silence may "be deemed a final denial of the claim." *Id.* All claims are then subject to the general limitations rule that they are "barred unless the complaint is filed within six years after the right of action first accrues." *Id.* § 2401(a).[7] For FTCA and Patriot Act claims only, the action is also "barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after . . . final denial of the claim by the agency." *Id.* § 2401(b); *accord* 18 U.S.C. § 2712(b)(2).

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[7] These FTCA procedures apply with equal force to the Patriot Act. *See* 18 U.S.C. § 2712(b)(1) (requiring "[a]ny action . . . under this section" to follow the agency presentment "procedures of the Federal Tort Claims Act").

Properly construed, any claim against the United States must, in effect, first be presented to the Government no later than five years and six months from accrual; that is, six months before the six-year limitations deadline in 28 U.S.C. § 2401(a). For tort and Patriot Act claims, a plaintiff is subject to a stricter rule requiring timelier administrative presentment. If the plaintiff presents his claim to the agency within two years, he is treated like other claimants and benefits from the full six-year statute of limitations. But if the plaintiff presents his claim to the agency after two years, the limitations period for civil suit is shortened to six months after agency denial. The statute effectively imposes a penalty on a plaintiff who sits on his claim before presenting it to an agency.

Despite the plain text, in *Schuler v. United States* this court applied comments in the FTCA's legislative history to rewrite its deadline. 628 F.2d 199 (D.C. Cir. 1980). It worried that "[w]ere we to read the 'or' in the section as really intending the disjunctive, a claimant who filed a claim with the agency within two years would then be able to bring it to a District Court at any remote future time after the agency denied him relief." *Id.* at 201. But that result does not follow. A claimant would still be subject to § 2401(a), which bars *any* claim not brought within six years of accrual. The *Schuler* court thought that "relying on [§ 2401(a)] makes little sense" because it is a "general" limitation "superseded" by the "specific language of Section 2401(b)." *Id.* And notwithstanding § 2401(a) and (b) can operate jointly, the Court determined that "the legislative history of Section 2401(b) clearly shows that Congress intended a claimant to surmount both [§ 2401(b)] barriers." *Id.* at 202.

Schuler divined this congressional intent not from the statute but from a pair of committee reports. The committee reports describe § 2401(b) as requiring "a claimant [to] file a

claim in writing to the appropriate Federal agency within 2 years after the claim accrues, ***and*** to further require the filing of a court action within 6 months . . . of a final decision . . . by the agency." H.R. Rep. No. 89-1532, at 5 (1966) (emphasis added); *accord* S. Rep. No. 89-1327, at 8 (1966) (similarly using an "and"). *Schuler* engrafted the committee report's "and" onto the statutory "or," relying on its "common sense and the legislative history" and its belief that the FTCA was "not happily drafted." 628 F.2d at 201.

Three years later, the Second Circuit adopted our statutory misconstruction. It did so despite conceding that "[i]t is beyond dispute that 'or' generally is a disjunctive." *Willis v. United States*, 719 F.2d 608, 610 (2d Cir. 1983). Surveying the legislative history, the court declared it "beyond our ken" "[w]hy the draftsman chose to use 'or' in the bill, as distinguished from the crystal clear 'and' of the committee reports." *Id.* at 612. Relying on *Schuler*, *Willis* rewrote § 2401(b) to fit the statute to its legislative history. *Willis* acknowledged that it did not provide "a strictly literal reading" and that it could therefore "lead to an intercircuit conflict." *Id.* at 610, 613 n.3.

Later precedent of both the Supreme Court and this Court makes clear that the statute's plain language cannot be disregarded. In interpreting statutes, we begin with the "plain language" because it is "[t]he most reliable guide to congressional intent," *Friends of the Earth, Inc. v. EPA*, 446 F.3d 140, 145 (D.C. Cir. 2006), and "avoid[s] the pitfalls that plague too quick a turn to the more controversial realm of legislative history." *Lamie v. U.S. Tr.*, 540 U.S. 526, 536 (2004). "[L]egislative history is not the law" and insofar as it is ever a proper source for revealing congressional intent, it is only to *resolve* an ambiguity, not to *create* one by "muddy[ing] clear statutory language." *Azar v. Allina Health Servs.*, 587

U.S. 566, 579 (2019). This is particularly true "with respect to filing deadlines [when] a literal reading of Congress' words is generally the only proper reading of those words." *United States v. Locke*, 471 U.S. 84, 93 (1985).

There is no ambiguity in the meaning of "or." *Schuler* simply—and erroneously—thought that the Congress did not intend what it wrote. And as predicted, its disregard of the text eventually engendered a circuit split. *Compare Schuler*, 628 F.2d at 201 ("Were we to read the 'or' in the section as really intending the disjunctive, a claimant who filed a claim with the agency within two years would then be able to bring it to a District Court at any remote future time after the agency denied him relief") *with Ellison v. United States*, 531 F.3d 359, 363 (6th Cir. 2008) ("Had Congress used 'and' in writing this statute (or had we adopted 'and' in construing it), that would mean that a claim would be barred only if the plaintiff filed the action late in the agency *and* filed the action late in court.").[8]

Schuler's misinterpretation violates basic principles of statutory construction and fair notice. Under *Schuler*'s approach, the meaning of § 2401(b) is the precise opposite of its text. Indeed, *Willis* acknowledged that its interpretation "may cause hardship to litigants" who rely on the law as

[8] *Ellison* created its own interpretative anomalies by inverting the logic of the statute. In an effort to reconcile *Schuler*'s (mistaken) belief that a plain text read would eliminate any judicial deadline with the disjunctive "or," the court read "forever barred . . . unless" (a) "or" (b) as "forever barred . . . if not" (a) "or" (b). *Id.* at 363. That is, the court interpreted § 2401(b) to forever bar claims if a plaintiff does not present the claim to an agency within two years or does not sue within six months of agency denial. That is not what the statute says. But *Ellison* at least recognized that it could not simply "transform[] 'or' into 'and'" to better align with purported legislative purpose. *Id.* at 363.

written. 719 F.2d at 613 n.3. *But see Feliciano v. Dep't of Transp.*, 145 S.Ct. 1284, 1291 (2025) ("[T]hose whose lives are governed by law are entitled to rely on its ordinary meaning, not left to speculate about hidden messages."). That should not be the case, especially in the context of the FTCA, where claimants are often *pro se*.

Of course, *Schuler* remains binding on this panel until the Supreme Court or the *en banc* Court corrects it. But its *stare decisis* effect applies only to the FTCA. We have never interpreted the Patriot Act's statute of limitations and are therefore not bound to compound its error. Although "*stare decisis* concerns may counsel against overruling" our erroneous FTCA precedent, there is "no reason whatsoever" to let that error spill over to a separate statute. *Rose v. Rose*, 481 U.S. 619, 636 (1987) (O'Connor, J., concurring in part and concurring in the judgment). "To be sure, where two statutes use similar language," courts "generally take this as a strong indication that they should be interpreted *pari passu*." *Smith v. City of Jackson*, 544 U.S. 228, 260 (2005) (O'Connor, J., concurring in the judgment) (cleaned up); *see* Maj. Op. 24–25 (relying on this rationale). But nothing in *Schuler* "provides any reason to extend its holding to the" Patriot Act as "the decision in [*Schuler*] was not based on any analysis of [the FTCA's] actual language. Rather, the *ratio decidendi* was the statute's [legislative history]." *Smith*, 544 U.S. at 261–62.

As should be plain, the legislative history of statute A has no bearing on the meaning of statute B. The committee reports that *Schuler* thought key are doubly irrelevant: once because they are unenacted legislative history and, again, because they are the legislative history of a different statute. "[L]egislative history can not justify reading a statute to mean the opposite of what it says" or "turn[ing] a clear text on its head." *Spivey v. Vertrue, Inc.*, 528 F.3d 982, 985 (7th Cir. 2008). And it

certainly cannot do so if it tells the legislative history of another statute.

There is no dispute that Page filed his Patriot Act claim within six months of agency denial and within six years of claim accrual. *See* Maj. Op. 25. That should be the end of the matter.

2. Page's Timeliness

Even under what I believe is the majority's mistaken statutory construction, Page's Patriot Act claim is timely. The Patriot Act authorizes a suit against the United States for a willful violation of certain FISA provisions. Section 106(a) of FISA—the only provision Page relies on—in turn provides that "[n]o information acquired from an electronic surveillance pursuant to [FISA] may be used or disclosed by Federal officers or employees except for lawful purposes." 50 U.S.C. § 1806(a). My colleagues believe that Page knew or should have known of the Government's use or disclosure of FISA-derived information as of the April 2017 *Washington Post* article, a theory I address more fully *infra*.[9] For now, I note my belief that nothing in the *Post* article would give Page the requisite notice of his injury to establish that his claim accrued more than two years before it was administratively presented.

The majority also points to Page's statements in a May 22, 2017 letter to the House Permanent Select Committee on Intelligence. Maj. Op. 27. Unlike the *Washington Post* report, the May 2017 letter is not incorporated into Page's complaint. The Government requested that the district court take judicial notice of the letter under Fed. R. Evid. 201(b), a request the majority now apparently grants. The Government skates on thin ice when it asks the Court to resolve an affirmative defense

[9] *See* discussion II.C.

on a motion to dismiss based on facts outside the record. As we have repeatedly stated, affirmative defenses may be resolved on a Rule 12(b)(6) motion based only on "the face of the complaint." *Smith-Haynie v. District of Columbia*, 155 F.3d 575, 578 (D.C. Cir. 1998). Should the Government urge the court to "consider matters outside the pleadings," the Court must "convert[] the motion into one for summary judgment and afford[] all parties 'reasonable opportunity to present all material made pertinent to such a motion by Rule 56.'" *Gordon v. Nat'l Youth Work All.*, 675 F.2d 356, 360 (D.C. Cir. 1982) (quoting Fed. R. Civ. P. 12(b)).

The majority concludes that the May 2017 letter reflects Page's belief that the Government "leaked his identity and revealed classified information regarding [the FISA warrants] . . . documented in the *Washington Post* article." Maj. Op. 27. The first claim goes to Page's belief that the Government revealed his previously anonymized identity as a result of *United States v. Buryakov*, No. 15-cr-73, 2016 WL 4417889 (S.D.N.Y. May 19, 2016). In that case, the FBI filed documents indicating that the defendant, a Russian intelligence agent, discussed the attempted recruiting of "Male-1" as an intelligence asset. Two news outlets later reported that "Male-1" was Carter Page. *Testimony of Carter Page Before the H. Permanent Select Comm. on Intel.*, 115th Cong. 16 nn. 31–32 (2017), https://perma.cc/74C9-RWZ9. The second claim goes to Page's belief that the Government leaked the existence of the FISA surveillance to the Washington Post.[10] Neither

[10] The Government, for its part, draws a different inference. It relies on the May 2017 letter and other evidence extrinsic to the complaint as indicia that Page suspected numerous "errors and omissions in the FISA applications," including "about the so-called Steele dossier." Gov't Br. 16–17. In other words, the Government's evidentiary support goes to Page's *knowledge about the lawfulness* of the surveillance. But as the Government itself argues elsewhere,

pertains to Page's Patriot Act claim, which instead focuses on the Government's use of FISA-obtained information in the application renewal process. Even considering the May 2017 letter—which I do not believe we should—it helps the Government not at all, as nothing in the letter indicates Page's awareness of his Patriot Act claim more than two years before his administrative filing.

3. The Merits

Although I believe that Page's Patriot Act claim is timely, I also believe he has forfeited it. Recall, FISA § 1806(a) provides that "[n]o information acquired from an electronic surveillance pursuant to [FISA] may be used or disclosed by Federal officers or employees except for lawful purposes." 50 U.S.C. § 1806(a). In district court, Page argued that the Government "violated the PATRIOT Act because [it] knowingly used the unlawfully obtained" FISA information in its renewal applications. *Page v. Comey*, 628 F. Supp. 3d 103, 134 (D.D.C. 2022). As the district court correctly explained, Page mistakenly conflated §§ 1806(a) and 1809(a); that is, Page alleged that the Government disclosed information that was "*acquired* through unauthorized surveillance" when his Patriot Act claim requires that "FISA information [be] used or disclosed . . . *for an unlawful purpose*." *Id.* at 134–35. On appeal, Page now alleges that the "FISA-acquired information was" put to the "unlawful end of misleading the FISC." Blue Br. 81 (internal alterations omitted). His theory works like this. The Justice Department lacked probable cause when it obtained

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Page's claim focuses on the use or disclosure of FISA information for an unlawful purpose. Nothing in the Washington Post's reporting, the May 2017 letter or the Government's other evidence supports a claim that the Government *misused* the information it acquired.

at least the third and fourth FISA warrants. These warrants nevertheless issued because of the Government's duplicity during the application process. And because FISA-derived information was used to support the flawed probable cause finding, that information was put to an unlawful purpose. *Id.* at 81–82. The argument is both forfeited and meritless. An appellant "forfeits an argument by failing to press it in district court." *Government of Manitoba v. Bernhardt*, 923 F.3d 173, 179 (D.C. Cir. 2019). Page's complaint does not assert the legal theory that he now advances on appeal. His district court briefs do not touch on the argument. And the district court did not pass on its merits.

Were the argument preserved, Page's Patriot Act claim would fail on the merits. As Page himself asserts, FISA-acquired information was put to a quintessentially lawful purpose: disclosure to the FISC. Page argues that because the totality of the evidence did not support probable cause, the Government's use of FISA evidence to obtain a warrant was itself an unlawful purpose. But the Government's duty under FISA is to disclose its evidence to the FISC judges. Granted, the Government cannot "mislead [the FISC] by including [false] information . . . or . . . omit[ting] material information." Blue Br. 82. But the FISA information submitted to the FISC did neither. Page's challenge is not to the Government's lawful use of FISA information but to its unlawful omission of non-FISA information. He does not allege that the Government (as opposed to the individual defendants) used FISA-derived information outside the warrant renewal process. He does not allege that using FISA-derived information to apply for a warrant constitutes an unlawful purpose. He does not allege that the Government manipulated, altered or in any way obfuscated the contents of the FISA-derived information. What he alleges is that the Government should have included additional information alongside the FISA-derived

information, which would have led the FISC to deny the Government's warrant renewal applications. In other words, his grievance is not with the Government's "*use* of the collected information" but with its "collection of the information itself." *Al-Haramain Islamic Found., Inc. v. Obama*, 705 F.3d 845, 853 (9th Cir. 2012) (explaining that such claims must be brought against individual defendants under FISA rather than against the Government through the Patriot Act). I therefore agree with the majority that Page's Patriot Act claim fails but not based on untimeliness.

C. FISA Section 1809(a)(2)

Finally, I do not join the majority's holding that Page's § 1809(a)(2) claim is untimely. I also believe that Page has stated a plausible § 1809(a)(2) claim and would therefore reverse the district court's dismissal of this claim.

1. The Statute of Limitations

Page's two FISA claims allege two legally distinct injuries that can accrue at different times. Recall, Page pleaded two claims under FISA. First, he alleged that the individual defendants "intentionally engage[d] in [unauthorized] electronic surveillance under color of law." 50 U.S.C. § 1809(a)(1). The injury that gives rise to this claim is the act of surveillance. Second, he alleged that the individual defendants "disclose[d] or use[d] information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through [unauthorized] electronic surveillance." *Id.* § 1809(a)(2). The injury that gives rise to this claim is not the act of surveillance but the disclosure or use of information obtained through surveillance.

The majority devotes only minimal attention to explaining why Page's § 1809(a)(2) claim is time-barred. In its view:

> The [*Washington Post*] article [] reported that the FBI had renewed the initial warrant "more than once," JA097, thereby informing readers, including Page, that the FBI had submitted multiple warrant renewal applications. FISA requires warrant renewal applications to describe information gathered from previous surveillance . . . . The statute's command plus the *Post* report of repeated renewals sufficed to put Page on notice[.]

Maj. Op. 19–20. With respect, I believe that recitation misreads the statute, the record and the procedural posture. The majority ascribes to Page a comprehensive knowledge of FISA's provisions. But nothing in the Washington Post's reporting would alert Page—or any reasonable reader—to the Government's use or disclosure of FISA-derived information. My colleagues' rejection of Page's § 1809(a)(2) claim is particularly glaring at the motion to dismiss stage, when our duty is to "assume the truth of [Page's] factual allegations and draw all reasonable inferences in h[is] favor." *Mills*, 105 F.4th at 395.

The *Washington Post* article quotes unnamed Government officials as asserting that the FISA applications to surveil Page were "renewed more than once by the FISA court." JA97. Page's § 1809(a)(2) claim turns, in part, on his assertion that the Government used or disclosed FISA-derived information in its three surveillance renewal applications. Page does not know this for certain—nor do we, as the partially declassified renewal applications retain vast redactions—but he suggests that it is likely because FISA requires renewal applications to

contain "a statement of the facts concerning all previous applications that have been made . . . and the action taken on each previous application." 50 U.S.C. § 1804(a)(8). My colleagues thus conclude that once Page read the *Post* article and learned that the surveillance warrants had been renewed, he was aware of his § 1809(a)(2) injury per his own theory.[11] Again, with respect, I believe that conclusion does not follow.

Under the discovery rule, a plaintiff's claim accrues "when the plaintiff discovers, or with due diligence should have discovered, the injury that forms the basis for the claim." *Petrella*, 572 U.S. at 670 n.4 (internal quotations omitted). In

[11] The majority also relies on Page's statements in a May 22, 2017 letter to the House Permanent Select Committee on Intelligence. Maj. Op. 20. In addition to my concerns noted *supra* II.B.2., this evidence is patently forfeited and likely waived. The Government—but not the individual defendants—raised the letter before us. *Compare* Gov't Br. 16–18 *with* Red Br. 54–55. Because it is the defendants' burden to prove their affirmative defense and because a statute of limitations defense is subject to ordinary rules of forfeiture and waiver, *see John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008), Page's congressional testimony cannot support the individual defendants' limitations defense. The majority offers no justification for its use of the letter other than noting that a court may take judicial notice of matters not subject to reasonable dispute. Maj. Op. 20–21 n.5. But judicial notice does not allow us to venture outside the four corners of the complaint on a motion to dismiss to rely on evidence the defendants themselves forfeited. And this evidence is more than forfeited. At oral argument, counsel for the individual defendants was asked why he had not raised Page's public statements made between April and November 2017; counsel disclaimed any reliance on these statements. *See* Oral Arg. Tr. 52:15–53:11. Counsel's "intentional relinquishment" of any reliance on the May 2017 letter constitutes a waiver. *Kontrick v. Ryan*, 540 U.S. 443, 458 n.13 (2004).

other words, accrual may occur through actual or constructive knowledge. Both bases should fail at this stage.

Section 1804(a) requires the Government to disclose "all previous [FISA] applications" and, in the case of surveillance extensions, "a summary statement of the foreign intelligence information obtained . . . or a reasonable explanation of *the failure to obtain such information*." 50 U.S.C. § 1804(a)(8), (11) (emphasis added). In other words, the statute plainly contemplates that a renewal application may not disclose FISA-derived information. For example, if the Government tries but fails to install a bugging device on a target's phone within the statutorily prescribed deadline, *see id.* § 1805(d), it could renew its application without disclosing or using "information obtained under color of law by electronic surveillance." *Id.* § 1809(a)(2).

