November 13, 2006

<u>BY FEDEX</u>
Clerk, United States Court of Appeals for the Sixth Circuit
100 East Fifth Street, Rm. 532
Potter Stewart U.S. Courthouse
Cincinnati, OH 45202-3988

ATTN: Yvonne Henderson

Re: *American Civil Liberties Union, et al v. National Security Agency, et al*, Nos. 06-2095, 06-2140

Dear Ms. Henderson:

Please find enclosed an original and 7 copies of the Brief for the Appellees.

We would appreciate it if you would have the extra copies stamped and returned to us in the enclosed self-addressed, postage-prepaid envelope.

If you have any questions or concerns, please do not hesitate to contact me at 212-549-2601 or by email at annb@aclu.org.

Cordially,

Ann Beeson

Encl.
cc: Douglas N. Letter, Esq.
Thomas N. Bondy, Esq.
Anthony A. Yang, Esq.

Nos. 06-2095, 06-2140

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMERICAN CIVIL LIBERTIES UNION, et al.,
Plaintiffs–Appellees/Cross-Appellants,

v.

NATIONAL SECURITY AGENCY, et al.,
Defendants–Appellants/Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, each of the Plaintiffs-Appellants certifies that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

STATEMENT REGARDING ORAL ARGUMENT 1

STATEMENT OF JURISDICTION 2

STATEMENT OF THE ISSUES 2

LEGAL AND FACTUAL BACKGROUND 3

STANDARD OF REVIEW 7

SUMMARY OF ARGUMENT 7

ARGUMENT 9

I. PLAINTIFFS HAVE STANDING TO CHALLENGE THE PROGRAM BECAUSE THEY ARE SUFFERING CONCRETE INJURIES AS A RESULT OF THE PROGRAM 9

II. THE PROGRAM VIOLATES FISA 20

A. FISA and Title III provide the exclusive means by which the executive branch can lawfully engage in electronic surveillance within this country's borders 20

B. The Program involves surveillance conducted in violation of FISA and Title III 24

C. The Program is not authorized by the AUMF 26

III. THE PROGRAM VIOLATES THE SEPARATION OF POWERS BECAUSE IT INVOLVES SURVEILLANCE THAT CONGRESS HAS EXPRESSLY PROHOBITED 30

IV. THE PROGRAM VIOLATES THE FOURTH AMENDMENT BECAUSE IT AUTHORIZES THE INTERCEPTION OF PRIVATE COMMUNICATIONS WITHOUT A WARRANT......................42

A. The Program is presumptively unreasonable under the Fourth Amendment 42

B. No exception to the warrant requirement permits a program of warrantless surveillance inside this nation's borders 44

1. The warrant requirement applies with full force to foreign intelligence surveillance within the United States 44

2. The "special needs" doctrine does not justify an exception from the warrant requirement 47

C. The Program is manifestly unreasonable..50

V. THE PROGRAM VIOLATES THE FIRST AMENDMENT BECAUSE IT INVOVLES THE SURVEILLANCE OF PROTECTED COMMUNICATIONS BUT FAILS TO COMPLY WITH CONSTITUIONALLY MANDATED SAFEGUARDS...52

VI. THE STATE SECRETS PRIVILEGE POSES NO BAR TO DETERMINING THE LEGALITY OF THE WARRANTLESS EAVESDROPPING PROGRAM 54

A. The state secrets privilege is a narrowly construed evidentially privilege, not an immunity doctrine 54

B. The very subject matter of this action is not a state secret 57

C. State secrets are not necessary or relevant to proving Plaintiffs' claims or any valid defense of those claims 61

VII. THE TRIAL COURT ERRED BY DISMISSING PLAINTIFFS' DATAMINING CLAIMS BASED ON THE STATE SECRETS PRIVILEGE 65

CONCLUSION 71

CERTIFICATE OF COMPLIANCE

ADDENDUM

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases:

ACLU v. Brown, 619 F.2d 1170 (7th Cir. 1980)....................68

Afroyim v. Rusk, 387 U.S. 253 (1967)....................32

Air-Sea Forwarders, Inc. v. Air Asia Co. Ltd., 88 F.2d 176 (9th Cir. 1989)....................59, 69

Al-Haramain Islamic Foundation, --- F. Supp. 2d ---, 2006 WL 2583425 (D. Or. 2006)....................*passim*

Almeida-Sanchez v. United States, 413 U.S. 266 (1973)....................51

Attn'y Gen. of the United States v. The Irish People, Inc., 684 F.2d 928 (D.C. Cir. 1982)....................56, 69, 70

Bano v. Union Carbide Corp., 361 F.3d 696 (2d. Cir. 2004)....................65

Bell v. Wolfish, 441 U.S. 520 (1979)....................48

Berger v. New York, 388 U.S. 41 (1967)....................42

Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144 (D.C. Cir. 1976)....................18

Birnbaum v. United States, 588 F.2d 319 (2d Cir. 1978)....................59

Blake v. Wright, 179 F.3d 1003 (6th Cir. 1999)....................42

CAMP Legal Defense Fund, Inc. v. City of Atlanta, 451 F.3d 1257 (11th Cir. 2006)....................17

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Chandler v. Miller, 520 U.S. 305 (1997)....................48

Chimel v. California, 395 U.S. 752 (1969)....................43

City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750 (1988)....................53

Clark v. Library of Congress, 750 F.2d 89 (D.C. Cir. 1984) 18

Clark v. Martinez, 543 U.S. 371 (2005) 41

Clift v. United States, 597 F.2d 826 (2d. Cir. 1979) 56

Clinton v. Jones, 520 U.S. 681 (1997) 31

Crater Corp. v. Lucent Technologies Inc., 423 F.3d 1260 (Fed. Cir. 2005) 56, 67, 69

Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987) 27

DaimlerChrysler Corp. v. Cuno, 126 S. Ct. 1854 (2006) 10

Doe v. Ashcroft, 334 F. Supp. 2d 471 (S.D.N.Y. 2004) 60

Doe v. Gonzales, 386 F. Supp. 2d 66 (D. Conn. 2005) 60

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Dooley v. United States, 182 U.S. 222 (1901) 63

DTM Research L.L.C. v. A.T.&T. Corp., 245 F.3d 327 (4th Cir. 2001) 57

Ellsberg v. Mitchell, 709 F.2d 51 (D.C. Cir. 1983) .... *passim*

Ex parte Milligan, 71 U.S. 2 (1866) 38

Ex parte Quirin, 317 U.S. 1 (1942) 63

Fitzgerald v. Penthouse Intern. Ltd., 776 F.2d 1236 (4th Cir. 1985) 56, 57, 68, 71

