



U.S. Department of Justice
Civil Division, Appellate Staff
Joseph.F.Busa@usdoj.gov
202-305-1754

VIA CM/ECF

December 24, 2020

Patricia S. Connor, Clerk of Court
U.S. Court of Appeals for the Fourth Circuit
Lewis F. Powell, Jr. United States Courthouse Annex
1100 East Main Street, Suite 501
Richmond, Virginia 23219

RE: *Wikimedia v. National Security Agency* (No. 20-1191)

Dear Ms. Connor:

We write pursuant to Federal Rule of Appellate Procedure 28(j). Plaintiff-Appellant in the above-captioned case has relied on the Ninth Circuit's decision in *Fazaga v. Federal Bureau of Investigation*, 965 F.3d 1015 (9th Cir. 2020) in arguing for reversal here. *See* Opening Br. 16, 46, 47, 49, 51, 55, 56, 59, 60, 61; Reply Br. 3, 4, 5, 7, 8, 10, 11, 15. The government writes to inform the Court that the government filed a petition for a writ of certiorari in *Fazaga* on December 17, 2020. *See* Supreme Court Dkt. No. 20-828, <https://www.supremecourt.gov/Search.aspx?FileName=/docket/docketfiles/html/public\20-828.html>. As the government has explained, the district court's judgment here should be affirmed even under *Fazaga*'s reasoning because *Fazaga* did not address the resolution of threshold issues (such as standing) and any disposition of those threshold issues here would jeopardize privileged state secrets. *See* Gov't Br. 27-28. In any event, *Fazaga* was wrongly decided. *See* Gov't Br. 16-23, 27 & n.2, 31-37. We will notify this Court once the Supreme Court acts on the *Fazaga* petition.

Sincerely,

s/ Joseph F. Busa
JOSEPH F. BUSA
Counsel for Defendants-Appellees

cc: all counsel (via CM/ECF)