To conclude that Page had actual knowledge of his injury at the time of the *Washington Post* article, we must infer that Page (i) read the one line in the entire article that discussed renewal applications, (ii) read the FISA statute, (iii) found the precise portion of the statute addressing applications to the FISC and (iv) ascertained from the text's oblique language that the Government used FISA-derived information in its warrant reauthorization requests. That is one inferential leap too many, especially at the dismissal stage. Page is a layman—not a lawyer—and the entire FISA process occurs behind closed doors.[12] Even now, Page can only speculate about the contents

[12] My colleagues gesture at Page's "multiple advanced degrees" as somehow justifying their stringent treatment of his claim. Maj. Op. 19. They do not explain how Page's resume provides any insight into the ins and outs of FISA. But even taking their point on its own terms, no expert could discern from the "public information" available as of April 2017 that a viable § 1809(a)(2) lay against the

of the FISA renewal applications because they have been only partially declassified. The evidentiary vacuum existing even now should not allow us to hold, as a matter of law, that Page possessed actual knowledge of his injury from a single newspaper article necessarily bereft of detail. And, again, what Page "knew and when []he knew it, in the context of a statute of limitations defense, are questions of fact for the jury." *Goldman v. Bequai*, 19 F.3d 666, 672 (D.C. Cir. 1994) (internal alterations omitted) (quoting *Riddell v. Riddell Wash. Corp.*, 866 F.2d 1480, 1484 (D.C. Cir. 1989)).

If the majority instead means to suggest that Page had inquiry notice of his § 1809(a)(2) injury, I believe that conclusion is also premature at the dismissal stage. Whether a plaintiff exercising "reasonable diligence should have known of a cause of action is a question of fact for the jury." *Klein v. Cornelius*, 786 F.3d 1310, 1321 (10th Cir. 2015). Indeed, the district court thought it so *unlikely* that the individual defendants used FISA-acquired information in their renewal applications that the court dismissed Page's § 1809(a)(2) claim on the merits. *See Page*, 628 F. Supp. 3d at 129.

Finally, even if I were to credit that the *Post* article gave Page actual or constructive knowledge of his § 1809(a)(2) claim as it relates to the individual defendants' use of FISA-acquired information in renewal applications, that knowledge would apply only to the first of Page's two § 1809(a)(2) claims. As further described *infra*,[13] Page separately alleges that FBI employees Peter Strzok and Lisa Page leaked FISA-acquired information to the Washington Post and to the New York

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individual defendants. *Id.* As explained, a FISA warrant can be renewed without using or disclosing any FISA-derived information.

[13] *See* discussion II.C.3.

Times. The majority gives no reason that the disclosure/use claim is untimely. I believe there is none.

* * *

The individual defendants assert—and the majority erroneously credits—that Page's § 1809(a)(2) claim accrued when the first word of the FBI's surveillance surfaced: April 11, 2017, the date the Washington Post disclosed that the Government had obtained a FISA warrant to surveil Page. Page's second amended complaint alleges that he did not apprehend his injury until December 9, 2019—almost 32 months later—with the publication of the OIG's Report.

The majority disposes of this critical factual dispute with a lone sentence from the *Post* article, which quotes an anonymous Government official speaking off the record and alleging that the FISA warrant was renewed. Never mind that the Government's official organs—the White House, the FBI and the Justice Department—all "declined to comment" to the Post. JA96. Never mind that the *Post* article catalogs "unsubstantiated claims about U.S. Surveillance" and quotes the former Director of National Intelligence as saying, "U.S. law enforcement agencies did not have any FISA orders to monitor the communications of Trump . . . or his campaign." JA99. And never mind that the *Post* report initially contained erroneous information that was later corrected. *See* JA100 (updating the report to correct two factual errors in the initial publication). The majority sweeps all this aside and concludes that no factfinder could conclude that Page possessed anything less than encyclopedic knowledge of the FISA renewal process—and oracular insight into the FBI's bases for seeking renewal—all from the lone *Post* article. A jury—the traditional factfinders—will never be given the opportunity to adjudicate these contested facts because my colleagues conclude that

Page's complaint does not even *plausibly* assert that he was unaware that the Government used and or disclosed FISA-derived information about him.

As we have repeatedly held, "courts should hesitate to dismiss a complaint on statute of limitations grounds based solely on the face of the complaint because statute of limitations issues often depend on contested questions of fact." *Momenian v. Davidson*, 878 F.3d 381, 387 (D.C. Cir. 2017) (quotation omitted); *see also Jones v. Rogers Mem'l Hosp.*, 442 F.2d 773, 775 (D.C. Cir. 1971) ("[T]he complaint cannot be dismissed" under a 12(b)(6) statute of limitations defense "unless it appears *beyond doubt* that the plaintiff can prove *no* state of facts in support of his claim that would entitle him to relief.") (emphasis added). This record is riddled with doubts. Because the individual defendants have not come close to satisfying the "strict standard" at the motion-to-dismiss stage of demonstrating that Page's "claims are conclusively time-barred on the face of the complaint," I cannot join the majority holding. *Capitol Servs. Mgmt., Inc. v. Vesta Corp.*, 933 F.3d 784, 787 (D.C. Cir. 2019).

2. The FISA Warrant Renewal Allegations

Turning to the merits, I believe that Page has stated a plausible violation of § 1809(a)(2) and would therefore reverse the district court's dismissal of this claim. Page's complaint alleges that the individual defendants "unlawfully . . . disclosed[] and used . . . the results of the surveillance on him," including through "leaks to the media, obtaining each subsequent renewal warrant, [and] obtaining additional surveillance and investigative information." JA70. The complaint adds that the defendants "used the information obtained from the issued FISA warrants to obtain each of the subsequent warrants as well as to . . . obtain or justify

additional investigative measures against Dr. Page . . . [and] to request investigative assistance from other law enforcement and intelligence agencies." JA70–71 (emphasis removed). Elsewhere, the complaint describes each of the individual defendants' roles in the Government's investigation, including their roles in obtaining FISA warrant renewals from the FISC. At the same time, Page fails to bridge the gap between these two allegations; that is, he does not explain how an individual defendant used the fruits of FISA surveillance in investigating or approving applications to the FISC. The district court treated this gap as a chasm into which all of Page's claims incurably fell. In my view, that unduly cabined view of the complaint was inappropriate at the pleading stage.

Instead, the district court was required to accept the validity of Page's factual allegations and "draw all reasonable inferences" from the complaint in Page's favor. *Mills*, 105 F.4th at 395. Those allegations and reasonable inferences tip Page's complaint over the plausibility line. For example, Page alleges that FBI Director James Comey personally signed the second and third FISA warrant applications and Deputy Director Andrew McCabe personally signed the fourth application. And Page alleges that information gathered from earlier FISA surveillance was included in each subsequent reauthorization application. In isolation, neither action links an individual defendant to a disclosure or use. But the Court must read "the allegations of the complaint as a whole." *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 47 (2011). That reading makes plain that the Director and the Deputy Director used or disclosed FISA-derived information when they separately sought warrant reauthorization from the FISC.

The district court rejected this reauthorization theory because, in its view, Page's complaint was a web of contradictions: the complaint alleged that surveillance

"produced 'no evidence at all'" that Page was a Russian agent, which "undercut[] his claim that its results were used to procure the renewal warrants." *Page*, 628 F. Supp. 3d at 129. I see no contradiction. Accepting the complaint's facts as true, the FBI captured some of Page's communications and informed the FISC of the contents of those communications, notwithstanding that the communications did not squarely peg Page as a Russian asset. FISA's *ex parte* procedures hold the Government to "a heightened duty of candor," *In re Accuracy Concerns Regarding FBI Matters Submitted to the FISC*, 411 F. Supp. 3d 333, 336 (FISC 2019), which means it must include all evidence—incriminating and mitigating—in its FISC applications. There is no basis to conclude, as the district court may have done, that the FISC would treat the absence of evidence as evidence of absence in reauthorizing surveillance of Page. And in any event, it was not the district court's role to assess the likelihood (assuming plausibility) of Page's underlying factual allegations. At the motion to dismiss stage, the plaintiff's job is to plead, not to prove.

This is particularly true in the context of FISA litigation, where "the necessary information lies within defendants' control" and so a plaintiff must resort to "pleadings on information and belief." *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1279 n.3 (D.C. Cir. 1994). "Specific facts are not necessary" to clear the low bar of Rule 8(a)(2)—nor could such facts be proffered pre-discovery in all but the most extraordinary of FISA civil suits. *Erickson v. Pardus*, 551 U.S. 89, 93 (2007). At this stage in the litigation, it suffices that Page alleged that (i) FISA-derived information was used and disclosed in applying for FISA warrants, (ii) at least some of the individual defendants personally engaged in that use or disclosure through their involvement in the application process and (iii) at least some of these defendants knew or should have known that each earlier FISA application included material

omissions or falsehoods and, thus, the compiled information was tainted by an improper process. Granting Page "the benefit of all inferences that can be derived from" his allegations, *Hettinga v. United States*, 677 F.3d 471, 476 (D.C. Cir. 2012), they are more than sufficient to "nudge[] [Page's] claims across the line from conceivable to plausible." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

3. The Media Leak Allegations

Page's separate use-and-disclosure theory expressly directed at defendants Peter Strzok and Lisa Page survives for a similar reason. In their FBI employment, they allegedly conspired to produce a public narrative that Page was an agent of Russia through selective leaks of FISA information to the media. Their scheme led to the *Washington Post* story and, ultimately, to the cascade of events that have so despotically damaged Page's reputation. Page pursues his claims against these defendants down two paths. The first lacks merit but the second alleges a viable § 1809(a)(2) claim.

Page first argues that "Strzok and Lisa Page gave [his] identity to the [Washington Post]," and that this identification alone constitutes a § 1809(a)(2) violation. Blue Br. 78–79. As the individual defendants note, however, Page does not "argue that defendants obtained his identity *by* electronic surveillance." Red Br. 49–50; *see* 50 U.S.C. § 1809(a)(2) (encompassing only intentional disclosure or use of "information obtained . . . by electronic surveillance"). They are correct; Page's complaint extensively documents the defendants' investigation into and targeting of him before any electronic surveillance commenced. Page therefore cannot prevail on his first argument.

Page separately alleges that Strzok and Lisa Page "leaked . . . the results of the" FISA surveillance "to media outlets,

including the New York Times [and] the Washington Post." JA69–70. This theory has traction. If proven, it would constitute a naked "intentional[] disclos[ure] or use[]." 50 U.S.C. § 1809(a)(2). If proven, it would mean that those two jumped-up civil servants—"neither servants nor civil," as Churchill once described their antecedents—plotted to pervert the law.

The district court discounted Page's allegations because "[n]either the Times nor the Post article cited in the complaint contains any mention of the fruits of Page's surveillance." *Page*, 628 F. Supp. 3d at 129. That may be a strong argument on summary judgment. But not at this stage when the district court must accept Page's allegations as true and ask whether they state a plausible claim for relief under the law. They do.

My colleagues commit the same error as the district court. They conclude that Page plausibly alleges that Strzok and Lisa Page "leaked to the *Washington Post* and the *New York Times* the existence of and putative bases for FISA warrants to surveil him" but not "that [Lisa] Page or Strzok leaked the FISA warrants' results." Maj. Op. 22. This is so because the former was "confirmed by the OIG Report" yet the latter rests on a purportedly "naked assumption." *Id.* at 22–23. With respect, our role at this stage is not to dissect the record in search of rigorous proof. If Page's allegations support a reasonable inference that the defendants leaked the FISA warrants, that ends the matter. In my view, the allegations support such an inference. Two leading papers of record spread across their front pages details of the Government's surveillance of Page. I do not see how the majority can find it implausible that Strzok and Lisa Page leaked information obtained from that surveillance to the media—especially when my colleagues acknowledge that these leakers *did* unlawfully disclose the existence of and bases for the surveillance. Nor do I see how

any plaintiff could ever jump the majority's pleading hurdle absent some form of pre-suit discovery. But for the fortuity of the OIG Report, Page's entire complaint would necessarily have been pleaded exclusively on information and belief—or, to use my colleagues' words, on "naked assumption[s]."

It is irrelevant that neither media article describes the fruits of the surveillance. Both articles name Carter Page. They reveal that he was the target of FISA surveillance. And on Page's telling, the surveillance had yet to uncover any information whatsoever to link him to Russia as its agent. It is at least plausible to conclude that the reporters were leaked some portion of Page's communications and chose to focus their coverage on the existence of the surveillance rather than on the substance of what the surveillance produced. As alleged, Strzok and Lisa Page were the sources of these leaks. And as alleged, Strzok and Lisa Page knew or had reason to know that the information was obtained through improperly authorized surveillance. At summary judgment, the absence of evidence of leaked surveillance contents—as opposed to the fact of surveillance itself—could prove dispositive. For now, however, the Court must accept the complaint's allegations as true and, on that basis, the district court erred in dismissing Page's § 1809(a)(2) claim.

III. CONCLUSION

FISA's grand bargain was struck after the public learned of an array of intelligence scandals involving the Executive's rampant and lawless spying on American citizens. The enacting Congress aimed to subject the President's unbridled surveillance authority to the oversight of the other two branches and, in exchange, surveillance was allowed to take place away from the public eye. At the core of this bargain

were FISA's warrant procedures. Yet, as this case makes shockingly clear, those procedures have proven inadequate.

From start to finish, the FISA process was marred by governmental omissions and commissions that led a pliant court to authorize surveillance on an American citizen. FISA's requirements may sometimes prove difficult to satisfy but disregarding them is the gateway to naked violations of our civil liberties. I take some solace in the knowledge that the Government's egregious conduct roused the Congress to action. In response to this very case, it amended FISA to increase oversight and impose new penalties on individuals who crash FISA's guardrails. *See* Reforming Intelligence and Securing America Act, Pub. L. No. 118-49, 138 Stat. 862 (2024). Alas, this is cold comfort to Page. Nevertheless, I believe that Page's first FISA claim is untimely and his Patriot Act claim is both forfeited and fails on the merits. I therefore join my colleagues in affirming the dismissal of those claims but I would give Page his day in court on his claim brought pursuant to 50 U.S.C. § 1809(a)(2). With regard to that claim, I respectfully dissent.

APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23-5038 **September Term, 2024**

1:20-cv-03460-DLF

Filed On: July 14, 2025

Carter Page,

Appellant

v.

James B. Comey, et al.,

Appellees

BEFORE: Srinivasan, Chief Judge; Henderson, Millett, Pillard, Wilkins, Katsas*, Rao, Walker, Childs, Pan*, and Garcia, Circuit Judges

O R D E R

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Clifton B. Cislak, Clerk

BY: /s/
Lillian R. Wright
Deputy Clerk

*Circuit Judges Katsas and Pan did not participate in this matter.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CARTER PAGE,

Plaintiff,

v.

JAMES B. COMEY *et al.*,

Defendants.

No. 20-cv-3460 (DLF)

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is

ORDERED that the plaintiff's motion to alter or amend the judgment and for relief from the judgment, Dkt. 119, is **DENIED.**

The case remains closed.

SO ORDERED.

January 18, 2023

DABNEY L. FRIEDRICH
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CARTER PAGE,

Plaintiff,

v.

JAMES B. COMEY *et al.*,

Defendants.

No. 20-cv-3460 (DLF)

MEMORANDUM OPINION

Following the Court's order granting the defendants' motions to dismiss and closing this case, Carter Page filed a motion to alter or amend the judgment under Rule 59(e) and for relief from the judgment under Rule 60(b) of the Federal Rules of Civil Procedure. Pl.'s Mot. for Recons., Dkt. 119. For the reasons that follow, the Court will deny the motion.

I. BACKGROUND[1]

As explained at length in the Court's initial opinion, *see* Mem. Op. at 1–9, Dkt. 115, this case arises out of various FBI agents' alleged actions to obtain four successive Foreign Intelligence Surveillance Act (FISA) warrants to electronically surveil Page during the Trump 2016 campaign, despite there being no probable cause to do so. *Id.* at 2. Among other things, Page alleged that the FBI used reports by Christopher Steele, who "was paid by the Democratic National Committee and/or the Clinton campaign to perform political opposition research," as a basis to obtain the FISA warrants "without adequately investigating [Steele's] reliability and motives." *Id.* at 2–3. And as relevant here, the complaint alleged that Igor Danchenko, "one of Steele's key sub-

[1] The Court assumes familiarity with the extensive discussion of the facts set forth in its initial opinion. *See* Mem. Op. at 1–10, Dkt. 115.

sources," provided information to the FBI that "contradicted key claims in Steele's reports" but "was not reported" in the FISA applications. *Id.* at 31.

Page's Second Amended Complaint brought claims under the FISA and *Bivens* against individual defendants James Comey, Andrew McCabe, Kevin Clinesmith, Peter Strzok, Lisa Page, Joe Pientka, Stephen Somma, and Brian Auten, all individuals who worked at the FBI. Second Am. Compl. (SAC) ¶¶ 256–274, 283–289, Dkt. 73. The complaint also listed John Does 1–10 as individual defendants "whose identities or specific involvement in the conduct alleged in this Complaint may not yet be known to the Plaintiff." *Id.* ¶¶ 34–35. Finally, Page sued the United States under the Federal Tort Claims Act (FTCA) and PATRIOT Act, *id.* ¶¶ 275–282, 303–311, and DOJ and the FBI under the Privacy Act, *id.* ¶¶ 290–302.

Each of the named individual defendants and the institutional defendants moved to dismiss. Dkts. 80–88. The Court granted the motions. *See* Order, Dkt. 114. It dismissed the FISA, *Bivens*, FTCA, and PATRIOT Act counts for failure to state a claim under Rule 12(b)(6). Mem. Op. at 34–35, 38–39, 43–44. It further dismissed one Privacy Act count for failure to exhaust administrative remedies, *id.* at 49, and the other as time-barred, *id.* at 50. Although the Court dismissed all claims without prejudice except for the *Bivens* claim, the Court directed that the case be closed.[2] Order at 1. On September 29, 2022, Page moved to alter or amend the judgment under Rule 59(e) and for relief from the judgment under Rule 60(b) based on newly discovered evidence about the FBI's relationship with Danchenko. Pl's Mem. of Law in Supp. of Mot. for Recons. at 2–3, Dkt. 119-1.

[2] The Order constituted "[t]he dismissal without prejudice of [the] *action* (or 'case')," which "is final and appealable." *Ciralsky v. CIA*, 355 F.3d 661, 666 (D.C. Cir. 2004) ("That the dismissal was without prejudice to filing another suit does not make the cause unappealable, for denial of relief and dismissal of the case ended this suit as far as the District Court was concerned." (quoting *United States v. Wallace & Tiernan Co.*, 336 U.S. 793, 794–95 n.1 (1949)).