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Freedman v. Maryland, 380 U.S. 51 (1965) 53

Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149 (4th Cir. 2000) 16

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc, 528 U.S. 167 (2000) 10, 15, 16

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Gordon v. Warren Consolidated Board of Education, 706 F.2d 778 (1983) 18

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Handschu v. Special Services Division, 349 F. Supp. 766 (S.D.N.Y. 1972). 18

Heine v. Raus, 399 F.2d 785 (4th Cir. 1968) 56, 59, 69

Hepting v. AT&T Corp., 439 F. Supp. 2d 974 (N.D. Cal. 2006) .... *passim*

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Illinois v. Lidster, 540 U.S. 419 (2004) 48

In re Grand Jury Proceedings, 776 F.2d 1099 (2d Cir. 1985) 53

In re Guantanamo Detainee Cases, 344 F. Supp. 2d 174 (D.D.C. 2004) 69

In re Sealed Case, 310 F.3d 717 (FISA Ct. Rev. 2002) 39, 47, 60

In re Under Seal, 945 F.2d 1285 (4th Cir. 1991) 69

In re United States, 872 F.2d 472 (D.C. Cir. 1989) .... *passim*

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J.E.M. Ag. Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc., 534 U.S. 124 (2001) 28

Jabara v. Kelley, 476 F. Supp. 561 (E.D. Mich. 1979) 15, 18, 62

Jabara v. Kelley, 75 F.R.D. 475 (E.D. Mich. 1977) .... *passim*

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Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp., 176 F.3d 921 (6th Cir. 1999) 17

Katz v. United States, 389 U.S. 347 (1967) 20, 42, 43, 52

Kirk v. Louisiana, 536 U.S. 635 (2002) 51

Kronisch v. United States, 150 F.3d 112 (2d Cir. 1998) 59

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Madsen v. Kinsella, 343 U.S. 341 (1952) 73

Marcus v. Search Warrant, 367 U.S. 717 (1961) 52, 53

Marshall v. Bramer, 828 F.2d 355 (6th Cir. 1987) 53

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Meese v. Keene, 481 U.S. 465 (1987) 16

Mincey v. Arizona, 437 U.S. 385 (1978) 50

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Molerio v. F.B.I., 749 F.2d 815 (D.C. Cir. 1984) 57, 70

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Morales v. TWA, Inc., 504 U.S. 374 (1992) 27

Nat'l Mining Ass'n v. U.S. Army Corps of Engineers, 145 F.3d 139 (D.C. Cir. 1988) 65

National Lawyers Guild v. Attorney General, 96 F.R.D. 390 (S.D.N.Y. 1982) 68

National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) 48

O'Connor v. Ortega, 480 U.S. 709 (1987) 49

Ozonoff v. Berzak, 744 F.2d 224 (1st Cir. 1984) 15, 16, 18

Paton v. La Prade, 524 F.2d 862 (3d Cir. 1975) 15, 18

Payton v. New York, 445 U.S. 573 (1980) 43

Presbyterian Church v. United States, 870 F.2d 518 (9th Cir. 1989) 17

Sable Communications of California, Inc., v. F.C.C., 692 F. Supp. 1208 (C.D. Cal. 1988) 65

Samson v. California, 126 S. Ct. 2193 (2006) 48

Shelton v. United States, 404 F.2d 1292 (D.C. Cir. 1968) 32

Sierra Club v. Adams, 578 F.2d 389 (C.A.D.C. 1978) 10

Sierra Club v. Morton, 405 U.S. 727 (1972) 10

Simpson v. United States, 435 U.S. 6 (1978) 27

Sinclair v. Schreiber, 916 F.2d 1109 (1990) 18

Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602 (1989) 51

Snepp v. United States, 444 U.S. 507 (1980) 59

Socialist Workers Party v. Attorney General of the United States, 419 U.S. 1314 (1974) 17, 18

Spock v. United States, 464 F. Supp. 510 (S.D.N.Y. 1978) 56, 59, 60, 66

Stanford v. Texas, 379 U.S. 476 (1965) 52

Tenenbaum v. Simonini, 372 F.3d 776 (6th Cir. 2004) 55

Tenet v. Doe, 544 U.S. 1 (2005)....59

Terkel v. AT & T Corp, 441 F. Supp. 2d 899 (N.D.Ill. 2006)....57, 61

Terry v. Ohio, 392 U.S. 1 (1968)....48, 51

The Confiscation Cases, 87 U.S. (20 Wall.) 92 (1873)....37

The Prize Cases (The Amy Warwick), 67 U.S. 635 (1862)....63

Totten v. United States, 92 U.S. 105 (1875)....57

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United States v. Chambers, 395 F.3d 563 (6th Cir. 2005)....43

United States v. Biasucci, 786 F.2d 504 (2d Cir. 1986)....46

United States v. Brown, 484 F.2d 418 (5th Cir. 1973)....47, 64

United States v. Buck, 548 F.2d 871 (9th Cir. 1977)....47

United States v. Butenko, 494 F.2d 593 (3d Cir. 1974)....47

United States v. Cuevas-Sanchez, 821 F.2d 248 (5th Cir. 1987)....46

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United States v. Ninety-Three Firearms, 330 F.3d 414 (6th Cir. 2003) 26

United States v. Nixon, 418 U.S. 683 (1974) 31

United States v. Pelton, 835 F.2d 1067 (4th Cir. 1987) 60

United States v. Reynolds, 345 U.S. 1 (1953) 55, 56, 68, 69

United States v. Smith, 27 F. Cas. 1192 (C.C.D.N.Y. 1806) 32

United States v. Torres, 751 F.2d 875 (7th Cir. 1984) 47

United States v. Truong Dinh Hung, 629 F.2d 908 (4th Cir. 1980) 47, 64

United States v. United States District Court ("*Keith*"), 407 U.S. 297 (1972) ....*passim*

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Vernonia School District 47J v. Acton, 515 U.S. 646 (1995) 48

Virginia Dept. of State Police v. The Washington Post, 386 F.3d 567 (4th Cir. 2004) 59

Virginia v. American Booksellers Ass'n, Inc., 484 U.S. 383 (1988) 14

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Statutes:

18 U.S.C. § 2510 *et seq.* 3, 20

18 U.S.C. § 2511 ....3, 22

18 U.S.C. § 2518 20

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28 U.S.C. § 1331 2

5 U.S.C. § 702 2

50 U.S.C. § 1801 .... 3, 22

50 U.S.C. § 1805 .... 22, 39

50 U.S.C. § 1809 23

50 U.S.C. § 1811 .... 22, 39

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The President's News Conference, 42 WEEKLY COMP. PRES. DOC. 125-29 (Jan. 26, 2006)............59

Vice President Dick Cheney, Commencement Address at the United States Naval Academy (May 26, 2006)............59

Vice President Dick Cheney, Remarks at a Rally for the Michigan National Guard and Joint Services (July 10, 2006)............59

Vice President Dick Cheney, Remarks at a Rally for the Troops at Charleston Air Force Base (Mar. 17, 2006) 59

Vice President Dick Cheney, Remarks at a Rally for the Troops at Fort Leavenworth 59

U.S. Constitution:

U.S. Const., Art. I, § 1 31

U.S. Const., Art. I, § 8, cl. 1, 12, 13, 14, 18 32

U.S. Const. Art. II, § 2 33

U.S. Const., Art. II, § 3 31

Regulations:

Fed. R. Evid. 803(3) 17

Legislative Materials:

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H.R. Conf. Rep. No. 95-1720 (1978) 22, 23

S. Rep. No. 95-604(I) (1978) 21, 23, 35, 46

S. Rep. 95-701 (1978) 46

Oversight on the Dep't of Justice: Hearing Before the H. Comm. on the Judiciary, 109th Cong. (2006) 58

The Worldwide Terror Threat: Hearing Before the S. Select Comm. on Intelligence, 109th Cong. (2006), *available at* 2006 WL 246499 58

Wartime Executive Power and the NSA's Surveillance Authority (Part I): Hearing before the Senate Judiciary Committee, 109th Cong. (2006) 27

IN THE UNITED STATES COURT OF APPEALS
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Nos. 06-2095, 06-2140

AMERICAN CIVIL LIBERTIES UNION, ct al.,
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v.

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Defendants–Appellants/Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

BRIEF FOR THE APPELLEES

STATEMENT REGARDING ORAL ARGUMENT

The Defendants-Appellants (the "government" or "defendants") appeal from a district court order permanently enjoining a program of warrantless electronic surveillance inside this nation's borders. Plaintiffs-Appellees ("plaintiffs") cross-appeal from the district court's order dismissing plaintiffs' challenge to the government's datamining of telephone and e-mail records. Because the government action challenged here

threatens the very foundations of our democratic system, plaintiffs request oral argument.

STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 702. The district court issued a final judgment on August 17, 2006. R.71 Judgment. The government filed a timely notice of appeal on August 17, 2006. R.72 Notice of Appeal. The plaintiffs filed a timely notice of appeal on August 24, 2006. R.76 Notice of Appeal. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

The government's appeal presents the question of whether the district court properly held that the National Security Agency's warrantless surveillance of telephone calls and e-mails violated the Foreign Intelligence Surveillance Act, the principle of separation of powers, and the Fourth and First Amendments. Plaintiffs' appeal presents the question of whether the district court erred in dismissing plaintiffs' datamining claims, prior to any discovery and without consideration of non-privileged evidence, on the basis of the state secrets privilege.

LEGAL AND FACTUAL BACKGROUND

Congress has enacted two statutes that together supply "the *exclusive means* by which electronic surveillance . . . and the interception of domestic wire, oral, and electronic communications may be conducted" inside the United States. 18 U.S.C. § 2511(2)(f) (emphasis added). The first is Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510-2522 ("Title III"), and the second is the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801-1871 ("FISA"). FISA and Title III subject all electronic surveillance to judicial oversight and impose procedural safeguards meant to protect individual privacy.

In the fall of 2001, President Bush authorized the National Security Agency ("NSA") to inaugurate a program of warrantless electronic surveillance inside the nation's borders.[1] The NSA program operates

[1] R.70 Memorandum Opinion ("Op.") at 1-2, 13; R.6 Plaintiffs' Statement of Undisputed Facts ("SUF") 1A & R.4 Ex. A, President's Radio Address; SUF 1B & R.4 Ex. B, Gonzales Press Briefing; SUF 2A & R.4 Ex. C, Hayden Address; SUF 2B & R.4 Ex. D, President's News Conference; SUF 2C & R.4 Ex. F, Moschella Letter; SUF 3A & R.4 Ex. E, Taranta Article; SUF 3B & R.4 Ex. F, Moschella Letter; SUF 3C & R.4 Ex. B, Gonzales Press Briefing; SUF 11A & R.4 Ex. H, NSA Hearing; SUF 11B & R.4 Ex. B, Gonzales Press Briefing; SUF 11C & R.4 Ex. C, Hayden Address; SUF 11D & R.4 Ex. B, Gonzales Press Briefing.

entirely without judicial supervision,[2] and government officials have conceded that the NSA program violates FISA.[3] Under the NSA program, the decision to authorize surveillance in any particular case is made not by a judge but by an NSA "shift supervisor."[4] The NSA conducts surveillance when, in the shift supervisor's judgment, there is a "reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda."[5] That standard, as the Attorney General has conceded, is not one of probable cause.[6] Since 2001, the President has reauthorized the NSA program more than 30 times[7] and he has stated his intention to continue doing so.[8]

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[2] Op. 1; SUF 11A & R.4 Ex. H, NSA Hearing; SUF 11B & R.4 Ex. B, Gonzales Press Briefing; SUF 11C & R.4 Ex. C, Hayden Address; SUF 11D & R.4 Ex. B, Gonzales Press Briefing.

[3] SUF 10A & R.4 Ex. B, Gonzales Press Briefing.

[4] SUF 13A & R.4 Ex. B, Gonzales Press Briefing; *see also* SUF 13B & R.4 Ex. H, NSA Hearing.

[5] Op. 13; SUF 6G & R.4 Ex. B, Gonzales Press Briefing (emphasis added); *see also* SUF 6A & R.4 Ex. C, Hayden Address; SUF 6I & R.4 Ex. C, Hayden Address; SUF 6B & R.4 Ex. D, President's News Conference; SUF 6C & R.4 Ex. A, President's Radio Address); SUF 6D & R.4 Ex. E, Taranta Article; SUF 6E & R.4 Ex. F, Moschella Letter; SUF 6F & R.4 Ex. G, "Ask the Whitehouse"; SUF 6H & R.4 Ex. C, Hayden Address.