II. LEGAL STANDARDS

Rule 59(e) permits a party to file a "motion to alter or amend a judgment . . . no later than 28 days after the entry of the judgment." Fed. R. Civ. P. 59(e). "A Rule 59(e) motion is discretionary and need not be granted unless the district court finds that there is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (per curiam) (quotation marks omitted). A movant cannot use a Rule 59(e) motion to raise new issues, theories, or arguments that could have been presented in the course of the litigation. *Banister v. Davis*, 140 S. Ct. 1698, 1703 (2020); *Fox v. Am. Airlines, Inc.*, 389 F.3d 1291, 1296 (D.C. Cir. 2004). Instead, such a motion "must address new evidence or errors of law or fact and cannot merely reargue previous factual and legal assertions," and it will be granted "[o]nly if the moving party presents new facts or a clear error of law which compel a change in the court's ruling." *New York v. United States*, 880 F. Supp. 37, 38 (D.D.C. 1995) (quotation marks omitted).

Similarly, under Rule 60(b), "the court may relieve a party . . . from a final judgment" on grounds including "mistake, inadvertence, surprise, or excusable neglect"; "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)"; "fraud . . . , misrepresentation, or misconduct by an opposing party"; or "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(1), (2), (3), (6). "[A] district court enjoys significant discretion in deciding whether to grant or deny a Rule 60(b) motion . . . ." *Computer Pros. for Soc. Resp. v. U.S. Secret Serv.*, 72 F.3d 897, 903 (D.C. Cir. 1996). Like Rule 59(e), "Rule 60(b) is not a vehicle for presenting theories or arguments that could have been raised previously." *Walsh v. Hagee*, 10 F. Supp. 3d 15, 19 (D.D.C. 2013) (quotation marks omitted).

III. ANALYSIS

In his motion for reconsideration, Page asks the Court to reopen the case to "correct mistakes of fact and law" and grant him "leave to amend his SAC" based on newly discovered evidence. Pl.'s Mem. at 13–14. He also requests authorization to conduct "targeted discovery." *Id.* at 13. The Court will address each in turn.

A. Reopening the case based on newly discovered evidence

Page alleges that, after the Court's opinion and order issued, new evidence came to light that Danchenko was a paid source for the FBI from March 2017 to October 2020 and thus had "been paid to assist each of the Defendants' perpetration of their illegal activities," which the defendants "conceal[ed] . . . from this Court throughout the course of the current litigation." *Id.* at 2, 5. Page understands this new information to imply that the individual defendants "deliberately put one of the fabricators of the Steele Dossier on FBI payroll in order to keep him quiet and further cover up the individual FBI Defendants' misdeeds." *Id.* at 17 (emphasis omitted); *see also id.* at 16–19. Based on this new evidence, Page "moves the Court to alter and/or amend the final order" dismissing his Second Amended Complaint and closing the case. *Id.* at 13.

Such relief is not warranted. Troubling as the Danchenko allegation may be, it does not "compel the court to change its prior position" on any count. *Nat'l Ctr. for Mfg. Scis. v. Dep't of Def.*, 199 F.3d 507, 511 (D.C. Cir. 2000). Rather, the alleged new evidence would not affect the analyses dismissing the claims against either the individual or institutional defendants.

As to the individual defendants, the new facts have no bearing on the Court's rationale for dismissing the FISA claims.[3] The Court reasoned that Page's FISA claims "fail[ed] for two reasons": (1) FISA "does not allow for aiding and abetting liability," Mem. Op. at 19–20; and

[3] Page does not challenge the dismissal of the *Bivens* claims against the individual defendants.

(2) it applies only to those "who participate[] in *collecting* the target's communications using certain devices," which Page's complaint did not allege for any individual defendant, *id.* at 26, 28–29. Even assuming the new allegations about a coverup involving Danchenko are true, those two legal conclusions remain unaffected. While Page suggests that the Danchenko evidence supports a "civil conspiracy" theory of liability, *see* Pl.'s Reply at 4–5, Dkt. 124, that argument fails for the same reason his aiding-and-abetting theory failed. Mem. Op. at 20 ("[S]tatutory silence on the subject of secondary liability means there is none." (quotation marks omitted)); *see also Broidy Cap. Mgmt. LLC v. Muzin*, No. 19-cv-0150, 2020 WL 1536350, at *11 (D.D.C. Mar. 31, 2020), *aff'd*, 12 F.4th 789 (D.C. Cir. 2021) ("The same principle applies to bar recovery from coconspirators . . . .").

Moreover, Page's assertion that Danchenko himself was a "device" by which the defendants collected communications, Pl.'s Reply at 17, is likewise unconvincing. Page defines "device" to include "[a] scheme to trick or deceive." *Id.* (quoting Black's Law Dictionary (11th ed. 2019)). But his definition is plainly at odds with the statutory language, which speaks of "the installation of . . . an *electronic*, *mechanical*, or other surveillance device," 50 U.S.C. § 1801(f)(1), (4) (emphasis added), and the Court's explanation of that term, which emphasizes that using a device "is distinct from the process of getting a warrant," Mem. Op. at 22–23. Therefore, even if a coverup helped secure the warrants, it cannot be considered a "device" for purposes of FISA.

As to the institutional defendants, the new evidence does not impact the statute of limitations analysis for dismissing Page's Privacy Act claim.[4] *See id.* at 50–52. The Court reasoned that Page knew about alleged leaks to media outlets "when [the relevant articles] were published in April 2017," even if "he did not then know the identities of the leakers" or details of

[4] Page does not challenge the dismissal of his other Privacy Act claim due to failure to exhaust.

the leaks. *Id.* at 51. Thus, the Court concluded, Page's "Privacy Act disclosure claims expired two years after publication," *id.*, and his suit (brought more than three-and-a-half years later) was time-barred. *Id.* at 52. Again, the Danchenko allegations are irrelevant. Even if the new evidence did show that the defendants engaged in "material and willfull [*sic*] misrepresentations," Pl.'s Reply at 23, those misrepresentations would not negate Page's inquiry notice of any Privacy Act violations when the articles containing alleged leaks were published. *See* Mem. Op. at 51. Page's arguments to the contrary reference the portion of the Court's opinion discussing—and rejecting—whether the *FISA claims* were time barred, *see* Pl.'s Mem. at 25–26 (citing Mem. Op. at 16), and are inapposite for the Privacy Act conclusion.[5]

To the extent Page challenges the dismissal of the remaining claims against the institutional defendants, *see* Pl.'s Reply at 12–13 (FTCA claim); *id.* at 18–22 (PATRIOT Act claim), he did not raise those arguments in his motion and the Court will not consider "issues raised for the first time in a reply brief." *Rollins Env't Servs. (NJ) Inc. v. EPA*, 937 F.2d 649, 653 n.2 (D.C. Cir. 1991). And even if the Court did consider them, the arguments would fail for the same reason: whether or not Danchenko was a paid FBI informant does not impact the analyses as to either claim. *See* Mem. Op. at 40 (dismissing FTCA claim because Page did not allege that "the defendants *used* the warrants wrongfully"); *id.* at 41–45 (dismissing PATRIOT Act claim due to sovereign immunity, failure to exhaust, and failure to plausibly allege that the government improperly "used or disclosed FISA information").

[5] Page's remaining arguments about FISA's legislative history and statutory interpretation, *see* Pl.'s Mem. at 20–23; Pl.'s Reply at 18–19, and the Privacy Act's statute of limitations, *see* Pl.'s Mem. at 26–27, are legal theories that "could have [been] raised before the decision issued" and the Court will not address them now. *Banister*, 140 S. Ct. at 1703.

Because the newly discovered information about Danchenko would not "compel a change in the court's ruling" on any claim, it does not support altering, amending, or granting relief from the Court's order dismissing Page's complaint and closing the case. *New York*, 880 F. Supp. at 38 (quotation marks omitted). As a result, Page's motion for leave to amend necessarily fails. *See* Pl.'s Mem. at 17, 19–20. "[O]nce a final judgment has been entered, a court cannot permit an amendment unless the plaintiff 'first satisfies Rule 59(e)'s more stringent standard' for setting aside that judgment." *Ciralsky*, 355 F.3d at 673 (quoting *Firestone*, 76 F.3d at 1208 (alteration omitted)). "Since the court decline[s] to set aside the judgment under Rule 59(e)," Page's "motion to amend under Rule 15(a) [is] moot." *Id.*[6]

B. Conducting targeted discovery

Page also asks for discovery to enable him "to learn sufficient details to plead the relevant causes of action." Pl.'s Mem. at 13. Specifically, he seeks to uncover "[w]hat exactly the [d]efendants . . . disclosed to journalists," "[w]hat . . . the [d]efendants kn[ew] about the partisan, political motivations of the surveillance of Page," and the identities of John Does 1–10, "the individuals who 'engaged in' the mechanics of the FISA surveillance." *Id.* at 24–25. The Court will deny these requests.

First, Page has not provided grounds for this relief under Rule 59(e) or Rule 60(b). These discovery requests are not related to the newly discovered evidence, nor has Page identified any "intervening change of controlling law . . . or the need to correct a clear error or prevent manifest

[6] To the extent Page wishes to bring new causes of action, *see, e.g.*, Pl.'s Reply at 14–15 (quoting 42 U.S.C. § 1985(3)), the Court notes that his Second Amended Complaint was dismissed without prejudice to refiling a new suit. *See* Order at 1. Page has provided no argument or reason to believe that that dismissal unfairly prejudiced him due to, for example, a statute of limitations concern. *See Ciralsky*, 355 F.3d at 674 (remanding for the district court to consider "the [statute of limitations] consequences of denial" of a Rule 59(e) decision, but ultimately "leav[ing] the choice entirely in the hands of the district court" (quotation marks omitted)).

injustice." *Firestone*, 76 F.3d at 1208 (quotation marks omitted). Rules 59(e) and 60(b) are thus not the proper vehicle for these requests, which could have been presented earlier. *Id.*; *Walsh*, 10 F. Supp. 3d at 19.

In any event, Page's discovery requests fail for a second reason. "A plaintiff may not 'use discovery to obtain the facts necessary to establish a claim that is plausible on its face pursuant to [the] *Twombly* and *Iqbal* [pleading standards]—even when those facts are only within the head or hands of the defendant.'" *Ambellu v. Re'ese Adbarat Debre Selam Kidist Mariam*, 406 F. Supp. 3d 72, 83 (D.D.C. 2019), *aff'd*, No. 19-7124, 2020 WL 873574 (D.C. Cir. Feb. 14, 2020) (quoting *Felder v. WMATA*, 105 F. Supp. 3d 52, 59 (D.D.C. 2015)). Page is not entitled to conduct "a fishing expedition" to discover new potential claims he may bring against the defendants. *Id.* at 82 (quoting *Bastin v. Fed. Nat'l Mortgage Ass'n*, 104 F.3d 1392, 1396 (D.C. Cir. 1997)); *see also Mama Cares Found. v. Nutriset Societe Par Actions Cimplifiee*, 825 F. Supp. 2d 178, 184 (D.D.C. 2011) ("[T]he discovery rules are designed to assist a party to prove a claim it reasonably believes to be viable *without discovery*, not to find out if it has any basis for a claim." (quotation marks omitted)).

Page's request for discovery to learn the identities of the John Does fares no better. Courts do sometimes allow cases to proceed against "'John Doe' defendants, but only in situations where the otherwise unavailable identity of the defendant will eventually be made known through discovery." *Newdow v. Roberts*, 603 F.3d 1002, 1010 (D.C. Cir. 2010). That exception is not applicable here. Page's complaint does not detail any alleged wrongdoing by the John Does. *See* SAC ¶¶ 34–35 (stating that Does' "specific involvement in the conduct alleged in this Complaint [was] not yet [] known to the Plaintiff"). The complaint later states that unknown individuals engaged in surveillance of Page pursuant to the FISA warrants, *id.* ¶¶ 140–141, but makes no

attempt to link that action to any cause of action.[7] Thus, this is a very different case from *Malibu Media, LLC v. Doe*, 64 F. Supp. 3d 47, 48–50 (D.D.C. 2014), which permitted jurisdictional discovery "to learn the identity of putative defendants." *See* Pl.'s Mem. at 23. There, the complaint plausibly alleged that John Doe violated the Copyright Act, and discovery was permitted to uncover his identity and ensure personal jurisdiction. *Malibu Media*, 64 F. Supp. 3d at 48–50. By contrast, Page has not alleged any claim against John Does 1–10. Thus, discovery would, once again, "amount to nothing more than a fishing expedition" to uncover wrongdoing that he has not already plausibly alleged. *Bastin*, 104 F.3d at 1396. Page's "[m]ere conjecture or speculation" of wrongdoing by John Does 1–10 "is not enough to justify jurisdictional discovery." *Malibu Media*, 64 F. Supp. 3d at 48 (quotation marks omitted); *see also Landwehr v. FDIC*, 282 F.R.D. 1, 4–5 (D.D.C. 2010) (explaining that plaintiffs could not "maintain their claims against the 'Doe' defendants" given "the complete absence of any specific allegations against" them).

CONCLUSION

For the foregoing reasons, the plaintiff's motion to alter or amend the judgment and for relief from the judgment is denied. A separate order consistent with this decision accompanies this memorandum opinion.

Dabney L. Friedrich

DABNEY L. FRIEDRICH
United States District Judge

January 18, 2023

[7] Notably, FISA exempts from liability those who engage in electronic surveillance that "was authorized by and conducted pursuant to a search warrant or court order of a court of competent jurisdiction." 50 U.S.C. §§ 1809(b), 1810.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CARTER PAGE,

Plaintiff,

v.

JAMES B. COMEY *et al.*,

Defendants.

No. 20-cv-3460 (DLF)

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is

ORDERED that the individual defendants' Motions to Dismiss, Dkts. 80–87, are **GRANTED**. It is further

ORDERED that the government defendants' Motion to Dismiss, Dkt. 88, is **GRANTED**. It is further

ORDERED that the plaintiff's Second Amended Complaint, Dkt. 73, is **DISMISSED**. It is further

ORDERED that Count Six (*Bivens*) is **DISMISSED WITH PREJUDICE**. The remaining counts are **DISMISSED WITHOUT PREJUDICE**.

The Clerk of Court is directed to close this case.

Dabney L. Friedrich

DABNEY L. FRIEDRICH
United States District Judge

September 1, 2022

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CARTER PAGE, *Plaintiff*, v. JAMES B. COMEY *et al.*, *Defendants.*	No. 20-cv-3460 (DLF)

MEMORANDUM OPINION

As part of its investigation into the alleged connection between the Trump 2016 presidential campaign and the Russian government, the Federal Bureau of Investigation obtained warrants under the Foreign Intelligence Surveillance Act (FISA) to electronically surveil Carter Page, an informal advisor to the campaign. Page alleges that the surveillance was unlawful because the warrant applications were false and misleading. He brings statutory and constitutional claims against the United States, the Department of Justice, the FBI, and individuals who worked at the FBI. Before the Court are the individual defendants' Motions to Dismiss, Dkts. 80–87, and the government defendants' Motion to Dismiss, Dkt. 88. For the reasons that follow, the Court will grant each motion.

I. BACKGROUND

A. Facts

1. *Operation Crossfire Hurricane*

On July 31, 2016, the FBI opened a counterintelligence investigation named "Operation Crossfire Hurricane" to determine whether individuals associated with the Trump presidential campaign were involved in coordinated activities with the Russian government. Second Am.

Compl. (SAC) ¶ 5, Dkt. 73.[1] Plaintiff Carter Page, a "volunteer member of an informal foreign policy advisory committee" to the Trump campaign, alleges that he was targeted in this investigation. *Id.* ¶¶ 5, 21. According to Page, the FBI obtained four successive FISA warrants to electronically surveil him, despite there being no probable cause to suspect that he was a Russian agent. *Id.* ¶ 3; 50 U.S.C. §§ 1804(a)(3)(A), 1805(a)(2)(A).

Allegedly, defendant Stephen Somma, then an FBI counterintelligence investigator, was the first to propose the surveillance of Page. SAC ¶ 202. After asking about the possibility of seeking FISA warrants, the FBI Office of General Counsel told Somma on August 15, 2016, that he needed more evidence to establish probable cause. *Id.* ¶ 203. Meanwhile, on August 17, the CIA told the Crossfire Hurricane team that Page had been a CIA "operational contact" from 2008 to 2013 and had helped the agency combat Russian and other foreign countries' intelligence-related activities. *Id.* ¶ 11. And on September 7, the CIA allegedly told defendants James Comey, then-director of the FBI, and Peter Strzok, then-Deputy Assistant Director of Counterintelligence, that 2016 presidential candidate Hillary Clinton had approved a plan to connect Trump and Russian hackers in order to distract the public from her use of a private email server. *Id.* ¶ 12.

Page further alleges that soon after, on September 19, the FBI received information about a connection between the Trump campaign and Russia. *Id.* ¶ 14. Christopher Steele, a confidential source for the FBI, provided two reports alleging that Page engaged in "improper or unlawful communications or activities" with "two sanctioned Russians with close ties to Russian President Vladimir Putin." *Id.* ¶¶ 14, 74. Steele was paid by the Democratic National Committee and/or the

[1] In deciding these motions to dismiss, the Court accepts as true all material factual allegations in the complaint. *See Am. Nat'l Ins. Co. v. FDIC*, 642 F.3d 1137, 1139 (D.C. Cir. 2011).

Clinton campaign to perform political opposition research. *Id.* ¶ 9. The FBI used his reports as a basis to obtain a FISA warrant to surveil Page. *Id.* ¶ 14.

According to Page, Steele's reports were "essentially the exclusive source of information supporting probable cause for the FISA warrant applications." *Id.* ¶ 15. FBI officials allegedly chose to proceed with and rely on Steele's information without adequately investigating his reliability and motives. *See, e.g., id.* ¶¶ 15, 91, 157, 170. And they falsely elevated Steele's credibility in the warrant applications and omitted facts that cast doubt on his claims. *See, e.g., id.* ¶¶ 17, 111. At the same time, they never disclosed Page's previous work as an operational contact for the CIA in any of the four warrant applications. *Id.* ¶¶ 17–18.

The DOJ Office of Inspector General (OIG) later investigated and revealed the FBI's "material failures" during this process. *Id.* ¶ 42. The Foreign Intelligence Surveillance Court (FISC) has indicated that Page's surveillance was "unlawful." *Id.* ¶ 50. Indeed, the government has conceded that it lacked probable cause to surveil Page under the last two warrants and also agreed to sequester information obtained from all four of the warrants. *Id.* ¶ 48. Below, the Court will describe Page's allegations about each warrant application, *see infra* Part I.A.2–5, and about each individual defendant's actions, *see infra* Part III.A.1.ii.c.

2. *First FISA Warrant*

On September 23, 2016, soon after the FBI received Steele's reports, a Yahoo! News article repeated the allegations that Page met with two sanctioned Russians, according to a "well-placed Western Intelligence source." SAC ¶ 76. Although Steele's confidential source agreement with the FBI prohibited him from talking to the media about the information he provided to the FBI, allegedly he was the source for the article. *Id.* A draft application for the first FISA warrant acknowledged that he was the source for the article, though the draft was later changed to say that

Steele's business associate or client gave the information. *Id.* ¶ 80. The final version of the warrant application cited the Yahoo article as corroboration for Steele's allegations, even though he was the source for both. *Id.* ¶¶ 78, 80.

Two days after publication of the Yahoo article, Page sent a letter to Comey denying that he had contact with the sanctioned Russians and explaining his long history of interactions with the CIA and the FBI. *Id.* ¶ 81. Comey gave the letter to the Crossfire Hurricane team and its supervisor, Strzok. *Id.* Around the same time, Page told Stefan Halper, another FBI confidential source, that he was never involved with Russia on behalf of the Trump campaign. *Id.* ¶ 86. This was consistent with statements that other witnesses made during FBI interviews. *Id.* ¶¶ 85, 87. Allegedly, Page's denials were never disclosed by the FBI to DOJ attorneys. *Id.* ¶ 86. Meanwhile, even though a DOJ attorney asked Somma whether Page was ever a source for the CIA, Somma did not mention Page's years as a CIA operational contact. *Id.* ¶¶ 11, 72, 84, 205.

Page alleges that in early October, a DOJ attorney learned that Steele was performing political opposition research and thus grew concerned about his credibility. *Id.* ¶ 89. Strzok briefed Comey and defendant Andrew McCabe, then-Deputy Director of the FBI, about these concerns, but they "brushed [them] aside" and urged DOJ to move forward with the warrant application. *Id.* ¶ 91. Defendant Lisa Page, an FBI lawyer, told the DOJ attorney that Comey and McCabe had approved the decision to apply for the warrant; she also told McCabe that a "high-level push" might be necessary to get it approved. *Id.* After the DOJ attorney asked the FBI whether Steele had ties to any political campaign, a footnote was added to the application that indicated that Steele was hired to perform political opposition research. *Id.* ¶¶ 89–92. The footnote did not, however, reveal that Steele was paid with Democratic National Committee funds, a fact allegedly known to senior DOJ and FBI officials. *Id.* ¶¶ 93, 96.

The warrant application was submitted to the FISC on October 21, 2016. *Id.* ¶ 95. Defendant Joe Pientka III, an FBI supervisory special agent on the Crossfire Hurricane team, signed the authorization for its submission. *Id.* ¶ 198. Comey signed the warrant application. *Id.* ¶ 150. Based on Steele's reports, the application claimed that Page met with at least two Russian officials during a July 2016 trip to Russia. *Id.* ¶ 95. Allegedly, Pientka did not verify or correct the application's false statement that "Steele's reporting had been corroborated and used in criminal proceedings." *Id.* ¶ 199. Nor did he confirm, as FBI policy required, that Steele's FBI handling agent had reviewed and approved the application's content. *Id.* In fact, Page alleges that the handling agent had not done so because Somma failed to seek his review. *Id.* ¶ 206. According to the complaint, the application failed to disclose (1) Steele's funding source, (2) Page's work as a CIA operational contact, or (3) a witness's exculpatory statement that no one in the Trump campaign coordinated with Russia. *Id.* ¶¶ 87, 95–96. Further, it did not contain a "cautionary warning to be vigilant against politically motivated false reports" regarding Russia. *Id.* ¶ 95.

3. *Second FISA Warrant*

On October 31, 2016, Mother Jones published a story about Steele's reports to the FBI. *Id.* ¶ 101. After Steele admitted that he was the source for the story, his FBI handling agent told him to stop collecting information for the FBI and that it was unlikely that the agency would continue to work with him. *Id.* ¶¶ 101–103. On November 17, the FBI closed Steele as a source "for cause." *Id.* ¶ 104. FBI officials including Strzok and defendant Brian Auten, an FBI supervisory intelligence analyst on the Crossfire Hurricane team, investigated Steele's credibility during trips to London in November and December; several former colleagues reported on Steele's poor judgment and habit of pursuing politically risky people. *Id.* ¶¶ 105, 174–175, 180. Allegedly, Lisa Page, Strzok, Pientka, and other FBI personnel then learned more about Steele's anti-Trump bias

from DOJ official Bruce Ohr, who told them that Steele's reports were being relayed to the Clinton campaign. *Id.* ¶ 106.

Yet the FBI continued to receive information from Steele through various intermediaries. *Id.* ¶¶ 107–108. And his reliability continued to be called into question. Page further alleges that after Pientka and Somma received information from the Deputy Assistant Secretary of State that cast doubt on some of Steele's claims, no one from the Crossfire Hurricane team followed up with her to learn more. *Id.* ¶ 109. The FBI also learned in December that one of Steele's sources was possibly a Russian spy and intelligence officer. *Id.* ¶ 110.

The second warrant application to surveil Page was submitted to the FISC on January 12, 2017, also signed by Comey. *Id.* ¶¶ 111, 152. It acknowledged that the FBI's relationship with Steele was "suspended." *Id.* ¶ 111. But according to Page, it asserted, falsely, that Steele's information was reliable because earlier reporting had been verified and used in criminal proceedings. *Id.* The application did not mention Steele's questionable credibility due to his political motivations and the fact that one of his sources was a possible Russian intelligence officer. *Id.* ¶¶ 112–113. Nor did it include "any foreign intelligence information that had been gathered during the first three months" of Page's surveillance, as none had been produced. *Id.* ¶¶ 114–115.

4. *Third FISA Warrant*

In late January 2017, the FBI, including Auten and Somma, interviewed Igor Danchenko, one of Steele's sources, for information about Page. *Id.* ¶¶ 120, 184, 209. The complaint alleges that Danchenko's statements "contradicted or undermined" the allegations that Steele had attributed to him. *Id.* And in March, two FBI agents, including Somma, conducted an "ambush interview" of Page. *Id.* ¶¶ 122, 210. They interviewed him four more times that month, and the information he provided did not support the contention that he was a Russian agent. *Id.* ¶ 121.

The third warrant application was submitted to the FISC on April 7, 2017, again signed by Comey, who was aware of the results of the Danchenko interview. *Id.* ¶¶ 122, 153. The application stated that Danchenko was "truthful and cooperative," but allegedly did not disclose that his answers contradicted Steele's allegations. *Id.* ¶ 121. And it claimed that the requested warrant would "continue to produce foreign intelligence information," even though no such evidence had been revealed in the past six months of surveillance. *Id.* ¶ 123. DOJ has since conceded to the FISC that it lacked probable cause when it sought the third warrant. *Id.* ¶ 119.

5. *Fourth FISA Warrant*

Before the submission of the fourth warrant application, Page publicly stated that he had previously assisted the U.S. government. *Id.* ¶ 129. Accordingly, the affiant for the fourth application asked defendant Kevin Clinesmith, then-FBI assistant general counsel, whether Page had ever been a source for the CIA. *Id.* On June 15, a CIA liaison told Clinesmith in an email that Page had been a CIA source. *Id.* ¶ 130. Thereafter, Clinesmith falsely told the affiant that Page had been a "sub source" but "never a source." *Id.* ¶ 131. When the affiant asked for proof in writing, Clinesmith altered the email from the CIA liaison to state that Page was "not a [CIA] source." *Id.*[2] Relying on this email, the affiant signed the application. *Id.* ¶ 132.

The fourth warrant application was submitted to the FISC on June 29, 2017 and signed by McCabe. *Id.* ¶¶ 133, 163. Again, it did not disclose Page's status as a CIA operational contact or the results of the Danchenko interviews. *Id.* ¶¶ 134–135. It also asserted that the warrant would "continue to produce foreign intelligence information," despite, as Page alleges, the lack of any such information produced during the previous nine months of surveillance. *Id.* ¶ 136. DOJ has

[2] On August 19, 2020, Clinesmith pled guilty to making a false statement under 18 U.S.C. § 1001(a)(3). SAC ¶ 131; *see United States v. Clinesmith*, Minute Entry, No. 20-cr-165 (D.D.C. Aug. 19, 2020).

since conceded to the FISC that it lacked probable cause when it sought the fourth warrant. *Id.* ¶ 127.

Page claims that the defendants, in seeking these four warrants, failed to comply with the FISA statute, FISC rules, and FBI policies. *Id.* ¶¶ 52–62. He also alleges that the defendants, after unlawfully obtaining the four warrants and thus his electronic communications, "used and disclosed" them to obtain the subsequent warrants, to "unlawfully pursue investigative ends," and to leak information to the media. *Id.* ¶¶ 140–142. According to Page, the United States has conceded in filings with the FISC that it has used and disclosed information obtained from the warrants in ways prohibited by that court. *Id.* ¶ 231.

6. *Media coverage and investigation*

On April 11, 2017, the Washington Post first reported about the FISA warrants obtained to surveil Page. *Id.* ¶ 221. The investigation of Page, it explained, was part of the FBI's Russia probe that had begun in July 2016. *Id.* The article revealed that a FISA warrant had been issued in 2016 and renewed at least once, based on a "lengthy declaration" with evidence that Page was a Russian agent. *Id.* It also mentioned Page's alleged meeting with one of the two sanctioned Russians, as disclosed by the Steele report. *Id.* Soon after, a New York Times article reported about the Russia probe and the Steele dossier, briefly discussing Page's alleged Russia ties. *Id.* ¶ 224. Lisa Page and Strzok exchanged texts about these articles. *Id.* ¶¶ 220, 222–223, 225. The complaint further alleges that they collaborated to leak protected information about Carter Page to the media, *see id.*, and that McCabe approved this plan, *id.* ¶ 225.

The DOJ OIG began investigating the Page warrants in March 2018. *Id.* ¶ 232. On December 9, 2019, the OIG released the Horowitz Report, which revealed that the FISA warrants lacked probable cause and were "unlawfully obtained." *Id.* ¶ 233. In the months before the report's

release, the OIG provided it to some of the defendants in this case for review and comment. *Id.* ¶ 234. During this time, Page sent numerous emails to DOJ and the OIG, asserting his right under the Privacy Act to review and amend the forthcoming report. *Id.* ¶¶ 238, 240, 242, 244. But his requests went largely unanswered; the OIG general counsel told him only that the OIG would not contact him for an interview. *Id.* ¶ 249. Page alleges that the Horowitz Report contains numerous errors that he has "a right to have amended." *Id.* ¶ 250.

B. Procedural History

On November 27, 2020, Page filed suit, bringing claims against individual, institutional, and unknown defendants. *See* Compl., Dkt. 1. He brought claims under FISA, 50 U.S.C. § 1810, and *Bivens* against defendants Comey, McCabe, Clinesmith, Strzok, Lisa Page, Pientka, Somma, and Auten. *Id.* ¶¶ 216–234, 243–250; *see also* SAC ¶¶ 256–274, 283–289. He sued the United States under the Federal Tort Claims Act (FTCA), Compl. ¶¶ 235–242; *see also* SAC ¶¶ 275–282, and DOJ and the FBI under the Privacy Act, Compl. ¶¶ 251–263; *see also* SAC ¶¶ 290–302. He filed an Amended Complaint on April 15, 2021. Am. Compl., Dkt. 51.

Meanwhile, Page was in the process of exhausting his administrative remedies under the PATRIOT Act. SAC ¶ 306; 18 U.S.C. § 2712(b)(1). He presented an administrative claim to DOJ on September 30, 2020, which was denied on April 22, 2021. SAC ¶ 306. Accordingly, Page filed his Second Amended Complaint on June 8, 2021, adding a claim against the United States for a violation of the PATRIOT Act, 18 U.S.C. § 2712. *Id.* ¶¶ 303–311.

Each individual defendant separately moves to dismiss the FISA and *Bivens* claims. *See* Mots. to Dismiss, Dkts. 80–87. The United States, the FBI, and DOJ move to dismiss the FTCA, Privacy Act, and PATRIOT Act claims. *See* Gov't Mot. to Dismiss, Dkt 88.

II. LEGAL STANDARDS

Rule 12(b)(1) of the Federal Rules of Civil Procedure allows a defendant to move to dismiss an action for lack of subject-matter jurisdiction. Fed. R. Civ. P. 12(b)(1). Federal law empowers federal district courts to hear only certain kinds of cases, and it is "presumed that a cause lies outside this limited jurisdiction." *Kokkonen v. Guardian Life Ins.*, 511 U.S. 375, 377 (1994). When deciding a Rule 12(b)(1) motion, the court must "assume the truth of all material factual allegations in the complaint and construe the complaint liberally, granting plaintiff the benefit of all inferences that can be derived from the facts alleged, and upon such facts determine [the] jurisdictional questions." *Am. Nat. Ins. Co. v. FDIC*, 642 F.3d 1137, 1139 (D.C. Cir. 2011) (citations and internal quotation marks omitted). But the court "may undertake an independent investigation" that examines "facts developed in the record beyond the complaint" in order to "assure itself of its own subject matter jurisdiction." *Settles v. U.S. Parole Comm'n*, 429 F.3d 1098, 1107 (D.C. Cir. 2005) (internal quotation marks omitted). A court that lacks jurisdiction must dismiss the action. Fed. R. Civ. P. 12(b)(1), 12(h)(3).

Rule 12(b)(6) of the Federal Rules of Civil Procedure allows a defendant to move to dismiss the complaint for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). To survive a Rule 12(b)(6) motion, a complaint must contain factual matter sufficient to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A facially plausible claim is one that "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This standard does not amount to a specific probability requirement, but it does require "more than a sheer possibility that a defendant has acted unlawfully." *Id.*; *see also Twombly*, 550 U.S. at 555 ("Factual allegations must be enough to raise a right to relief above the speculative

level."). A complaint need not contain "detailed factual allegations," *Iqbal*, 556 U.S. at 678, but alleging facts that are "merely consistent with a defendant's liability . . . stops short of the line between possibility and plausibility," *id.* (internal quotation marks omitted).

Well-pleaded factual allegations are "entitled to [an] assumption of truth," *id.* at 679, and the court construes the complaint "in favor of the plaintiff, who must be granted the benefit of all inferences that can be derived from the facts alleged," *Hettinga v. United States*, 677 F.3d 471, 476 (D.C. Cir. 2012) (internal quotation marks omitted). The assumption of truth does not apply, however, to a "legal conclusion couched as a factual allegation." *Iqbal*, 556 U.S. at 678 (internal quotation marks omitted). An "unadorned, the defendant-unlawfully-harmed-me accusation" is not credited; likewise, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Ultimately, "[d]etermining whether a complaint states a plausible claim for relief [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679.

III. ANALYSIS

The defendants seek to dismiss the complaint on statute of limitations grounds and for failure to state a claim. The United States also moves to dismiss the FTCA claim and one of the Privacy Act claims on the basis that the Court lacks jurisdiction over them. The Court will first address the claims against the individual defendants, followed by the claims against the institutional defendants.

A. Individual Defendants

Page brings four counts against the individual defendants for FISA violations, one for each warrant, under 50 U.S.C. § 1810. SAC ¶¶ 256–274. He also brings a claim under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), seeking damages for

alleged violations of his Fourth Amendment rights. SAC ¶¶ 283–289. The Court will address each claim in turn.

1. *FISA Claims*

FISA governs the procedures for "governmental electronic surveillance of communications for foreign intelligence purposes." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 402 (2013); 50 U.S.C. § 1801 *et seq.* (1978). To obtain a surveillance order, a federal officer must submit an application to a FISC judge that satisfies various statutory criteria. 50 U.S.C. § 1804(a)(1)–(9). For instance, the applicant must include, upon oath or affirmation, "a statement of the facts and circumstances relied upon by the applicant to justify his belief that . . . the target of the electronic surveillance is a foreign power or an agent of a foreign power." *Id.* § 1804(a)(3), (a)(3)(A). The judge shall approve the application if, among other requirements, "there is probable cause to believe that . . . the target of the electronic surveillance is a foreign power or an agent of a foreign power." *Id.* § 1805(a)(2), (a)(2)(A). The judge makes this determination "on the basis of the facts submitted by the applicant." *Id.* § 1805(a)(2).

A person may be criminally liable "if he intentionally . . . (1) engages in electronic surveillance under color of law except as authorized" by FISA, the Wiretap Act, and certain other federal statutes, or "(2) discloses or uses information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through electronic surveillance not authorized" by the same statutes. *Id.* § 1809(a). An "aggrieved person" has a civil cause of action against those who violated § 1809(a).[3] *Id.* § 1810. Page alleges that the individual defendants violated §§ 1809(a) and 1810 both by unlawfully engaging in electronic

[3] An "aggrieved person" is a "person who is the target of an electronic surveillance or any other person whose communications or activities were subject to electronic surveillance." 50 U.S.C. § 1801(k).

surveillance and using or disclosing the fruits of that surveillance. SAC ¶¶ 260, 264, 268, 272. The defendants argue that these claims are time-barred. Alternatively, each defendant claims that Page fails to sufficiently allege that he or she violated the statute. The Court finds that the claims are not time-barred but that Page does not state a claim against any of the individual defendants.

i. Statute of Limitations

A statute of limitations defense may be raised in a pre-answer Rule 12(b)(6) motion only "when the facts that give rise to the defense are clear from the face of the complaint." *Smith-Haynie v. District of Columbia*, 155 F.3d 575, 578 (D.C. Cir. 1998). When a "cause of action created by a federal statute" has no express limitations period, courts "generally borrow the most closely analogous state limitations period." *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 414 (2005) (internal quotation marks omitted). In rare cases, courts borrow analogous federal limitations periods but only where applying the state limitations period would frustrate federal policy. *Id.* at 415; *N. Star Steel Co. v. Thomas*, 515 U.S. 29, 34–35 (1995).

FISA's civil cause of action does not contain a statute of limitations. *See* 50 U.S.C. § 1810. The Court cannot locate, and the parties do not provide, any case that has decided the appropriate statute of limitations for a FISA claim. The parties disagree over the proper statute of limitations period. The defendants argue that Page's FISA claim is most analogous to libel, slander, or invasion of privacy, so D.C.'s one-year limitations period should apply.[4] *See* D.C. Code § 12-301(4) (libel or slander); *Greenpeace, Inc. v. Dow Chem. Co.*, 97 A.3d 1053, 1061–62 (D.C. 2014)

[4] *See* McCabe Mot. to Dismiss at 24–25 & n.9, Dkt. 80; Clinesmith Mot. to Dismiss at 15, Dkt. 81; Strzok Mot. to Dismiss at 9, Dkt. 82; Lisa Page Mot. to Dismiss at 15, Dkt. 83; Pientka Mot. to Dismiss at 7, Dkt. 84; Somma Mot. to Dismiss at 10–11, Dkt. 85; Auten Mot. to Dismiss at 11, Dkt. 86; Comey Mot. to Dismiss at 18, Dkt. 87.