[6] SUF 6J & R.4 Ex. H, NSA Hearing; *see also* SUF 11C & R.4 Ex. C, Hayden Address.

[7] Op. 1-2, 13, 22; SUF 1A & R.4 Ex. A, President's Radio Address; SUF 4 & R.4 Ex. D, President's News Conference.

[8] SUF 5 & R.4 Ex. D, President's News Conference.

Plaintiffs are prominent journalists, scholars, attorneys, and national nonprofit organizations whose work requires them to communicate by telephone and e-mail with people outside the United States, including people in the Middle East and Asia.[9] In a complaint filed on January 17, 2006, plaintiffs challenged the legality of the NSA program in two respects. First, they challenged the warrantless wiretapping of the content of telephone and e-mail communications (the "Program").[10] Second, they challenged the datamining of telephone and e-mail records (the "Datamining Program"). On March 9, 2006, plaintiffs moved for partial summary judgment, seeking a declaration that the Program was unlawful and a permanent injunction against its use. The government responded by filing a motion to dismiss, or in the Alternative for Summary Judgment, seeking dismissal of the entire action on the basis of the state secrets privilege.

On August 17, 2006, the district court granted plaintiffs' motion for partial summary judgment and issued an order permanently enjoining the Program. R.71 Judgment and Order. The district court found that plaintiffs had standing because the Program had caused plaintiffs to suffer "a concrete,

[9] Op. 2; SUF 15A & R.4 Ex. I, Diamond Decl. ¶¶2-8; R.4 Ex. J, Hollander Decl. ¶¶2-12, 14-15; R.4 Ex. K, McKelvey Decl. ¶¶2-7; R.4 Ex. L, Swor Decl. ¶¶2, 4, 7, 10.

[10] Throughout this brief, plaintiffs use "wiretapping" to refer to the interception of both telephone and e-mail communications.

actual inability to communicate with witnesses, sources, clients and others without great expense which has significantly crippled Plaintiffs, at a minimum, in their ability to report the news and competently and effectively represent their clients." Op. 20. The district court refused to dismiss plaintiffs' challenge to the Program on the basis of the state secrets privilege. Op. 3-15. The district court found that plaintiffs were "able to establish a *prima facie* case based solely on defendants' public admissions" regarding the Program, Op. 14, and that privileged information was "not necessary to any viable defense," Op. 14. However, the court granted the government's motion to dismiss plaintiffs' claims against the Datamining Program, finding that the state secrets doctrine foreclosed those claims from proceeding past the pleading stage. Op. 15, 42.

On the merits of plaintiffs' claims, the district court held that the Program violated FISA, Op. 31, 36, and that it violated the First and Fourth Amendments, Op. 30, 33. The court considered and specifically rejected the government's argument that the Program falls within an exception to the Fourth Amendment's warrant requirement. Op. 31, 42. Finally, relying on *Youngstown Sheet & Tube v. Sawyer,* 343 U.S. 579 (1952) ("*Youngstown*"), the district court found that the Program violated the principle of separation of powers because "the President has acted, undisputedly, as FISA forbids."

Op. 36. The court rejected the government's claim that the Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) ("AUMF"), implicitly amended FISA and invested the government with the authority to conduct warrantless surveillance, Op. 37-38, and rejected the claim that the President has "inherent authority" to ignore FISA and the Constitution. Op. 40-41.

On August 17, 2006, the government appealed from the district court's order granting partial summary judgment on plaintiffs' claims relating to the Program; on August 24, 2006, plaintiffs appealed from the district court's dismissal of their claims relating to the Datamining Program. On October 4, 2006, this Court stayed the district court's injunction pending appeal.

STANDARD OF REVIEW

This appeal raises issues of law reviewable *de novo* by this Court.

SUMMARY OF ARGUMENT

To guard against executive abuses that threatened our democracy in the past, Congress enacted two statutes that together provide "the exclusive means" by which the executive can engage in electronic surveillance within this nation's borders. This case challenges a judicially unsupervised surveillance program that senior officials have admitted violates those

statutes. The issue presented is purely legal: Whether the President has authority to violate statutory law and the Constitution by engaging in warrantless wiretapping inside the United States. The district court correctly held that he does not.

The Program violates the principle of separation of powers because it involves surveillance that Congress, in a valid exercise of its own constitutional power, has expressly prohibited. The President has no authority to violate the law. Because it operates entirely without judicial supervision, the Program also violates the Fourth Amendment. No exception to the Fourth Amendment's warrant requirement is applicable here, and the government's disregard of FISA – a statute that has proved workable for almost thirty years – is manifestly unreasonable. Because the Program intercepts protected communications without judicial oversight, the Program also violates the First Amendment.

The government makes no attempt to defend the Program on the merits. Instead, it argues that the state secrets privilege prevents plaintiffs from establishing standing and forecloses the Court from adjudicating the Program's legality. But plaintiffs have suffered concrete harm because the Program has prevented them from communicating with sources and witnesses, conducting scholarship, and engaging in advocacy. Furthermore,

government officials have publicly conceded all of the facts necessary to decide plaintiffs' claims. No additional facts, public or secret, could transform the Program into one that is lawful.

The government seeks not simply to dismiss this case but to prevent *any* court from reviewing the legality of the Program. Its view of the standing doctrine would prevent anyone from ever challenging the Program. Its view of the Fourth Amendment would give carte blanche to the President not only to wiretap telephones and comb through e-mails but also to search homes. Its view of the state secrets privilege could shield virtually any national security policy from judicial scrutiny. And, perhaps most disturbingly, the government's sweeping theory of executive power would allow the President to violate any law passed by Congress. This theory presents a profound threat to our democratic system. The government complains that the district court overreached but it is the government's theory that is radical, not the district court's rejection of it.