(invasion of privacy). Alternatively, they point to the two-year limitation for violations of the federal Wiretap Act, *see* 18 U.S.C. § 2520(e) (running from "the date upon which the claimant first has a reasonable opportunity to discover the violation"), and the federal Stored Communications Act, *see id.* § 2707(f) (running from "the date upon which the claimant first discovered or had a reasonable opportunity to discover the violation").[5] Page rejects these and instead relies on the three-year limitations period that D.C. law prescribes for actions "for which a limitation is not otherwise specifically prescribed." Pl.'s Omnibus Opp'n at 65, Dkt. 98 (citing D.C. Code § 12-301(8)).[6]

The Court agrees with Page. As a starting point, applying an analogous federal limitations period is the "exception," and the defendants provide nothing to overcome "[t]he presumption that state law will be the source of a missing federal limitations period." *N. Star Steel Co.*, 515 U.S. at 35; *see also Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 157–70 (1987) (Scalia, J., concurring) (questioning the legitimacy of borrowing analogous federal limitations periods). Looking to D.C. law, the residual three-year limitations period, *see* D.C. Code § 12-301(8), fits best. Page's claim is for an unlawful search, which is not akin to the intentional torts listed in D.C. Code § 12-301(4). Courts in this district, when borrowing analogous state limitations periods, have applied the residual three-year period when the claim at issue does not resemble those enumerated intentional torts. *See Bame v. Clark*, 466 F. Supp. 2d 105, 109 (D.D.C. 2006) (applying the three-year limit to an unlawful search claim); *Berman v. Crook*, 293 F. Supp. 3d 48,

[5] *See* McCabe Mot. to Dismiss at 24 n.10; Clinesmith Mot. to Dismiss at 18; Strzok Mot. to Dismiss at 9; Pientka Mot. to Dismiss at 7; Somma Mot. to Dismiss at 13; Auten Mot. to Dismiss at 11; Comey Mot. to Dismiss at 18.

[6] McCabe and Pientka recognize that the three-year limitations period could apply. *See* McCabe Mot. to Dismiss at 24–25; Pientka Mot. to Dismiss at 7.

56 (D.D.C. 2018) (applying the three-year limit to an unlawful search claim based on alleged falsity in the warrant application); *Lederman v. United States*, 131 F. Supp. 2d 46, 61–62 (D.D.C. 2001) (applying the three-year limit to First and Fourth Amendment claims). Page's FISA claim more closely resembles these constitutional claims, as he alleges "unwarranted government intrusion," *Bame*, 466 F. Supp. 2d at 109, as opposed to a common-law intentional tort committed by "private persons," *see Lederman*, 131 F. Supp. 2d at 61 (quoting *Payne v. Gov't of Dist. of Columbia*, 559 F.2d 809, 817 n.32 (D.C. Cir. 1977)). Accordingly, the Court will apply the three-year time bar, meaning Page's claim must have accrued on or after November 27, 2017 to be timely.

Federal law governs the accrual of federal claims, and it specifies that the statute of limitations begins to run when the plaintiff has a "complete and present cause of action." *Loumiet v. United States*, 828 F.3d 935, 947 (D.C. Cir. 2016) (citation omitted). Federal courts "generally apply a discovery accrual rule when a statute is silent on the issue, as [FISA] is here." *Rotella v. Wood*, 528 U.S. 549, 555 (2000). And "discovery of the injury, not discovery of the other elements of a claim, is what starts the clock." *Id.*; *see also Sprint Commc'ns Co. v. FCC*, 76 F.3d 1221, 1228 (D.C. Cir. 1996) ("Accrual does not wait until the injured party has access to or constructive knowledge of all the facts required to support its claim.").

The complaint reveals that, at the latest, Page learned about the FISA warrants when the Washington Post broke the story on April 11, 2017. SAC ¶ 221. The article disclosed quite a bit of information about Page's claim: (1) the FBI and DOJ were involved; (2) the agencies convinced a FISC judge that there was probable cause to believe that Page was an agent of Russia; (3) a partially unverified "dossier compiled by a former British intelligence officer" alleged that Page met with a Putin confidant in Russia; and (4) a warrant issued in 2016 and was renewed at least

once. *Id.*; *see also* Comey Mot. to Dismiss Ex. 5 (Wash. Post Article) at 2, Dkt. 87-7. Plus, Page is quoted in the article, saying, "This confirms all of my suspicions about unjustified, politically motivated government surveillance." Wash. Post Article at 3.[7] He "dismissed what he called 'the dodgy dossier' of false allegations" and denied that he met with the Russian. *Id.* at 4. Accordingly, by April 11, 2017, Page knew that he was subject to surveillance by the FBI and DOJ, and he suspected that the allegations, and the ensuing warrants, were baseless.

In a typical case, that might be enough for a claim to accrue. For example, in a medical malpractice case, the claim accrues when the plaintiff knows that "he has been hurt and who has inflicted the injury." *United States v. Kubrick*, 444 U.S. 111, 122 (1979). Accrual does not wait until he knows that "his injury was negligently inflicted," because a "reasonably diligent" plaintiff can "seek[] advice in the medical and legal community" and can thus learn "if he has been wronged." *Id.* at 122–23. This holds true even where "a considerable effort may be required" to determine whether a claim is actionable. *Rotella*, 528 U.S. at 556.

But in some contexts, more is required before a plaintiff is deemed to be on notice of his claim. In *Klein v. City of Beverly Hills*, for instance, the plaintiff brought a § 1983 suit alleging that police detectives obtained search warrants based on false statements and omissions. 865 F.3d 1276, 1278 (9th Cir. 2017). The court held that this judicial deception claim began accruing not when the unlawful search occurred, but rather when the underlying affidavit was "reasonably available." *Id.* at 1278–79. Without the affidavit, which revealed that the officers misled the judge, the plaintiff could not "discover the underlying illegality." *Id.* at 1279. In order to ensure

[7] Page did not include this portion of the article in his complaint. But because the complaint "specifically references" and relies on the article, the Court may consider it in its entirety without converting the motion into one for summary judgment. *Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1133 (D.C. Cir. 2015). Page does not object to the defendants' reliance on the article. *See* Pl.'s Omnibus Opp'n at 64–67.

that plaintiffs not file "unripe and factually unsupported" suits to "preserve their claims," the court ruled that "accrual need not begin at the time of the search" as long as "a diligent plaintiff has pursued the underlying affidavit without success." *Id.*; *see also Berman*, 293 F. Supp. 3d at 56 (plaintiff's claim for unlawful search based on a faulty warrant accrued the year that he learned of the search and received a redacted affidavit, "including the portions with the statements that he now alleges were false").

Similarly, the plaintiffs in *Hobson v. Wilson* alleged that they were victims of an unlawful FBI program that infringed their First Amendment rights. 737 F.2d 1, 38–39 (D.C. Cir. 1984), *overruled in part on other grounds by Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit*, 507 U.S. 163 (1993). Because the defendants "offered no evidence of what plaintiffs could have done to find out more about their claims, short of filing suit," the D.C. Circuit found that their claims accrued only when they knew both that they were targets of FBI investigation and surveillance *and* that the program was unconstitutional. *Id.* at 35 n.107, 38–41. As the Circuit explained, a plaintiff's suspicion or awareness of government surveillance or investigation, standing alone, "cannot conceivably constitute [actual] notice of possible" illegality, "without creating the anomalous situation of requiring persons to file suit on a hunch, only to be dismissed for failure to state a claim." *Id.* at 38–39.

Thus, in the context of government searches and surveillance, the rationale for the typical application of the discovery rule—that a diligent plaintiff, after discovering his injury, can gather enough information to state a claim within the limitations period—does not necessarily apply. This is especially true for FISA claims given the "secrecy shrouding the FISA process." *United States v. Daoud*, 755 F.3d 479, 486 (7th Cir. 2014) (Rovner, J., concurring). Indeed, when the government notifies a criminal defendant that it plans to introduce evidence obtained from FISA

surveillance of him, even then he is rarely given access to the underlying FISA application. *Id.* at 484 (majority opinion); *id.* at 490 (Rovner, J., concurring).

Here, the face of the complaint does not reveal when Page's claim accrued. Even though Page knew in April 2017 that he was under FISA surveillance and suspected that it was unjustified, it is far from clear that a diligent investigation would have revealed enough evidence of illegality to avoid "fil[ing] suit on a hunch." *Hobson*, 737 F.2d at 39. The complaint does not allege that Page had access to the underlying affidavits. *See generally* SAC. Nor did the April 2017 Washington Post article describe the contents of the affidavits, and it is unlikely that Page would have been granted full access to them. *See Daoud*, 755 F.3d at 486 (Rovner, J., concurring). Though his suspicions of unlawful surveillance did not trigger the need to sue, it did "require[] him to make inquiries in the exercise of due diligence." *Hobson*, 737 F.2d at 35; *see also Klein*, 865 F.3d at 1279 (the accrual date is delayed to a point after notice of the search as long as the plaintiff has diligently "pursued the . . . affidavit without success"). It is unclear from the complaint what investigative steps, if any, Page took or could have taken after April 2017. It is possible that he failed to search for the facts needed for his claim, or that he was adequately on notice of his claim well before the release of the Horowitz Report on December 9, 2019, which Page contends is the proper accrual date. *See* Pl.'s Omnibus Opp'n at 9, 67. But at this juncture, the complaint does not conclusively show that Page was sufficiently on notice of his claims before November 27, 2017. Accordingly, the Court will not dismiss his FISA claims as time-barred and will instead proceed to the merits.[8]

[8] The defendants refer to materials outside the complaint to demonstrate Page's knowledge of his claims. *See, e.g.*, Clinesmith Mot. to Dismiss at 17. Even if the Court were inclined to take judicial notice, none of these documents shows that, before November 27, 2017, Page was on sufficient notice of his claims so as to trigger accrual.

ii. Engaging in Electronic Surveillance

Page alleges that "the individual Defendants and others, known and unknown to [him], engaged in electronic surveillance against [him] that was not lawfully authorized by FISA" and "aided and abetted one another in doing so." SAC ¶ 260; *see also id.* ¶¶ 264, 268, 272. As an initial matter, the Court finds, and the defendants do not contest, that Page's surveillance, at least as alleged, was unlawful. Surveillance pursuant to a warrant obtained without probable cause is not "authorized" by FISA. 50 U.S.C. § 1809; *see also id.* §§ 1804(a), 1805(a). The complaint alleges material errors and omissions in each application that plausibly misled the FISC into an erroneous finding of probable cause. *See, e.g.*, SAC ¶¶ 16–19, 42–46. Indeed, the government has already conceded as much for the last two warrants. *Id.* ¶¶ 50–51.

Because Page's claims are rooted in FISA §§ 1809(a) and 1810, the Court must look there to determine if he has a cause of action against these defendants for the concededly unlawful searches. Section 1810 provides "a cause of action against any person who committed [a] violation [of § 1809]," which in turn prohibits "intentionally . . . engag[ing] in [unauthorized] electronic surveillance," § 1809(a).[9] Therefore, the relevant question is whether the complaint adequately alleges that these defendants "intentionally engage[d] in electronic surveillance" within the meaning of the statute. *Id.* Page argues that the defendants are liable as both aiders and abettors as well as principals, because they "supervis[ed]," "facilitat[ed]," "prepar[ed]," "approv[ed]," and "submit[ted]" the "false" applications, which "cause[d] others to physically engage in the unlawful surveillance." *See* Pl.'s Omnibus Opp'n at 32, 34, 49, 51. But his FISA claim fails for

[9] The Court addresses Page's "use or disclosure" claims under §§ 1809(a) and 1810 below in Part III.A.1.iii.

two reasons: § 1810 does not allow for aiding and abetting liability, and the phrase "engage in electronic surveillance" does not cover any of the defendants' alleged actions.

a. Aiding and Abetting Liability

"[W]hen Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant's violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors." *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 182 (1994). Instead, courts presume that "statutory silence on the subject of secondary liability means there is none." *Owens v. BNP Paribas S.A.*, 235 F. Supp. 3d 85, 93 (D.D.C. 2017) (quoting *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 689 (7th Cir. 2008)). Neither FISA § 1809(a) nor § 1810 reference any form of secondary liability. Thus, the statute's "plain language shows that Congress had one category of offenders in mind—i.e., those who directly" engage in unauthorized surveillance. *Council on Am.-Islamic Rels. Action Network, Inc. v. Gaubatz*, 891 F. Supp. 2d 13, 27 (D.D.C. 2012). Congress's express inclusion of an aiding and abetting provision in another section of FISA, *see* 50 U.S.C. § 1801(b)(1)(B), (E) (defining "[a]gent of a foreign power"), further indicates that it did not "intend[] § [1810] to authorize civil liability for aiding and abetting through its silence," *Owens*, 235 F. Supp. 3d at 93 (citation omitted).

Page offers little in response. Because the criminal aiding and abetting statute, 18 U.S.C. § 2, applies to criminal violations of 50 U.S.C. § 1809(a), he assumes that aiding-and-abetting liability also applies to the civil cause of action in § 1810. Pl.'s Omnibus Opp'n at 16. But Congress has not enacted an analogous *civil* aiding and abetting provision and instead takes a "statute-by-statute approach." *Cent. Bank of Denver*, 511 U.S. at 182–83. And § 1810 makes no mention of aiding and abetting liability. Moreover, courts, including this one, have held that

plaintiffs cannot bring a civil action using a secondary liability theory under the Stored Communications Act, which similarly incorporates that Act's criminal provision. *See Gaubatz*, 891 F. Supp. 2d at 27; *Broidy Cap. Mgmt. v. Muzin*, No. 19-cv-150, 2020 WL 1536350, at *11 (D.D.C. Mar. 31, 2020) (collecting cases). Thus, to state a claim under § 1810, Page must allege that the individual defendants *personally* engaged in unauthorized surveillance, not simply that they *aided* those who did. *See Cent. Bank of Denver*, 511 U.S. at 177–78.

b. "Engaging in Electronic Surveillance" Defined

To determine the meaning of the phrase "engage[] in electronic surveillance," the Court starts, as it must, with the text. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). To "engage" means "to take part" or "participate." *Engage*, Merriam-Webster's New Collegiate Dictionary 378 (1977). And the common meaning of "electronic surveillance" is akin to "[e]avesdropping," *Electronic Surveillance*, Black's Law Dictionary (5th ed. 1979), which in turn is defined as "listen[ing] surreptitiously to" or "observ[ing]" an individual in "a private place," or "[i]nstalling or using . . . any device" to do so," *Eavesdropping*, Black's Law Dictionary (5th ed. 1979). *See also Wiretapping*, Black's Law Dictionary (5th ed. 1979) ("A form of electronic eavesdropping where, upon court order, enforcement officials surreptitiously listen to phone calls"); *Surveillance*, Oxford English Dictionary (2d ed. 1989) ("Watch or guard kept over a person[.]"). More importantly, FISA itself defines "electronic surveillance." That definition includes, as relevant here:

> [T]he acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire or radio communication sent by or intended to be received by a particular, known United States person who is in the United States, if the contents are acquired by intentionally targeting that United States person, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes.

50 U.S.C. § 1801(f)(1).[10]

The statute's criminal and civil liability provisions cover those who participate in the acquisition, by a particular device, of the contents of certain communications sent or received by a targeted person. The breadth of the phrase "engage in electronic surveillance" depends on the term "acquisition." If it were understood expansively to encompass the entire FISA surveillance process, the statute could presumably provide liability for many different actors: those who took part in the decision to surveil (with or without a warrant), the preparation and submission of the warrant application (if any), and the collection of the communications, among other things. But text, structure, and context point toward a much narrower reading. *See Robinson*, 519 U.S. at 341.

Turning first to the text, the ordinary meaning of "acquisition" is "the *act* of acquiring," *Acquisition*, Merriam-Webster's New Collegiate Dictionary 11 (1977) (emphasis added), not the process behind it. That "acquisition" is followed in the statute by the term "by an electronic, mechanical, or other surveillance device" further indicates that its statutory meaning is tethered to the actual collection of the communications by specified means, as opposed to the pre-collection investigation or authorization stage. One who engages in acquisition is one who takes part in the act of obtaining communications by using a device. *See also* 50 U.S.C. § 1810(f)(4) ("[E]lectronic surveillance" also means "the *installation* or *use* of an electronic, mechanical, or other surveillance *device* in the United States for monitoring *to acquire information*." (emphasis added)).

This narrower reading of FISA's definition of "electronic surveillance" comports with common usage of that term. "Surveillance" has long been understood to refer to the specific act

[10] While this first definition is relevant to Page as a "target[ed]" and "known United States person who is in the United States," *id.*, FISA also includes three other definitions for "electronic surveillance," *see id.* § 1801(f). Each of the other three definitions is similarly limited to the "acquisition by an electronic, mechanical, or other surveillance device," *id.* §§ 1801(f)(2), (3), or "installation or use of an electronic, mechanical, or other surveillance device," *id.* § 1801(f)(4).

of collecting information by listening to or watching someone. *See, e.g.*, *Katz v. United States*, 389 U.S. 347, 354 (1967) ("The agents confined their surveillance to the brief periods during which [the petitioner] used the telephone booth, and they took great care to overhear only the conversations of the petitioner himself." (footnote omitted)); *Lopez v. United States*, 373 U.S. 427, 465 (1963) (Brennan, J., dissenting) (comparing "electronic surveillance, whether the agents conceal the devices on their persons or in walls or under beds, and conventional police stratagems such as eavesdropping and disguise"). That activity is distinct from the process of getting a warrant. *See, e.g.*, *United States v. U.S. Dist. Court* (*Keith*), 407 U.S. 297, 315 (1972) (addressing whether the Fourth Amendment "requir[es] a warrant before [electronic] surveillance is undertaken"); *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 179 (1977) (Stevens, J., dissenting) (referring to "the Government's application for permission to engage in surveillance by means of a pen register"). To interpret the phrase "engage in electronic surveillance" to include the process of getting the warrant would trample on this common understanding. The application for an order approving electronic surveillance and the actual surveillance are not one and the same.

Other provisions of FISA confirm this interpretation. FISA defines "[a]gent of a foreign power" to include, among others, "any person other than a United States person who . . . *engages in* the international proliferation of weapons of mass destruction, or *activities in preparation* therefor . . . or knowingly *aids or abets* [or *conspires* with] any person in the conduct of such proliferation or activities in preparation therefor[.]" 50 U.S.C. § 1801(b), (b)(1)(E) (emphasis added). This language implies that "engaging in" an activity does not include preparing for it or aiding the primary actors.[11] And unlike that section, FISA's liability provisions omit any reference

[11] The defendants point to the Supreme Court's decisions in *Southwest Airlines Co. v. Saxon*, 142 S. Ct. 1783 (2022), and *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), to support their

to preparation, aiding, abetting, or conspiring. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quotation omitted)).

Further, the FISA application must state "the period of time for which the electronic surveillance is required to be maintained," 50 U.S.C. § 1804(a)(9), implying that the surveillance has not yet begun. In fact, Page's complaint recognizes this distinction: it alleges that the defendants "unlawfully obtained the four warrants" and then "used the warrants to engage in surveillance of him." SAC ¶ 140. And § 1809(b), the statutory defense for a § 1809(a) violation, refers to "electronic surveillance [that] was authorized by and conducted pursuant to a search warrant or court order of a court of competent jurisdiction." If engaging in electronic surveillance included the process of getting the court order, this sentence would make very little sense.

FISA's provisions detailing "minimization procedures," 50 U.S.C. §§ 1801(h), 1804(a)(4), 1805(c)(2)(A), likewise confirm that "acquisition" is a specific, narrow stage in the FISA process. Minimization procedures, which balance privacy concerns with "the need of the United States to obtain, produce, and disseminate foreign intelligence information," specifically differentiate between the "acquisition," "retention," and "dissemination" of information. *See id.* § 1801(h)(1). In the minimization context, "acquisition" refers to the actual gathering of information, for instance, by "tapp[ing]" a switchboard line. *In re Sealed Case*, 310 F.3d 717, 731 (FISA Ct. Rev.