ARGUMENT

I. PLAINTIFFS HAVE STANDING BECAUSE THEY ARE SUFFERING CONCRETE INJURIES AS A RESULT OF THE PROGRAM.

The district court correctly held that plaintiffs have standing because their injuries are concrete and particularized, "fairly traceable to the

challenged action of the defendant," and "likely" to be redressed by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc*, 528 U.S. 167, 180-81 (2000).[11] Plaintiffs' calls and e-mails are precisely the kinds of communications the government has conceded are targeted under the Program. Some of the plaintiffs, in connection with scholarship, journalism, or legal representation, communicate with people whom the United States government believes or believed to be terrorists or to be associated with terrorist organizations.[12] As the district court found, the Program is disrupting the ability of the plaintiffs to obtain information from sources, locate witnesses, conduct scholarship, engage in advocacy, and participate in other activity protected by the First Amendment.[13] For example, the Program has prevented plaintiff Nancy Hollander, a criminal defense attorney, from engaging in certain communications with clients in

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[11] Contrary to the government's argument, Gov't Br. 25, plaintiffs are not required to show standing separately for each of their claims. *Sierra Club v. Morton*, 405 U.S. 727, 737 (1972); *Sierra Club v. Adams*, 578 F.2d 389, 392 (C.A.D.C. 1978). *DaimlerChrysler Corp. v. Cuno*, cited by the government, states only that a "litigant, by virtue of his standing to challenge one government action, [cannot] challenge other governmental actions that did not injure him." 126 S. Ct. 1854, 1868, n.5. Plaintiffs do not seek to challenge government actions that have not injured them.

[12] Op. 17; SUF 15B & R.4 Ex. I, Diamond Decl. ¶9; R.4 Ex. J, Hollander Decl. ¶¶12-14, 17-24; R.4 Ex. K, McKelvey Decl. ¶8-10; R.4 Ex. L, Swor Decl. ¶¶5-7, 10.

[13] Op. 13-14, 20-21; SUF 15E & R.4 Ex. I, Diamond Decl. ¶¶11, 13-15; R.4 Ex. J, Hollander Decl. ¶¶12, 16, 25; R.4 Ex. K, McKelvey Decl. ¶14-15; R.4 Ex. L, Swor Decl. ¶¶9, 11-12, 14-16.

the Middle East and Europe, though these communications are necessary to Ms. Hollander's effective representation of those clients.[14] The Program has similarly prevented plaintiff Mohammed Abdrabboh, another attorney, from obtaining information from his clients over the telephone because those clients are now reluctant to disclose information that may be intercepted by the government.[15] Professional responsibility rules leave these attorneys with little choice but to cease any calls or e-mails that might jeopardize confidential information relating to their clients. Op. 18.[16] As ethics expert Professor Niehoff explains, the Program

> requires the attorneys to cease – immediately – all electronic and telephonic communications relating to the representation that they have good faith reason to believe will be intercepted. And the Interception Program requires the attorneys to resort – immediately – to alternative means for gathering information.[17]

The problem is not limited to communications with clients. Potential witnesses, experts and colleagues in other countries are equally reluctant, and often unwilling, to communicate with plaintiff attorneys by phone or e-mail, further hampering plaintiffs' ability to speak with individuals

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[14] Op. 17; SUF 15E & R.4 Ex. J, Hollander Decl. ¶25.
[15] R.47 Ex. Q, Abdrabboh Decl. ¶¶8-9.
[16] R.47 Ex. M, Niehoff Decl ¶17.
[17] *Id.* at ¶19.

necessary to the representation of their clients. *Id.*[18] For example, the Program has prevented plaintiff William Swor from "discuss[ing] factual issues with witnesses over the phone for fear of interception"; as a result he has been prevented from obtaining evidence that could be vital to his clients' defense.[19] Plaintiffs must travel long distances – at substantial cost – to meet personally with their clients and with other individuals connected to their cases, or, if they are not able to spend the time and money to make such trips, to incur an equally harmful injury: impairment of their ability to represent their clients effectively. *Id.* at 18.[20]

Plaintiffs have acted reasonably in attempting to mitigate the harm caused by the Program. Litigation in Oregon recently revealed that the NSA monitored electronic communications between Al-Haramain, a charity accused of terrorist activity, and two of its lawyers in the United States. *Al-Haramain Islamic Foundation*, --- F. Supp. 2d ---, 2006 WL 2583425, * 7-8 (D. Or. 2006).[21] Many of plaintiffs' clients are accused of similar, if not

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[18] R.47 & Ex. P, Dratel Decl. ¶10; R.47 Ex. Q, Abdrabboh Decl. ¶¶7-8; R.47 Ex. R, Ayad Decl. ¶6.

[19] Op. 17; SUF 15E & R.4 Ex. L., Swor Decl. ¶¶9, 16.

[20] SUF 15 & R.4 Ex. J, Hollander Decl. ¶¶20, 23-25; R.4 Ex. L, Swor Decl. ¶¶13-14; R.47 Ex. P, Dratel Decl. ¶¶9-11; R.47 Ex. Q, Abdrabboh Decl. ¶¶7-8; R.47 Ex. R, Ayad Decl. ¶¶ 6-8.

[21] R.47 Ex. P, Dratel Decl. ¶¶15-16.

identical, offenses as Al-Haramain.[22] It is plainly reasonable for plaintiffs to assume that their communications are being intercepted.

The district court properly found that the Program poses an "overwhelming, if not insurmountable, obstacle to effective and ethical representation." Op. 18 (quoting R. 47 Ex. M, Niehoff Decl.). As another court recently recognized in a related context, "the significance of the attorney-client privilege and its goal of frank and candid communication between a represented party and his counsel is too well-settled to require lengthy citation." *Turkmen v. Ashcroft*, 2006 WL 1517743, slip op. at 3 (E.D.N.Y. 2006), *affirmed* 2006 WL 1662663 (E.D.N.Y. 2006).

The Program has also inflicted particularized and concrete injury on the non-attorney plaintiffs. For example, the Program has limited the ability of plaintiff Larry Diamond, a scholar of democracy, to obtain sensitive information from pro-democracy activists in the Middle East, Africa and Asia.[23] Because the exposure of the "confidential or sensitive information" that these contacts provide could "cause their governments to retaliate against them," Professor Diamond has "stopped discussing such topics in

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[22] R.47 Ex. P, Dratel Decl. ¶17; R.4 Ex. J, Hollander Decl ¶12; R.47 Ex. R, Ayad Decl. ¶ 7; R.47 Ex. Q, Abdrabboh Decl ¶4; R.4 Ex. L, Swor Decl. ¶5.

[23] Op. 17; SUF 15E & R.4 Ex. I, Diamond Decl. ¶15.

[his] international phone calls and e-mails with these individuals."[24] Similarly, Tara McKelvey, a journalist, can no longer "assure anonymity or privacy" to her sources, "many of whom are quite frightened of the United States government and military," and the Program has "prevented [her] from obtaining information from some of these individuals."[25] McKelvey, like the attorney plaintiffs, has had to make trips – at substantial cost – to obtain information that, but for the Program, could have been obtained by telephone or e-mail.[26] This professional and economic harm is more than adequate to establish standing. Op. 13-14.