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argument that the phrase "engage in" means "to do." *See* Rough Hr'g Tr. at 5–6, 10–12. In both cases, the Court indicated that "engaged in" has a narrower meaning than other formulations, such as "affecting" or "involving." *Saxon*, 142 S. Ct. at 1789 (citing *Circuit City*, 532 U.S. at 118). These decisions offer limited support, however, because both addressed the meaning of "engaged in foreign or interstate commerce" under 9 U.S.C. § 1, which has a particular statutory history that is not relevant here. *See Saxon*, 142 S. Ct. at 1789–90; *Circuit City*, 532 U.S. at 111–21.

2002) ("By minimizing *acquisition*, Congress envisioned that, for example, 'where a switchboard line is tapped but only one person in the organization is the target, the interception should probably be discontinued where the target is not a party' to the communication." (quoting H. Rep. No. 95–1283, at 55–56)).[12] Acquisition thus refers to the information collection phase of FISA.

A helpful parallel can be found in the "physical search" provision of FISA. Like an electronic surveillance, a physical search can occur only after the FISC approves an application that establishes probable cause that the target is a foreign power or agent of a foreign power. 50 U.S.C. §§ 1823(a)(3)(A), 1824(a)(2)(A).[13] But a person is liable for an unlawful physical search only if he "intentionally . . . under color of law for the purpose of obtaining foreign intelligence information, *executes* a physical search within the United States except as authorized by statute." *Id.* § 1827(a) (emphasis added). Section 1828 allows "any aggrieved person . . . whose premises, property, information, or material has been subjected to a physical search" to sue "any person who committed such violation." *Id.* § 1828. Congress thus created a remedy only against those who execute, or "carry out," the unlawful search, as opposed to those who procure the order that allows the search to happen. *Execute*, Oxford English Dictionary (2d ed. 1989).

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[12] The government properly minimizes information during the acquisition phase if, for instance, "before executing the FISC order the FBI verified the facilities subject to the approved" surveillance and "subsequently, the collections were conducted during the approved times using the least physical intrusion necessary." *United States v. Turner*, 840 F.3d 336, 342 (7th Cir. 2016). On the other hand, minimization at the retention stage includes "destroy[ing]" information that has already been collected, if it "is not necessary for obtaining[,] producing, or disseminating foreign intelligence information." *In re Sealed Case*, 310 F.3d at 717 (quoting H. Rep. at 56) (second alteration in original). And at the dissemination stage, minimization requires "restrict[ing]" collected information "to those officials with a need for such information." *Id.*

[13] A "physical search" means "any physical intrusion within the United States into premises or property (including examination of the interior of property by technical means) that is intended to result in a seizure, reproduction, inspection, or alteration of information, material, or property, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes[.]" 50 U.S.C. § 1821(5).

The Wiretap Act also serves as a useful comparison.[14] A person violates the Act if he "intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication" unless it is authorized by statute. 18 U.S.C. § 2511(1)(a). The definition of "intercept" is nearly identical to one for "electronic surveillance": "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." *Id.* § 2510(4). By prohibiting both intercepting (i.e., acquiring) and procuring another to intercept, the Act implies that "acquisition" itself does not include a procurement component. And unlike the Wiretap Act, FISA does not include the procurement phrase, supporting the conclusion that FISA covers only acquisition, not the procurement of others to acquire the target's communications.

Accordingly, one who "engage[s] in electronic surveillance" under §§ 1809(a) and 1810 is one who participates in *collecting* the target's communications using certain devices.[15] To be sure,

[14] The Wiretap Act, enacted in 1968, "provided procedures for obtaining electronic surveillance warrants in certain criminal investigations." *United States v. Belfield*, 692 F.2d 141, 144 (D.C. Cir. 1982). FISA was passed ten years later to address electronic surveillance in the national security space. *Id.* at 145. The Wiretap Act and FISA prescribe "the exclusive means by which electronic surveillance, as defined in [FISA], and the interception of domestic wire, oral, and electronic communications may be conducted." 18 U.S.C. § 2511(2)(f).

[15] The Court has found, and the parties have provided, very little caselaw on §§ 1809 and 1810. Although the few relevant cases do not analyze the meaning of phrase "engage in electronic surveillance," as the Court has done here, they are generally consistent with the Court's ruling. *See United States v. Koyomejian*, 946 F.2d 1450, 1459 n.16 (9th Cir. 1991) ("[Section] 1809(a) is best understood as subjecting to criminal liability anyone who *performs* electronic surveillance as defined by FISA" without authorization (emphasis added)). In *Fazaga v. FBI*, 965 F.3d 1015 (9th Cir. 2020), *rev'd on other grounds*, 142 S. Ct. 1051 (2022), the court found that allegations that agents "had audio surveillance" in their house, "were responsible for planting [the] devices," and had once entered the mosque where they had electronic surveillance devices, plausibly stated a claim under § 1810 for "install[ing] or us[ing] . . . [a] device . . . for monitoring to acquire information." *Id.* at 1038; 50 U.S.C. § 1801(f)(4). That court went further by implying that supervising agents might have been liable had the complaint alleged that they "ordered or arranged for[] the planting of the recording devices," *id.* at 1039, but the court did not decide that issue. And it did not perform a textual analysis of the meaning of "engage in electronic surveillance," as the Court does here.

surveillance pursuant to a warrant cannot occur absent an application and order of approval from the FISC. *See* Pl.'s Omnibus Opp'n at 49. But Congress chose to create individual liability only for the actors involved in conducting the surveillance, rather than those responsible for gaining approval to do so. Those who work on the FISA applications may "aid[], abet[], counsel[], command[], induce[], or procure[]" the eventual surveillance, *see* 18 U.S.C. § 2, but as explained above, Congress did not provide for aiding and abetting liability in § 1810, and the statutory terms are not broad enough to encompass those actions.

This plain-text understanding—that Congress allowed suit against only those who conduct unauthorized surveillance, and not those who at the application stage mislead the FISC to approve that surveillance—may seem odd. But it is not so "absurd when considered in the particular statutory context," as the Court must. *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998). FISA was enacted in 1978 to address the issue of warrantless surveillance in the national security context. In *Katz*, the Supreme Court held that the Fourth Amendment applied to electronic surveillance, 389 U.S. at 353, but left open whether the warrant requirement applied "when the President was acting pursuant to his powers to protect the national security or to conduct the nation's foreign affairs," *Belfield*, 692 F.2d at 145 (citing *Katz*, 389 U.S. at 358 n.23). Later, in *Keith*, the Court explained that there was no national security exception to the warrant requirement with regard to "domestic threats to national security," and left open whether warrants were required "with respect to activities of foreign powers or their agents." 407 U.S. at 321–22. Congress, in response to *Keith* and "to post-Watergate concerns about the Executive's use of warrantless electronic surveillance," enacted FISA to "establish a regularized procedure" for such surveillance "in the foreign intelligence and counterintelligence field." *Belfield*, 692 F.2d at 145. FISA generally, with a few exceptions, "requires a court order authorizing foreign intelligence

electronic surveillance," and details numerous steps that must be followed to get an order. *Id.* at 145–46.

In sum, FISA was passed to counter the abuses of *warrantless* surveillance. This historical context helps explain why § 1809(a) applies to agents who conduct unauthorized surveillance—typically, that means without a court order—rather than those who help obtain faulty warrants. This gap in coverage seems evident now, but it likely was not in 1978. Accordingly, the Court's understanding of § 1809(a)'s ordinary meaning is bolstered by FISA's history.

Further, those aggrieved by surveillance conducted pursuant to a warrant lacking in probable cause are not entirely without a remedy. As discussed, they can sue the agents who conduct the search, if the agents act intentionally. And if the government seeks to use FISA-obtained evidence against them in a criminal trial, they may move to suppress such evidence on the grounds that it was unlawfully acquired. *See* 50 U.S.C. § 1806(e).

c. Allegations Against Individual Defendants

Having defined FISA's scope, the Court now turns to Page's allegations against the individual defendants.[16] Though his allegations are troubling, Page does not allege that any of the

[16] Many of the defendants ask the Court to consider the Horowitz Report in full, claiming that its conclusions conflict with some of Page's allegations. *See, e.g.*, Strzok Mot. to Dismiss at 4 n.3, 13; Pientka Mot. to Dismiss at 2 n.3, 14–15; Somma Mot. to Dismiss at 3 n.2, 16–17. At the hearing, the plaintiff did not oppose this request. Rough Hr'g Tr. at 71. The Court, however, declines to consider the entire Report. True, the Report is extensively referenced in the complaint. But the Court cannot wholly incorporate it by reference because it is not "integral to [Page's] claim." *Banneker*, 798 F.3d at 1133 (citation omitted). That is, it is not akin to a contract "that is a necessary element of [a breach of contract] claim." *Id.* Rather, Page references it "to show how [he] learned some facts in the complaint." *Id.* at 1134. He does "not purport to and [is] not required to adopt the factual contents of the report wholesale." *Id.* Indeed, he alleges that some of its contents are inaccurate. SAC ¶ 250. The Court can certainly consider the Report to "show any inaccuracy in [Page's] allegations about its contents." *Id.* at 1134 n.6. But it cannot, as some of the individual defendants argue, "tak[e] . . . as true" all of the Report's contents, including its conclusions about the individual defendants' intent and motivations, to contradict Page's allegations. *Id.*

individual defendants personally conducted the surveillance or acquired or collected his communications. For this reason, his FISA claims must be dismissed.

Comey, McCabe, Strzok, and Lisa Page. Some of the defendants, such as Comey, McCabe, Strzok, and Lisa Page, allegedly approved, encouraged, and facilitated Page's investigation and the warrant applications.

James Comey, the FBI director during the first three FISA warrant applications, SAC ¶ 26, read the first application and signed all three, *id.* ¶¶ 150, 152, 153. His "certification" confirmed to the FISC that the information sought was foreign intelligence information that could not reasonably be obtained by normal investigative techniques, and that a "significant purpose of the surveillance [was] to obtain foreign intelligence information." 50 U.S.C. § 1804(a)(6). According to Page, Comey gave a "green light" to apply for the first FISA warrant "without further scrutiny" of Steele, despite some concerns about his bias. SAC ¶¶ 91, 159. He also was aware of certain key information that was not fully disclosed in the various applications, including, among others, Hillary Clinton's plan to connect Trump and Russian election interference, Steele's funding source, and Page's previous status as a CIA operational contact. *Id.* ¶¶ 73, 81, 144, 146, 148, 153.

Andrew McCabe, the Deputy Director of the FBI during the Page surveillance, signed the foreign-intelligence certification for fourth FISA application. *Id.* ¶ 27. His alleged actions are similar to Comey's—he too gave the "green light" to proceed with the FISA application despite the concerns about Steele's bias, *id.* ¶ 91, and "ignored warnings that more information about [his] motives was needed before relying on his allegations," *id.* ¶ 157. He was told that Steele's work was political opposition research for a political party. *Id.* ¶ 94. DOJ supposedly would not approve the FISA application "without a call from McCabe." *Id.* ¶ 158.

Peter Strzok was the Deputy Assistant Director of Counterintelligence at the FBI and supervised the Page investigation until January 2017. *Id.* ¶ 29. Like Comey, he knew about Clinton's plan to connect Trump and Russia, *id.* ¶ 73, and that Page denied meeting with Russian officials and had previously worked with the CIA and FBI, *id.* ¶¶ 81, 166. He too "pushed to proceed with the application without further scrutiny of Steele" and "[fought] with [the DOJ attorney] for" it. *Id.* ¶¶ 168, 170. As the investigation continued, he learned more about Steele's questionable credibility. *Id.* ¶¶ 105–106, 171–172. Lisa Page, an FBI lawyer and Special Counsel to McCabe during the Page investigation, also learned about Steele's bias, including that his work was political opposition research. SAC ¶ 94, 106, 195. The complaint alleges that she "facilitated obtaining the initial FISA warrant for Dr. Page in the face of doubts voiced by the DOJ and others," *id.* ¶ 195, and exchanged text messages with Strzok indicating a political motivation, *id.* ¶ 197.

Absent from the complaint is any claim that these four defendants participated in drafting or substantively reviewing the faulty applications themselves, let alone that they performed the FISA surveillance and acquired Page's communications.

Pientka, Auten, Somma, and Clinesmith. Even for the four defendants who did contribute to the material errors in the applications, Page does not claim that they "engage[d] in electronic surveillance," as defined above.

Joe Pientka, a Supervisory Special Agent in the FBI's Washington Field Office, signed an authorization to submit the first application that confirmed compliance with the FBI's "Woods Procedures," which are "designed to ensure the accuracy of the factual assertions in a [FISA] application." SAC ¶¶ 31, 60, 198. He was responsible for reviewing the "Woods File" to confirm that there was appropriate documentation for each factual assertion in the application. *Id.* ¶ 198. But the file was "inaccurate, incomplete, and unsupported by appropriate documentation," *id.*, and

Pientka allegedly "failed to verify and correct the false statement" that "Steele's reporting had been corroborated and used in criminal proceedings," *id.* ¶ 199.

Auten and Somma were allegedly responsible for that false statement, along with numerous other material omissions. *Id.* ¶¶ 179, 206. Brian Auten was an FBI Supervisory Intelligence Analyst who worked on the Crossfire Hurricane investigation from its start in July 2016 through 2017. *Id.* ¶¶ 33, 175. He helped the agents prepare the applications by reviewing the probable cause sections for accuracy, filling in gaps, and providing information about Steele and his sub-sources. *Id.* ¶¶ 175–176. He "falsely enhanced [Steele's] credibility" by writing the misstatement discussed above and failing to disclose that Steele's colleagues gave negative feedback about his judgment and that some of his reporting was inaccurate. *Id.* ¶¶ 179–181. In January 2017, he interviewed Danchenko, one of Steele's key sub-sources, and found that he "contradicted key claims in Steele's reports"; this was not reported to the FISC. *Id.* ¶¶ 184, 209.

Stephen Somma was an FBI counterintelligence investigator and "Case Agent 1" on the Page investigation. *Id.* ¶ 201. He allegedly failed to disclose exculpatory statements from Page and other witnesses that he did not, contrary to Steele's reports, meet with sanctioned Russians. *Id.* ¶ 203. And he misled and withheld information from DOJ attorneys regarding Page's status as a CIA operational contact and Steele's political bias and funding source. *Id.* ¶¶ 205, 207. Like Auten, he "mischaracterized the extent to which the FBI had previously relied on . . . Steele's prior reporting" and did not disclose that Danchenko contradicted assertions made in the initial FISA application. *Id.* ¶¶ 206, 209. According to the OIG, Somma was "primarily responsible for some of the most significant errors and omissions in the FISA applications." *Id.* ¶ 32.

Finally, Kevin Clinesmith was an FBI Assistant General Counsel during the Page investigation who provided support to the Crossfire Hurricane team. SAC ¶¶ 28, 122, 185. The

affiant for the fourth warrant application asked him whether Page had ever been a "source (operational contact) for the CIA." *Id.* ¶ 129. Clinesmith knew that if Page had been a source, that fact needed to be disclosed to the FISC, but including it "would expose the material omission of this information" from the first three warrants. *Id.* ¶ 130. A CIA liaison told him that Page had been a source, *id.*, but Clinesmith told the affiant that Page was a "sub source" and "never a source," ultimately altering the liaison's email to that effect, *id.* ¶ 131. The affiant relied on the doctored email to sign the fourth application, which did not include "information about [Page's] history or status as a CIA operational contact." *Id.* ¶ 191–194.

If proven, these allegations clearly demonstrate wrongdoing. *See Franks v. Delaware*, 438 U.S. 154, 164–65 (1978) ("When the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that there will be a *truthful* showing." (quotation marks omitted and alteration adopted)); *Daoud*, 755 F.3d at 489 (Rovner, J., concurring) ("[I]t has been widely assumed, if not affirmatively stated, in the decisions of other courts that *Franks* applies to FISA applications."). Indeed, Clinesmith entered a plea in *United States v. Clinesmith* for making a false statement, in violation of 18 U.S.C. § 1001.[17] But Page does not allege that *any* of the individual defendants, including the unknown John Doe defendants and those most responsible for the applications' critical errors, took part in obtaining the surveillance information, either by setting up the devices or gathering or listening to Page's communications.[18]

[17] *See supra* note 2.

[18] In his opposition brief and at the hearing, Page concedes that he "has not named as a defendant any FBI who personally engaged in the physical execution of the unlawful warrants as these persons are as yet unknown and unknowable to him." Pl.'s Omnibus Opp'n at 32 n.5; Rough Hr'g Tr. at 24–25.

Thus, the Court cannot plausibly infer from this complaint that any of the individual defendants, known or unknown, "engaged in electronic surveillance," in violation of §§ 1809(a) and 1810.

iii. Using or Disclosing Information from Electronic Surveillance

Sections 1809(a) and 1810 also create a remedy against those who intentionally "disclose[] or use[] information obtained under color of law by electronic surveillance, knowing or having reason to know" that the surveillance was unauthorized. Page's additional allegations that the individual defendants used and disclosed the fruits of the allegedly unlawful surveillance in numerous ways, SAC ¶¶ 229–230, are conclusory and thus do not state an actionable use or disclosure claim.

According to Page, the defendants used and disclosed FISA-acquired information to obtain the renewal warrants and other investigative measures against him or others; to investigate and prosecute others; to request assistance from other law enforcement and intelligence agencies; to include in government databases; and to justify his ongoing surveillance to other officials. *Id.* ¶ 230. But he does not allege that any particular defendant took any of these actions. *Id.*; *see also id.* ¶ 229. And "a plaintiff cannot satisfy the minimum pleading requirements under Rule 8 of the Federal Rules of Civil Procedure by lumping all the defendants together in each claim and providing no factual basis to distinguish their conduct." *Toumazou v. Turkish Republic of Northern Cyprus*, 71 F. Supp. 3d 7, 21 (D.D.C. 2014) (citation and internal quotation marks omitted). Indeed, Page cannot show that a defendant *intentionally* used or disclosed information obtained through unlawful surveillance, as required by 50 U.S.C. §§ 1809(a) and 1810, without providing any details about his or her individual actions. To the extent Page claims that the defendants aided and abetted each other's use or disclosure violations, *cf.* Pl.'s Omnibus Opp'n at 16–18, that claim also fails for the reasons explained above in Part III.A.1.ii.a.

Page's allegations are also vague in other respects: they do not explain what information was leaked, to whom it was leaked, or when or how it was leaked. And his allegations that the surveillance produced "no evidence at all" that he acted as a Russian agent undercuts his claim that its results were used to procure the renewal warrants. SAC ¶¶ 123, 136. Accordingly, the Court cannot "draw the reasonable inference that [any of] the defendant[s] [are] liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

Although Page's media leak allegations are stated with particularity, they too fail to state a claim for another reason. He asserts that Comey, McCabe, Strzok, Lisa Page, and others disclosed "the existence of the FISA Warrants, the contents of the warrant applications, and the results of the Warrants" to the New York Times, the Washington Post, and others. SAC ¶ 226. But only the use or disclosure of information "obtained" by the electronic surveillance, not the fact of the surveillance or the basis for the warrants, violates § 1809(a). Neither the Times nor the Post article cited in the complaint contains any mention of the fruits of Page's surveillance. *See id.* ¶¶ 221, 224; Wash. Post Article; Comey Mot. to Dismiss, Ex. 6 (N.Y. Times Article), Dkt. 87-8. And the complaint does not cite any other media reports that contained FISA-obtained information, nor do the Strzok/Lisa Page text messages mention a plan to leak such information. SAC ¶¶ 220, 222–223. Page's bare allegation that the defendants disclosed the results of his surveillance to the media, without any further detail, does not raise his "right to relief above the speculative level." *Twombly*, 550 U.S. at 555.

The Court will thus dismiss the FISA claims in Counts One through Four against each individual defendant. Because the Court concludes that Page fails to state a claim that the defendants engaged in electronic surveillance, or used or disclosed its results, it need not address

the defendants' arguments that they are protected by a statutory defense and/or qualified immunity.[19]

2. *Bivens Claims*

The defendants move to dismiss the *Bivens* claim for failure to state a claim, both on the merits and on statute of limitations grounds. For the reasons explained above in Part III.A.1.i, the Court disagrees that the claim is time-barred. Page's *Bivens* claim is governed by the three-year limitations period in D.C. Code § 12-301(8), *see Berman*, 293 F. Supp. 3d at 56, and the complaint does not show that the claim accrued before November 27, 2017. The Court will nevertheless dismiss the claim because an extension of the *Bivens* remedy to this "new context" is unwarranted. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1859 (2017).

The Supreme Court has set forth a two-step inquiry that governs whether an extension of *Bivens* is appropriate. First, a court must "inquire whether the request involves a claim that arises in a new context or involves a new category of defendants." *Hernandez v. Mesa*, 140 S. Ct. 735, 743 (2020) (citation and internal quotation marks omitted). The Supreme Court's understanding of what constitutes "a new context" is "broad." *Id.* (internal quotation marks omitted). The test is whether "the case is different in a meaningful way from previous *Bivens* cases" decided by the Supreme Court. *Abbasi*, 137 S. Ct. at 1859. Second, if the claim arises in a new context, the *Bivens* claim must be rejected if there are "special factors indicating that the Judiciary is at least arguably less equipped than Congress to weigh the costs and benefits of allowing a damages action to proceed." *Egbert v. Boule*, 142 S. Ct. 1793, 1803 (2022) (citation and internal quotation marks

[19] As noted, § 1809 includes a statutory defense to prosecution if "the defendant was a law enforcement or investigative officer engaged in the course of his official duties and the electronic surveillance was authorized by and conducted pursuant to a search warrant or court order of a court of competent jurisdiction." 50 U.S.C. § 1809(b).

omitted). A court cannot recognize a *Bivens* remedy "[i]f there is even a single reason to pause" before applying it in a new context. *Id.* (citation and internal quotation marks omitted). Page's claims arise in a new context, and there are several reasons to pause.

Page's *Bivens* claim presents a new context because it is based on unlawfully obtained FISA warrants. SAC ¶ 287. Although Page, like the plaintiff in *Bivens*, alleges a Fourth Amendment violation as the basis for his constitutional claim, *see* 403 U.S. at 389, "[a] claim may arise in a new context even if it is based on the same constitutional provision as a claim in a case in which a damages remedy was previously recognized," *Hernandez*, 140 S. Ct. at 743. In *Bivens*, the Supreme Court created an implied damages remedy under the Fourth Amendment for an allegedly unconstitutional search and arrest carried out in an apartment. 403 U.S. at 389. But as the Fourth Circuit has recognized, "a claim based on unlawful electronic surveillance presents wildly different facts and a vastly different statutory framework from a warrantless search and arrest." *Attkisson v. Holder*, 925 F.3d 606, 621 (4th Cir. 2019). And here, some of the defendants, such as Comey and McCabe, are high-ranking officials, unlike the "line-level" agents sued in *Bivens*. *Id.* In this case, both the nature of Page's Fourth Amendment claim and the "rank of the officers involved," *Abbasi*, 137 S. Ct. at 1860, signal a new context.

Special factors also counsel against creating a *Bivens* remedy in this new context. Page's surveillance occurred as part of a high-level investigation into alleged foreign interference in a presidential election. SAC ¶¶ 5–6, 221, 224. "[A] *Bivens* cause of action may not lie where, as here, national security is at issue." *Egbert*, 142 S. Ct. at 1805. Plus, a court cannot extend *Bivens* if Congress has already provided "an alternative remedial structure." *Id.* at 1804 (quoting *Abbasi*, 137 S. Ct. at 1858). Congress has comprehensively legislated in the electronic surveillance space "without authorizing damages for a Fourth Amendment violation." *Attkisson*, 925 F.3d at 621. It

has instead created several private causes of actions under a number of statutes governing surveillance, including FISA, 50 U.S.C. § 1810, the Wiretap Act, 18 U.S.C. § 2520(a), the Stored Communications Act, *id.* § 2707(a), (g), and the PATRIOT Act, *id.* § 2712. These alternatives "alone" are "reason enough to limit the power of the Judiciary to infer a new *Bivens* cause of action." *Egbert*, 142 S. Ct. at 1804 (citation and internal quotation marks omitted).

Accordingly, the Court will dismiss the *Bivens* claim in Count Six against each individual defendant.

B. Institutional Defendants

Page brings claims against the United States under the FTCA and the PATRIOT Act. SAC ¶¶ 275–282, 303–311. He also asserts a Privacy Act claim against DOJ for failure to amend his records, *id.* ¶¶ 290–295, and a Privacy Act claim against DOJ and the FBI for unlawful disclosures, *id.* ¶¶ 296–302. The Court will address each claim in turn.

1. *FTCA Claim*

The FTCA "waive[s] the sovereign immunity of the United States for certain torts committed by federal employees." *FDIC v. Meyer*, 510 U.S. 471, 475 (1994) (citing 28 U.S.C. § 1346(b)). Federal courts have jurisdiction over these claims if they are "actionable" under § 1346(b). *Id.* at 477. The claim must be

> [1] against the United States, [2] for money damages, . . . [3] for injury or loss of property, or personal injury or death [4] caused by the negligent or wrongful act or omission of any employee of the Government [5] while acting within the scope of his office or employment, [6] under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Id. (alteration in original) (quoting § 1346(b)). Under the FTCA, "all elements of a meritorious claim are also jurisdictional." *Brownback v. King*, 141 S. Ct. 740, 749 (2021). Accordingly, for

a court to have subject-matter jurisdiction, and "to state a claim upon which relief can be granted," the "plaintiff must plausibly allege all six FTCA elements." *Id.*

Page has not plausibly pleaded the sixth element: that the United States, if a private person, would be liable under D.C. law. He alleges that the individual defendants committed an "abuse of process" by acting with an "ulterior motive to use the FISA warrant process to accomplish an end not permitted by law: to obtain the surveillance of . . . Page and the Trump presidential campaign without probable cause." SAC ¶ 280 (emphasis omitted); *see* 28 U.S.C. § 2680(h). Under D.C. law, however, abuse of process occurs when "process has been used to accomplish some end which is without the regular purview of the process, or which compels the party against whom it is used to do some collateral thing which he could not legally and regularly be required to do." *Jacobson v. Thrifty Paper Boxes, Inc.*, 230 A.2d 710, 711 (D.C. 1967). That an official has acted "spitefully, maliciously, or with an ulterior motive in instituting" process is not enough. *Scott v. District of Columbia*, 101 F.3d 748, 755 (D.C. Cir. 1996). Instead, the process must be *used* "for an immediate purpose other than that for which it was designed and intended." *Id.* (quoting Restatement (Second) of Torts § 682 cmt. b). For example, "[t]he usual case of abuse of process is one of some form of extortion, using the process to put pressure upon the other to compel him to pay a different debt or to take some other action or refrain from it." *Id.* at 755–56 (quoting Restatement (Second) of Torts § 682 cmt. b).

Here, Page points only to the defendants' "unlawful end" or "ulterior motive" "to obtain the surveillance of Dr. Page and the Trump presidential campaign without probable cause." SAC ¶¶ 16, 280 (emphasis omitted); *see also* Pl.'s Opp'n at 21, Dkt. 99 ("[The SAC] alleges that the Government's agents perverted the FISA warrant process by making material misstatements and omissions to obtain four successive warrants without probable cause for the ulterior motive of

surveilling . . . Page and the Trump presidential campaign."). As D.C. courts have held, that alone is insufficient to state a claim for abuse of process. *See Bown v. Hamilton*, 601 A.2d 1074, 1080 (D.C. 1992); *Scott*, 101 F.3d at 755. True, Page alleges that the defendants made false statements in the FISA application process so that the warrants would be granted in the absence of probable cause. SAC ¶ 16. But neither allegation suffices to state an abuse of process claim. *See Dormu v. District of Columbia*, 795 F. Supp. 2d 7, 33 (D.D.C. 2011) (granting summary judgment for defendants on an abuse of process claim even though the officers lacked probable cause to arrest the plaintiff); *Rauh v. Coyne*, 744 F. Supp. 1186, 1194 (D.D.C. 1990) (explaining that abuse of process "does not arise from a misrepresentation to the Court"); *Moradi v. Protas, Kay, Spivok & Protas, Chartered*, 494 A.2d 1329, 1330, 1333 n.7 (D.C. 1985) (noting that the plaintiff did not state a claim for abuse of process where (1) the defendant's agent had "negligently or falsely swor[n] that he had served summonses" on him in three cases, (2) the defendant had then obtained a default judgment and writ of attachment in each case, and (3) the defendant, knowing the plaintiff was not served, had obtained a judgment of condemnation (internal quotation marks omitted)).

Page's reliance on out-of-jurisdiction cases, *see* Pl.'s Opp'n at 21–22, cannot overcome clear authority from D.C. courts, as the proper inquiry is only whether a private person would be liable under D.C. law. 28 U.S.C. § 1346(b). Page cites one D.C. case, *Hall v. Field Enterprises, Inc.*, 94 A.2d 479 (D.C. 1953),[20] but it also does not help. In that case, the defendants had

[20] Page also cites *Whelan v. Abell*, 953 F.2d 663 (D.C. Cir. 1992), and *Neumann v. Vidal*, 710 F.2d 856 (D.C. Cir. 1983), but both cases "have been superceded by more recent decisions embracing the more restrictive standard of" *Bown*, 601 A.2d at 1079–80, and *Morowitz v. Marvel*, 423 A.2d 196, 198–99 (D.C. 1980). *Nader v. Democratic Nat'l Comm.*, 555 F. Supp. 2d 137, 161 (D.D.C. 2008) (citing *Moore v. United States*, 213 F.3d 705 (D.C. Cir. 2000); and *Scott v. District of Columbia*, 101 F.3d 748 (D.C. Cir. 1996)). In these cases, the D.C. Court of Appeals decided that simply initiating a legal proceeding with an ulterior motive is in and of itself insufficient to give rise to an abuse of process claim; the process instead must be used to accomplish "some end not

"fraudulently" and "without legal justification" filed suit against the plaintiff, achieved a fraudulent judgment, "without proper justification caused to be issued a writ of attachment predicated" on that judgment, and unlawfully seized his wages. *Id.* at 480–81. Initially, the court held that these allegations stated an abuse of process claim. *Id* at 481. But later, on a second appeal, the court held that the plaintiff's abuse of process claim failed because the process "was used for its legally intended purpose: to obtain a judgment against the plaintiff and to obtain satisfaction of that judgment" by garnishing his wages. *Hall v. Field Enters., Inc.*, 114 A.2d 840, 841 (D.C. 1955). Here, too, the warrants were used for their legally intended purpose: to surveil Page. *See* SAC ¶ 3.

"[T]he gist of the [abuse of process] action lies in the improper use after issuance" of process. *Hall v. Hollywood Credit Clothing Co.*, 147 A.2d 866, 868 (D.C. 1959). As noted, Page's complaint does not allege that the defendants *used* the warrants wrongfully, "to accomplish some end which the process was not intended by law to accomplish." *Hall*, 94 A.2d at 481. Instead, it merely alleges that he was surveilled pursuant to the warrants, SAC ¶ 3, and such surveillance is the "ordinary purpose" of a FISA order. *See Morfessis v. Baum*, 281 F.2d 938, 940 (D.C. Cir. 1960). Although Page claims that the purpose of the surveillance was to monitor the Trump campaign, the complaint does not allege that the agents obtained the warrants to, for instance, monitor campaign staffers who were not the proper targets of the warrants. Nor does it allege that the defendants used the FISA process to "pressure [Page] into taking any action or prevent him from taking action, or to achieve any other collateral purpose." *Scott*, 101 F.3d at 755. Because

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contemplated in the regular prosecution of the charge." *Bown*, 601 A.2d at 1080 (quoting *Morowitz*, 423 A.2d at 198).

Page has failed to allege an actionable abuse of process claim, the Court will dismiss the FTCA claim in Count Five for lack of jurisdiction under Rule 12(b)(1).

2. *PATRIOT Act Claim*

In the PATRIOT Act, Congress created a civil cause of action against the United States to recover damages for willful violations of certain sections of FISA. 18 U.S.C. § 2712(a). As relevant here, § 2712(a) allows a person to sue if he has been "aggrieved by any willful violation of . . . [FISA] section[] 106(a) [50 U.S.C. § 1806(a)]."[21] Section 1806(a), in turn, states that "information acquired from [FISA] electronic surveillance" about "any United States person may be used and disclosed by Federal officers and employees" without that person's consent "only in accordance with [FISA] minimization procedures" and only "for lawful purposes." *See also Fikre v. FBI*, 142 F. Supp. 3d 1152, 1169 (D. Or. 2015) (listing the elements that a plaintiff must allege to state a PATRIOT Act claim for a § 1806(a) violation). Before bringing an action under § 2712(a), the plaintiff must first present it to "the appropriate department or agency" within two years after the claim accrues. 18 U.S.C. § 2712(b)(1)–(2); *see Schuler v. United States*, 628 F.2d 199, 201 (D.C. Cir. 1980) (interpreting identical language in the FTCA). The claim accrues "on the date upon which the claimant first has a reasonable opportunity to discover the violation." 18 U.S.C. § 2712(b)(2).

The basis for Page's PATRIOT Act claim is that "the individual Defendants, acting in violation of the FISA, obtained, disclosed, or used information obtained by electronic surveillance of Mr. Page knowing or having reason to know that the information was obtained through electronic surveillance not lawfully authorized by the FISA." SAC ¶ 307. But this language

[21] An aggrieved person can also sue for violations of 50 U.S.C. § 1825(a), concerning physical searches, and 50 U.S.C. § 1845(a), concerning pen registers or trap and trace devices. 18 U.S.C. § 2712(a).

merely restates the elements for a violation under § 1809(a), rather than one under § 1806(a). And Congress did not include a sovereign immunity waiver for § 1809(a) violations. *See* 50 U.S.C. § 1810 ("an aggrieved person . . . shall have a cause of action against any *person* who committed such violation") (emphasis added);[22] *Al-Haramain Islamic Found., Inc. v. Obama*, 705 F.3d 845, 851–53 (9th Cir. 2012) (Under § 2712(a), a plaintiff "can bring a suit for damages against the United States for [unlawful] *use* of the collected information, but cannot bring suit against the government for collection of the information itself."). Thus, to the extent that Page brings a PATRIOT Act claim for the unlawful acquisition of information, the Court lacks jurisdiction to hear it.

Relying on the same allegations that underlie his "use and disclosure" FISA claim against the individual defendants, Page presents several theories to support his PATRIOT Act claim: (1) the media leaks; (2) the use of the warrant results in renewal applications; and (3) disclosures for a host of investigative purposes—to obtain other investigative measures against him or others, to investigate and prosecute others, to request assistance from other law enforcement and intelligence agencies, to include the information in government databases, and to justify his ongoing surveillance to other officials. SAC ¶¶ 229–230; Pl.'s Opp'n at 11–12.

As an initial matter, Page failed to present his third theory (about other investigative uses) to DOJ when he filed his administrative claim on September 30, 2020. *See* Gov't Mot. to Dismiss, Ex. 1 (Page Admin. Claim) to Ex. T (Don Decl.), Dkt. 88-22; *see also* Gov't Mot. To Dismiss at 55. Page does not contest this fact. *See* Pl.'s Opp'n at 9–19. The Court therefore treats this argument as conceded and finds that Page cannot bring a claim based on the disclosure of his

[22] "Person" is defined as "any individual, including any officer or employee of the Federal Government, or any group, entity, association, corporation, or foreign power." 50 U.S.C. § 1801(m). It does not include the United States.

information for other investigative uses. *Davis v. TSA*, 264 F. Supp. 3d 6, 10 (D.D.C. 2017) (noting that a court may treat as conceded arguments in a motion to dismiss that a plaintiff failed to address in its response).

The Court will not dismiss the remainder of Page's claim as time-barred. Although it is true that Page had notice of the alleged violations before September 30, 2018 (two years prior to his administrative claim), *see* Gov't Mot. to Dismiss at 47–50, the face of the complaint does not conclusively reveal when he could have reasonably discovered every alleged violation. 18 U.S.C. § 2712(b)(2). Simply because Page knew about the FISA renewals does not mean that he knew that the applications contained FISA-obtained information. At least at this stage, the Court cannot determine that Page's entire PATRIOT Act claim has expired under the statute of limitations, and thus, it will not dismiss it on this basis.

The Court will, however, dismiss the PATRIOT Act claim on the merits. First, Page's media leak theory fails for the reasons described in Part III.A.1.iii.[23] Section 1806(a) prohibits the disclosure of information "obtained" from FISA surveillance, but neither the Post nor the Times article revealed any results from the FISA warrants. *See* SAC ¶¶ 221, 224; Gov't Mot. to Dismiss, Ex. F. (Wash. Post Article), Dkt. 88-8; Gov't Mot. to Dismiss, Ex. G (N.Y. Times Article), Dkt. 88-9.[24] And Page does not point to any other media reports containing FISA information. It is not enough to say, as Page does in his opposition, that it is "not clear what unlawful disclosures of FISA-related information were made to the reporters who wrote these articles," Pl.'s Opp'n at 12.

[23] For the reasons explained below in Part III.B.3.ii, the Court could also dismiss the media-leak claim as time-barred, because Page knew of the alleged leaks by April 2017. SAC ¶¶ 221, 224.

[24] As explained above, *see supra* note 7, the Court may consider these articles, referenced in the complaint, in full, without converting the motion to dismiss into one for summary judgment.

To survive a motion to dismiss, he must allege facts in his complaint that allow the Court to plausibly infer that the defendants disclosed FISA-acquired information. He has not.