The crippling effect of the Program on plaintiffs' ability to effectively represent their clients plainly satisfies the injury in fact requirement, as the district court held. *See* Op. 13, 20.[27] The government mischaracterizes plaintiffs' concrete injuries as a "subjective chill." Gov't Br. 26-29. Numerous other courts, however, have held that plaintiffs in other cases had standing where they suffered professional injuries resulting from government investigations or surveillance programs. For example, in

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[24] Op. 17-18; SUF 15D & R.4 Ex. I, Diamond Decl. ¶12.

[25] Op. 17-18; SUF 15E & R.4 Ex. K, McKelvey Decl. ¶14-15.

[26] *Id.*

[27] In addition, traditional standing rules are relaxed when First Amendment rights are at stake, because free expression is "of transcendent value to all society, and not merely to those exercising their rights." *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965); *see also Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 392-393 (1988).

Ozonoff v. Berzak, 744 F.2d 224, 228-230 (1st Cir. 1984), the First Circuit recognized that a job applicant had standing to challenge an Executive Order authorizing the FBI to investigate his past political activities and associations where the applicant had suffered professional injury as a result of the investigation. Similarly, in *Paton v. La Prade*, 524 F.2d 862, 868 (3d Cir. 1975), the Third Circuit found a high school student had standing to challenge the contents of her FBI file because of the risk that the file might later be misinterpreted by another government agency and thereby bar her from seeking governmental employment as an adult. *See also Jabara v. Kelley*, 476 F. Supp. 561, 568 (E.D. Mich. 1979) (finding standing where surveillance had damaged law practice), *vac'd on other grounds sub nom. Jabara v. Webster*, 691 F.2d 272 (6th Cir. 1982).

Plaintiffs in this case have standing because they have had no choice but to change their behavior because of the government's unlawful activity. Op. 20, 22. In *Friends of the Earth*, the Court held that environmental groups had standing to sue a polluter where "the affiants . . . state[d] that they would use the nearby [river] for recreation if [defendant] were not discharging pollutants into it." *Friends of the Earth*, 528 U.S. at 184. The Court found nothing unreasonable about the "proposition that a company's continuous and pervasive illegal discharges of pollutants into a river would

cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms." *Id.*

Similarly, in *Gaston Copper*, the Fourth Circuit found standing where an affiant "testified that he and his family swim less in and eat less fish from [his] lake because of fears of pollution from Gaston Copper's permit exceedances." Despite the absence of any evidence of an objective environmental change in the waterway, the court held that the affiant still suffered a cognizable injury for standing purposes. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 156, 159 (4th Cir. 2000); *see also Meese v. Keene*, 481 U.S. 465, 475 (1987) (finding standing where politician decided not to show films the government labeled political propaganda because he feared it would impair his career); *Initiative and Referendum Institute v. Walker*, 450 F.3d 1082 (10th Cir. 2006) (finding standing where organization decided not to propose ballot initiative because it feared supermajority voting requirement would make campaign effort futile); *Ozonoff*, 744 F.2d at 228.

Plaintiffs' professional injuries are no less cognizable because they result in part from the decisions of third parties to cease communicating with

the plaintiffs.[28] The Supreme Court addressed this very issue in *Socialist Workers Party*, in which the applicants "complained that the challenged investigative activity will have the concrete effects of dissuading some [Youth Socialist Alliance] delegates from participating actively in the convention." *Socialist Workers Party v. Attorney General of the United States,* 419 U.S. 1314, 1319 (1974). Based on this harm, the Court found "the specificity of the injury claimed by the applicants is sufficient . . . to satisfy the requirements of Art. III." *Id.* Plaintiffs' claims are even stronger here because they have already suffered injuries because of the Program. *See* Op. 17-18; *see also CAMP Legal Defense Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1276 (11th Cir. 2006) (holding organization had standing to challenge permit application requirement because "the record contains evidence that [plaintiff] has had difficulty recruiting performers based on its inability to predict whether it would receive a festival permit 90 days in advance."); *Presbyterian Church v. United States*, 870 F.2d 518, 522 (9th Cir. 1989) (recognizing "distinct and palpable" injury to church where surveillance prevented "individual congregants from attending worship

[28] R.47 Ex. Q, Abdrabboh Decl. ¶¶7-8; R.47 Ex. R, Ayad Decl. ¶¶6-8. Contrary to the government's suggestion, plaintiffs' statements about third parties are admissible both to show the state of mind of the declarant (a hearsay exception) and to demonstrate their effect on the listener (nonhearsay). Fed. R. Evid. 803(3); *see also Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp.,* 176 F.3d 921, 927 (6th Cir. 1999).

services, and . . . interfered with the churches' ability to carry out their ministries." (emphasis omitted)).

The district court correctly found that the scope of plaintiffs' injuries clearly places this case outside the limitations imposed by *Laird v. Tatum*, 408 U.S. 1 (1972). Op. 20. In *Laird*, the Supreme Court held that the "mere existence, *without more*, of a governmental investigative and data-gathering activity" is insufficient to support standing. 408 U.S. at 10 (emphasis added). Accordingly, courts have consistently distinguished *Laird* where plaintiffs have suffered specific professional or job-related injuries like the kind sustained here. *See, e.g., Socialist Workers Party*, 419 U.S. at 1318; *Ozonoff*, 744 F.2d at 229-230; *Paton*, 524 F.2d at 868; *Jabara*, 476 F. Supp. at 568; *Clark v. Library of Congress*, 750 F.2d 89, 93 (D.C. Cir. 1984); *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144, 150-151 (D.C. Cir. 1976).[29] Finally, *Laird* does not apply where the intelligence gathering itself is unlawful. *See Jabara*, 476 F. Supp. at 568-569; *Berlin Democratic Club*, 410 F.Supp. at 150; *Handschu v. Special Services Division*, 349 F. Supp. 766, 770 (S.D.N.Y. 1972).

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[29] The Sixth Circuit decisions in *Sinclair v. Schreiber*, 916 F.2d 1109 (1990) and *Gordon v. Warren Consolidated Board of Education*, 706 F.2d 778 (1983), cited by the government, *see* Gov't Br. 27, simply reiterate that the mere existence of a surveillance program, *without more*, is not a *per se* harm sufficient to confer standing. *See Sinclair*, 916 F.2d at 1115; *Gordon*, 706 F.2d at 780.