Second, Page's alternate theory that the defendants violated the PATRIOT Act because they knowingly used the unlawfully obtained information from the FISA warrants to obtain later warrants, SAC ¶¶ 229, 307; Pl.'s Opp'n at 13, rests on a faulty legal premise. To plead a violation of the PATRIOT Act relying on § 1806(a), Page must allege that the FISA information was used or disclosed in violation of the statutory minimization procedures or *for an unlawful purpose*. The complaint does neither. SAC ¶ 303–311. Page instead claims that the federal officers knew that the disclosed information had been *acquired* through unauthorized surveillance. *See* SAC ¶ 307; Pl.'s Opp'n at 11, 13 (misstating the applicable standard for a PATRIOT Act claim based on a violation of § 1806(a)). This is an element of §§ 1809(a) and 1810—but not § 1806(a)—claims. And Congress has waived the United States's sovereign immunity for § 1806(a) claims only. *See Al-Haramain Islamic Found.*, 705 F.3d at 851–53. The use of information knowingly obtained through unauthorized surveillance *itself* does not, as Page argues, *see* Pl.'s Opp'n at 13, qualify as an unlawful purpose. Absent clear statutory language, which does not exist here, the Court rejects Page's invitation to graft § 1809(a)'s elements onto § 1806(a).[25] *See Loughrin v. United States*, 573 U.S. 351, 357 (2014) ("[W]hen Congress includes particular language in one section of a statute but omits it in another . . . this Court presumes that Congress intended a difference in meaning." (internal citation and quotation marks omitted)); *Bates v. United States*, 522 U.S. 23, 29 (1997) ("[W]e ordinarily resist reading words or elements into a statute that do not appear on

[25] Page's citation to legislative history is irrelevant. *See* Pl.'s Opp'n at 13 (quoting H.R. Rep. No. 95-1720, at 33 (1978), a Committee Report that discusses the criminal penalty in § 1809(a), not the use of information provision in § 1806(a)).

its face."). The unlawful *collection* of information is not equivalent to *using* the information, once obtained, for an unlawful purpose, in violation of § 1806(a).

Plus, this theory rests on factually thin and internally contradictory allegations. As explained in Part III.A.1.iii, Page's unadorned allegation that the FISA warrant results were used to procure the renewal warrants is undercut by his other assertions that the second application "did not outline any foreign intelligence information that had been gathered during the first three months" and that the surveillance under each warrant produced "no evidence at all" that he acted as a Russian agent. SAC ¶¶ 114, 123, 136; *see also* Pl.'s Opp'n at 13 (merely speculating that the applications included FISA-acquired information). Taken together, these are not "enough to raise [his] right to relief above the speculative level." *Twombly*, 550 U.S. at 555.

Finally, Page offers no factual detail that supports his single, conclusory assertion that the United States has conceded that it has used and disclosed the FISA information in some ways "which were then specifically prohibited by the FISC." SAC ¶ 231. He points to only one specific admission from the government—that it lacked probable cause for the third and fourth FISA warrants. SAC ¶ 43; *see also* Gov't Mot. to Dismiss at 58. Beyond that, he does not identify any government concessions about improper disclosures, failures to minimize, or violations of specific FISC prohibitions. SAC ¶ 231. Nor does he reference any filings before the FISC. *Id.* Without more, the Court cannot plausibly infer from the complaint that the government used or disclosed FISA information in violation of the minimization procedures or for an unlawful purpose.

The Court will therefore dismiss Page's PATRIOT Act claim in Count Nine.

3. *Privacy Act Claims*

"The Privacy Act regulates the collection, maintenance, use, and dissemination of information about individuals by federal agencies." *Wilson v. Libby*, 535 F.3d 697, 707 (D.C. Cir.

2008) (citation and internal quotation marks omitted); *see* 5 U.S.C. § 552a. An "agency that maintains a system of records shall," upon request, permit an individual to access and/or amend records pertaining to him. *Id.* § 552a(d). The Act also "requires that an agency 'permit' an individual 'who disagrees with the refusal of the agency to amend his record' to request a review of that decision." *Doe v. Rogers*, 498 F. Supp. 3d 59, 71 (D.D.C. 2020) (quoting 5 U.S.C. § 552a(d)(3)). And it allows individuals to file a civil action for injunctive relief against the agency if it has "refuse[d] to comply with" a request for access or has made a final determination "not to amend an individual's record in accordance with his request." *Id.* §§ 552a(g)(1)(A)–(B), (g)(2)–(3). The Act also sets rules for the disclosure of records contained in a system of records. *Id.* § 552a(b). An individual may bring a claim for improper disclosure under § 552a(g)(1)(D) and receive monetary damages if the agency acted intentionally or willfully. *Id.* § 552a(g)(1)(D), (g)(4).

Page brings two counts under the Privacy Act. SAC ¶¶ 290–302. He seeks injunctive relief to compel DOJ to amend inaccurate records, *id.* ¶ 294, and requests damages from DOJ and the FBI for unlawful disclosures to media outlets. *Id.* ¶¶ 297, 300. The Court will address each in turn.

i. Failure to Amend

According to Page, the Horowitz Report "contains numerous errors," and he requests an order requiring DOJ to amend it to correct those unspecified inaccuracies. SAC ¶¶ 250, 292–294; 5 U.S.C. § 552a(g)(1)(A), (g)(2)(A).

After an individual requests an amendment of a record, the Privacy Act requires the agency to either correct any portion "which the individual believes is not accurate, relevant, timely, or complete," or explain its refusal to amend. 5 U.S.C. § 552a(d)(2)(B). The individual can then

request a review of any refusal. *Id.* § 552a(d)(3). And he may sue after the agency makes a final determination not to amend or fails to comply with the statute's review provisions. *Id.* § 552a(g)(1)(A).

The parties disagree about whether Page has properly exhausted his administrative remedies for his failure to amend claim. The government contends that the exhaustion of administrative remedies is jurisdictional. Gov't Mot. to Dismiss at 29–31 (citing, *e.g.*, *Dick v. Holder*, 67 F. Supp. 3d 167, 187 (D.D.C. 2014)). Page argues instead that exhaustion is an affirmative defense that the complaint must reveal on its face. Pl.'s Opp'n at 29.[26]

The Court agrees with the government. Under D.C. Circuit precedent, "[e]xhaustion of [Privacy Act] administrative remedies is a prerequisite to bringing civil suit to compel amendment." *Nagel v. U.S. Dep't of Health, Educ. & Welfare*, 725 F.2d 1438, 1441 (D.C. Cir. 1984); *see also Haase v. Sessions*, 893 F.2d 370, 373 (D.C. Cir. 1990) (same for access claims). Courts in this circuit treat Privacy Act exhaustion as jurisdictional. *See Barouch v. DOJ*, 962 F. Supp. 2d 30, 67 (D.D.C. 2013) (collecting cases).

Page nonetheless asserts that he exhausted his administrative remedies before the Horowitz Report was publicly released. SAC ¶¶ 233, 238–244. In particular, in fall 2019, after the Inspector General's investigation was nearly finished and was about to enter the "review and comment phase," *id.* ¶ 237, Page sent multiple emails to DOJ, the OIG, and various officials at

[26] That is true for certain statutes. *See, e.g.*, *Jones v. Bock*, 549 U.S. 199, 216 (2007) (holding that the Prison Litigation Reform Act's exhaustion requirement for prisoner actions under 42 U.S.C. § 1983 is an affirmative defense). But under others, exhaustion requirements may be jurisdictional, and a court will dismiss an unexhausted claim under Rule 12(b)(1). *See Thompson v. DEA*, 492 F.3d 428, 438 (D.C. Cir. 2007). The authority that Page cites in support of his view that exhaustion is an affirmative defense appears to be an outlier and relies on a Title VII, rather than Privacy Act, case. Pl.'s Opp'n at 29 (citing *Ramstack v. Dep't of the Army*, 607 F. Supp. 2d 94, 104 (D.D.C. 2009)).

those agencies asking to view and amend the "forthcoming report" pursuant to the Privacy Act. *Id.* ¶¶ 238, 240, 242, 244 (referring to three emails from October 10, 16, and 21, and "no fewer than two emails" from September). On October 16, a DOJ official responded that his request was under review. *Id.* ¶ 243. And on November 12, Page was told only that he would not be contacted for an OIG interview. *Id.* ¶ 249.

Page received the final Horowitz Report when it was made public on December 19. *See id.* ¶ 233.[27] But Page does not allege that he has contacted anyone at DOJ to seek an amendment of the *finalized* Horowitz Report. *See generally* SAC. And the government offers undisputed evidence that he did not. *See* Gov't Mot. to Dismiss, Ex. DD (Malis Decl.) ¶ 8, Dkt. 88-32; Pl.'s Opp'n at 28–29 (not claiming otherwise).[28] Thus, the agency has not been given the chance "in the first instance," *Dickson v. Off. of Pers. Mgmt.*, 828 F.2d 32, 40 (D.C. Cir. 1987), to correct any portion of the final report that Page might identify as "not accurate, relevant, timely, or complete," 5 U.S.C. § 552a(d)(2)(B)(i). Without having asked DOJ to make "specific amendments" to the public report, his amendment claims are premature. *Hill v. U.S. Air Force*, 795 F.2d 1067, 1069 (D.C. Cir. 1986).

To be sure, DOJ never informed Page of his right to appeal. Pl.'s Opp'n at 29–30 (citing *Harper v. Kobelinski*, 589 F.2d 721, 723 (D.C. Cir. 1978)). But he does not allege that he received a denial (either for access or amendment) in the first place, a prerequisite for an appeal. SAC ¶ 249 (quoting the November 12 response letter from the DOJ official: "This letter does not address his

[27] Page does not assert an access claim under the Privacy Act for the draft Horowitz Report. *See* SAC ¶¶ 290–295; Pl.'s Opp'n at 28–38. Nor does he seek damages for the agency's failure to maintain accurate records under 5 U.S.C. § 552a(g)(4), a claim that does not require exhaustion. *Nagel*, 725 F.2d at 1441 n.2.

[28] The Court may consider facts in the record outside the pleadings to determine the exhaustion question because it must assure itself of its own jurisdiction. *Settles*, 429 F.3d at 1107.

requests under the Privacy Act[.]"). And "[t]he statute provides no exemption from administrative review when an agency fails, even by several months, to abide by a deadline [to respond to an amendment request]." *Dickson*, 828 F.2d at 40 (plaintiff could not file civil action before appealing the agency's denial, even though the agency was late to respond to the request for correction). Therefore, DOJ's failure to fully respond to Page's access claims does not excuse him from participating in the administrative process (which, in any event, he only initiated for the draft report). Plus, a review of Page's email requests reveals that he did not ask for any specific amendments to either the draft or the final report. *See* Malis Decl. Exs. A–C (for example, asking on October 10, 2019 to "review . . . the FISA abuse Inspector General report draft" for "accuracy purposes").[29] Thus, he never identified any inaccuracies in the report for DOJ to consider.

Page can still, however, request that DOJ fix any mistakes in the final Horowitz Report through the normal administrative process. *See Hill*, 795 F.2d at 1071 ("[N]othing in our disposition of this case prevents appellant from seeking to have his official agency records corrected."). But, at least as of now, Page has not exhausted his administrative remedies. Because "failure to exhaust administrative remedies under the Privacy Act is a jurisdictional deficiency," *see Barry v. Haaland*, No. 19-cv-3380, 2021 WL 1177798, at *7 (D.D.C. Mar. 29, 2021) (citation omitted), the Court will dismiss his Privacy Act claim in Count Seven for lack of jurisdiction.[30]

[29] The Court may consider these documents to assure itself of its jurisdiction, *see Settles*, 429 F.3d at 1107, and because they are documents on which the complaint necessarily relies, *see Hinton v. Corrs. Corp. of Am.*, 624 F. Supp. 2d 45, 46 (D.D.C. 2009). *See Sandoval v. DOJ*, 296 F. Supp. 3d 1, 12 (D.D.C. 2017) (considering the plaintiff's administrative requests, produced by the defendant, to determine whether he exhausted).

[30] Page's earlier Privacy Act suit against DOJ does not affect the exhaustion analysis because that case alleged different Privacy Act violations from previous years. *See* Compl., Dkt. 1, *Page v. DOJ*, 19-cv-3149 (D.D.C. Oct. 21, 2019).

ii. Unlawful Disclosures

Page also sues DOJ and the FBI for leaks of his information in violation of the Privacy Act. SAC ¶¶ 226, 296–302. He alleges that the defendants, including Comey, McCabe, Strzok, and Lisa Page, unlawfully disclosed "the existence of the FISA Warrants, the contents of the warrant applications, and the results of the Warrants" to media outlets such as the New York Times, the Washington Post, and "possibly others." *Id.* ¶ 226. The Court concludes that Page's unlawful disclosure claim is time-barred because he knew about the alleged disclosures to the media for more than two years before he filed this action.

"Privacy Act claims for monetary damages based on improper disclosure . . . have four elements: '1) the disclosed information is a record contained within a system of records; 2) the agency improperly disclosed the information; 3) the disclosure was willful or intentional; and 4) the disclosure adversely affected the plaintiff.'" *Doe v. DOJ*, 660 F. Supp. 2d 31, 44–45 (D.D.C. 2009) (quoting *Logan v. Dep't of Veterans Affs.*, 357 F. Supp. 2d 149, 154 (D.D.C. 2004)). An action under the Privacy Act "may be brought . . . within two years from the date on which the cause of action arises." 5 U.S.C. § 552a(g)(5). "[T]he cause of action does not arise and the statute of limitation does not begin to run until the plaintiff knows or should know of the alleged violation." *Tijerina v. Walters*, 821 F.2d 789, 798 (D.C. Cir. 1987).

The Privacy Act section of the complaint identifies only two media reports: the April 11, 2017 Washington Post article and the April 22, 2017 New York Times article. SAC ¶¶ 221, 224; Pl.'s Opp'n at 39 (not identifying any other disclosures). The Post article, which broke the story about the FISA warrants, cites anonymous "law enforcement and other U.S. officials" for details about the Page investigation. SAC ¶ 221; Wash. Post Article at 2. The Times article, which is mainly about then-FBI Director Comey, mentions Page only once. Citing a "former senior

American intelligence official," it describes how Page's trips to Russia "rais[ed] new concerns among counterintelligence agents." SAC ¶ 224; N.Y. Times Article at 11.[31] The rest of the article was sourced from "interviews with more than 30 current and former law enforcement, congressional and other government officials." *Id.* at 2. Page himself is quoted in both articles. *See* Wash. Post Article at 3 (explaining that the FISA surveillance was "unjustified" and "politically motivated"); N.Y. Times Article at 11 (describing the Russians he met as "mostly scholars").

Page certainly had "inquiry notice," if not actual notice, of these articles, and thus the alleged leaks, when they were published in April 2017. *See Agelli v. Burwell*, 164 F. Supp. 3d 69, 75 (D.D.C. 2016) (Privacy Act claim may accrue before the plaintiff "acquires actual knowledge of the agency's alleged misconduct"). And nowhere in Page's complaint or opposition brief does he claim that he was unaware of the articles, or the potential leaks, at the time. *See generally* SAC; Pl.'s Opp'n at 39. Therefore, his Privacy Act disclosure claims expired two years after publication—on April 11 and April 22, 2019. *See Hill v. DOD*, 981 F. Supp. 2d 1, 8 (D.D.C. 2013) ("Each disclosure of protected information represents a separate violation" that might trigger a separate limitations period.). This is true even though Page did not necessarily have "knowledge of the precise details of the disclosure." *Id.* at 7.

Thus, contrary to his contention otherwise, Pl.'s Opp'n at 39, Page's cause of action accrued, and the clock started to run, on April 11 and April 22, 2019, even though he did not then know the identities of the leakers. True, a Privacy Act plaintiff must eventually show that the disclosure was intentional or willful, which may require knowing who leaked the information.

[31] As explained above, *see supra* note 7, the Court may consider the Post and Times articles, referenced in the complaint, in full, without converting the motion to dismiss into one for summary judgment.

Convertino v. DOJ, 684 F.3d 93, 99 (D.C. Cir. 2012). But a Privacy Act claim runs against the agency, so a plaintiff does not need to name the responsible individual to sue. And more importantly, while a plaintiff will need to establish more detail at the summary judgment stage, *see id.*, he does not have to "allege the full details of . . . a disclosure at the pleading stage." *Feldman v. CIA*, 797 F. Supp. 2d 29, 41 (D.D.C. 2011) (denying motion to dismiss where the plaintiff alleged that the record was protected by the Privacy Act and pled sufficient facts to infer its leak because various agency employees learned of its details though they had no connection to the underlying investigation). After all, "a plaintiff can hardly be expected to know the full details behind an improper disclosure prior to discovery, since those details are most likely to be under the control of the defendant," *id.*, particularly here, where the articles disclosed sensitive information possessed only by law enforcement and intelligence agencies.

In sum, Page's complaint shows that he knew of the alleged disclosure violations in April 2017, yet he did not file suit until November 2020. It is evident from the face of the complaint that the statute of limitations period ran in April 2019, well before Page filed suit. *See Kursar v. TSA*, 751 F. Supp. 2d 154, 166 (D.D.C. 2010). For this reason, the Court will dismiss Page's Privacy Act claim in Count Eight as time-barred.

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As alleged, the FBI's conduct in preparing the FISA warrant applications to electronically surveil Page was deeply "troubling." *In re Accuracy Concerns Regarding FBI Matters Submitted to the FISC*, Order at 2, Misc. No. 19-02 (FISA Ct. Dec. 17, 2019). Indeed, the government has conceded that it lacked probable cause for two of the warrants. *In re Carter W. Page*, Op. and Order Regarding Use and Disclosure of Information at 2 (FISA Ct. June 25, 2020). And the FISC has found that the government violated its "duty of candor in all four applications." *Id.* at 3.

Similarly, Page alleges that the individual defendants intentionally provided false information and omitted material facts in all four applications. SAC ¶¶ 16–20. To the extent these allegations are true, there is little question that many individual defendants, as well as the agency as a whole, engaged in wrongdoing. Even so, Page has brought no actionable claim against any individual defendant or against the United States.

In part, that is because Page faces at least three statutory roadblocks. First, Congress has not created a private right of action against those who prepare false or misleading FISA applications. Both the plain language and the structure of FISA make clear that civil liability under 50 U.S.C. § 1810 attaches only to those who conduct or perform electronic surveillance. Second, Congress has not provided for damages claims against federal officers for constitutional violations stemming from unlawful electronic surveillance in the national security context. And third, Congress has not waived the United States's sovereign immunity for this kind of claim.

For those claims that *are* available to Page under the law, he has failed to sufficiently allege or exhaust them. He has not adequately pled that any FISA-obtained information was improperly used or disclosed. To the extent that he has a viable claim under the Privacy Act, he has neither exhausted his administrative remedies nor filed a timely claim. And his abuse of process claim, as alleged, is not cognizable under D.C. law.

When it comes to Page's core claim—that the defendants misled the FISC to obtain surveillance warrants without probable cause—the Court cannot create a cause of action that Congress did not enact. "[P]rivate rights of action to enforce federal law must be created by Congress," *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001), and courts may not usurp that power "no matter how desirable that might be as a policy matter," *id.* at 287. Any future remedy for these alleged FISA abuses must come from Congress, not this Court.

CONCLUSION

For the foregoing reasons, the Court grants the individual defendants' motions to dismiss and the government's motion to dismiss. A separate order consistent with this decision accompanies this memorandum opinion.

DABNEY L. FRIEDRICH
United States District Judge

September 1, 2022