Plaintiffs' injuries "can unequivocally be traced to the [Program]" and would be redressed by the permanent injunction, as the district court found. Op. 23. If the Program did not exist, plaintiffs would be able to discuss sensitive information over the telephone and via e-mail with clients, sources, and witnesses, and would not incur economic harm from being forced to travel to communicate with people face-to-face. The government's argument that the harm from the program is indistinguishable from the harm caused by lawful surveillance under FISA was properly rejected by the district court. Op. 23.[30] Unlike surveillance under FISA, surveillance under the program is neither approved by a neutral magistrate, grounded in probable cause, nor subject to the minimization requirements that govern FISA interception of attorney-client communications.[31] In fact, government officials admit that the program does not distinguish attorney-client communications from other communications it intercepts.[32] Plaintiffs have standing even if an injunction against the Program would not relieve all of their injuries; as the Supreme Court has held, a plaintiff "need not show that

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[30] The government's contention that the plaintiffs must prove they are aggrieved persons under FISA is equally misplaced. Gov't Br. 23-24. This case does not involve a challenge to surveillance conducted under FISA.

[31] *See* 50 U.S.C. § 1806(a) (stating that "[n]o otherwise privileged communication obtained in accordance with, or in violation of, the provisions of this subchapter shall lose its privileged character"); *id.* § 1801(h) (defining required "minimization procedures").

[32] R.47 Ex. P, Dratel Decl. ¶14.

a favorable decision will relieve his *every* injury." *Larson v. Valente*, 456 U.S. 228, 243 (1982). To require otherwise would result in a "draconian interpretation of the redressability requirement that is justified by neither precedent nor principle." *Id.*

II. THE PROGRAM VIOLATES FISA.

A. FISA and Title III provide the exclusive means by which the executive branch can lawfully engage in electronic surveillance within this country's borders.

The Supreme Court decided in *Katz v. United States*, 389 U.S. 347 (1967), that individuals have a constitutionally protected privacy interest in the content of their telephone calls. In response to *Katz*, Congress enacted Title III.[33] Title III requires the government to obtain a court order before instituting electronic surveillance for law enforcement purposes by demonstrating "probable cause for belief than an individual is committing, has committed, or is about to commit" one of a list of criminal offenses. 18 U.S.C. § 2518(3).

After Congress enacted Title III, however, the executive branch continued to engage in warrantless surveillance in intelligence investigations relating to perceived national security threats. Congressional investigations by the Church and Pike Committees in the 1970s determined that the

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[33] Pub. L. No. 90-351, 83 Stat. 311 (1968) (codified as amended at 18 U.S.C. §§ 2510-2522).

executive had engaged in warrantless wiretapping of journalists, activists, and members of Congress "who engaged in no criminal activity and who posed no genuine threat to the national security." S. Rep. No. 95-604(I), at 8 (1977), *reprinted in* 1978 U.S.C.C.A.N. 3904, 3909 (quoting Church Committee Report, Book II, 12). In its final report, the Church Committee warned that "[u]nless new and tighter controls are established by legislation, domestic intelligence activities threaten to undermine our democratic society and fundamentally alter its nature." Church Comm. Rep. Book II, at 1.

In response both to the abuses documented by the Church Committee and the Supreme Court's decision in *United States v. United States District Court*, 407 U.S. 297, 315-21 (1972) ("*Keith*"), Congress enacted FISA.[34] As the Senate Judiciary Committee explained, FISA was specifically designed "to curb the practice by which the Executive branch may conduct warrantless electronic surveillance on its own unilateral determination that national security justifies it." S. Rep. No. 95-604(I), 1978 U.S.C.C.A.N. at 3910; *see also id.* at 3908.

Like Title III, FISA generally prohibits the executive branch from conducting electronic surveillance without first obtaining a court order. Such court orders are obtained from the Foreign Intelligence Surveillance

[34] Pub. L. No. 95-511, Title I, 92 Stat. 1796 (1978) (codified as amended at 50 U.S.C. §§ 1801-1871).

Court ("FISC"), a specially constituted intelligence court, and are issued when the government can demonstrate, among other things, probable cause to believe that "the target of the electronic surveillance is a foreign power or an agent of a foreign power." 50 U.S.C. § 1805(a)(3).[35] Notably, Congress intended that FISA would govern even during emergencies and times of war. In an emergency, FISA (like Title III) permits the executive branch to conduct warrantless surveillance for up to 72 hours. 50 U.S.C. § 1805(f). After a formal declaration of war, the executive branch may engage in warrantless surveillance for up to fifteen days. 50 U.S.C. § 1811. Congress provided this fifteen-day period to "allow time for consideration of any amendment to [FISA] that may be appropriate during a wartime emergency." *See* H.R. Conf. Rep. No. 95-1720, at 34 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4048, 4063.

When Congress enacted FISA, it intended that FISA and Title III would regulate *all* electronic surveillance within the nation's borders. Prior to the enactment of FISA, Title III included a provision that explained that the law did not reach national security surveillance. 18 U.S.C. § 2511(3)

[35] FISA defines "foreign agent" to include individuals engaged in terrorism. 50 U.S.C. § 1801(b)(1)(C) (non-U.S. persons); *id.* § 1801(b)(2)(C) (citizens and permanent residents). FISA defines "foreign power" to include "a group engaged in international terrorism or activities in preparation therefor." *Id.* § 1801(a)(4).

(1977). When it enacted FISA, Congress repealed that provision, replacing it with a provision stating that FISA and Title III were to provide "the *exclusive means* by which electronic surveillance . . . and the interception of domestic wire, oral, and electronic communications may be conducted." 18 U.S.C. § 2511(2)(f) (emphasis added). In addition, Congress expressly prohibited electronic surveillance "except as authorized by statute." 50 U.S.C. § 1809(a)(1).

In enacting FISA, it was Congress's intent to foreclose the executive branch from engaging in electronic surveillance in the United States without judicial supervision, even during wartime. *See* S. Rep. No. 95-701, 1978 U.S.C.C.A.N. at 4016 (stating that FISA prohibited the Executive from engaging in warrantless surveillance outside the scope of the statute); S. Rep. No. 95-604(I), 1978 U.S.C.C.A.N. at 3907; H.R. Conf. Rep. No. 95-1720, 1978 U.S.C.C.A.N. at 4064.[36]

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[36] The House Conference Report also makes clear that Congress intended FISA and Title III to extinguish (with limited exceptions provided in those statutes) the President's authority to engage in warrantless surveillance. The conferees rejected language that would have described Title III and FISA as the "exclusive statutory means" by which electronic surveillance could be conducted, instead adopting language that makes those statutes "the exclusive means." H.R. Conf. Rep. No. 95-1720, 1978 U.S.C.C.A.N. at 4064.

B. The Program involves surveillance conducted in violation of FISA and Title III.

The Program operates in complete disregard of FISA and Title III.[37] At a December 19, 2005 news conference convened to discuss the Program, Attorney General Gonzales acknowledged that "the Foreign Intelligence Surveillance Act . . . requires a court order before engaging *in this kind of surveillance* . . . unless otherwise authorized by statute or by Congress."[38] At the same news conference, General Michael Hayden, Principal Deputy Director for National Intelligence, admitted that the Program has been used "in lieu of" the procedures specified under FISA.[39]

Senior administration officials have made numerous other statements establishing that the Program violates FISA and Title III. They have acknowledged, for example, that the Program operates entirely without judicial supervision or probable cause.[40] General Hayden has described the Program as "a more . . . 'aggressive' program than would be traditionally available under FISA." He also told the National Press Club on January 23,

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[37] SUF 9 & R.4 Ex. B, Gonzales Press Briefing.

[38] *Id.* (emphasis added).

[39] SUF 10A & R.4 Ex. B, Gonzales Press Briefing.

[40] SUF 11A & R.4 Ex. H, NSA Hearing; SUF 11B, 11D & R.4 Ex. B, Gonzales Press Briefing; SUF 11C & R.4 Ex. C, Hayden Address; SUF 6J & R.4 Ex. H, NSA Hearing; SUF 10C & R.4 Ex. B, Gonzales Press Briefing.

2006, that the Program's "trigger is quicker and a bit softer than it is for a FISA warrant."[41]

Plaintiffs included these and other public admissions by government officials in plaintiffs' Statement of Undisputed Facts.[42] Defendants did not dispute these facts below. The district court correctly found that these public admissions were binding on defendants. Op. 12-14; *see also Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 990, 992 (N.D. Cal. 2006) (concluding that government officials' public admissions about the Program should be accepted as facts), *appeal granted*, Nos. 06-80109, 06-80110 (9th Cir. November 7, 2006); Transcript of Oral Argument at 49, *Center for Constitutional Rights, et al., v. Bush*, No. 06-00313 (S.D.N.Y. Sep. 5, 2006) (counsel for government stating, "I think you can assume everything that the government has said in the public record, the president, General Hayden, the attorney general, is true.").

Based on the admissions of government officials, the district court correctly found that the Program violates FISA. Op. 31 ("[t]he wiretapping program . . . has undisputedly been implemented without regard to FISA and

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[41] SUF 10C & R.4 Ex. B, Gonzales Press Briefing; SUF 10D & R.4 Ex. C, Hayden Address.

[42] *See* SUF 1- 14, especially 10E, & R.4 Ex. B, Gonzales Press Briefing; SUF 10F & Ex. C, Hayden Address; SUF 10G & R.4 Ex. F, Moschella Letter.

of course the more stringent standards of Title III"); Op. 36 ("In this case, the President has acted, undisputedly, as FISA forbids."); Op. 40-41.

The government now contends that the Program may not involve "electronic surveillance" as defined by FISA. Gov't Br. 40-42. The government is barred from raising this argument for the first time on appeal. *See, e.g., United States v. Ninety-Three Firearms*, 330 F.3d 414, 424 (6th Cir. 2003) (refusing to consider appellant's argument on statute of limitations not raised in opposition to summary judgment motion in trial court); *United States v. Universal Mgmt. Servs., Inc.*, 191 F.3d 750, 758 (6th Cir. 1999). As discussed above, the government has clearly acknowledged that the Program violates FISA.

C. The Program is not authorized by the AUMF.

The government argues that Congress authorized the Program when it passed the AUMF. Gov't Br. 14, 42-45. This argument, which the government presents as a "construction" of the AUMF, is actually a wholesale rewriting of it. The AUMF authorizes military action against the Taliban and al Qaeda but it does not mention electronic surveillance and it certainly does not mention warrantless wiretapping inside the nation's borders. *Cf. Wartime Executive Power and the NSA's Surveillance Authority (Part I): Hearing before the Senate Judiciary Committee,* 109th

Cong., at 186 (2006) (Senator Lindsey Graham (R-SC)) ("I will be the first to say when I voted for it, I never envisioned that I was giving to this President or any other President the ability to go around FISA carte blanche."); *id.* (Senator Arlen Specter (R-PA)) ("I do not think that any fair, realistic reading of the September 14 resolution gives [the President] the power to conduct electronic surveillance.").

Even if the AUMF could plausibly be read to authorize electronic surveillance within this nation's borders, "FISA's history and content . . . are highly specific in their requirements and the AUMF, if construed to apply at all to intelligence is utterly general." Op. 38. Where a general statute conflicts with a specific one, it is the specific one that governs. *See, e.g.*, *Morales v. TWA, Inc.*, 504 U.S. 374, 384-85 (1992); *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) ("[w]here there is no *clear* intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment"); *Simpson v. United States*, 435 U.S. 6, 15 (1978). Indeed, to accept the government's position would require the Court to conclude not only that the AUMF's general language authorized a program of judicially unsupervised electronic surveillance within this nation's borders but also that the same general language implicitly *repealed* FISA's "exclusive means" provision. Repeals

by implication, however, are rarely recognized and can be established only by "overwhelming evidence" that Congress intended the repeal. *J.E.M. Ag. Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 137 (2001). There is no such evidence.

The proposition that Congress repealed the "exclusive means" provision by implication is made even more doubtful by the fact that Congress *expressly* amended FISA in 2001, *see* USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001), in 2004, *see* Intelligence Reform and Terrorism Prevention Act, Pub. L. No. 108-458, 118 Stat. 3638 (2004) and in 2006, *see* USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 195 (Mar. 9, 2006). If Congress had wanted to repeal the "exclusive means" provision, it would have done so expressly in one of those bills. In fact, Attorney General Gonzales himself has suggested that, had Congress been presented with a proposal to repeal the "exclusive means" provision, it would almost certainly have rejected it.[43]

[43] Press Briefing by Attorney General Gonzales and General Hayden (Dec. 19, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html ("We have had discussions with Congress in the past – certain members of Congress – as to whether or not FISA could be amended to allow us to adequately deal with this kind of threat, and we were advised that that would be difficult, if not impossible.").

In *Hamdan v. Rumsfeld,* 126 S. Ct. 2749 (2006), the Supreme Court rejected the argument that the AUMF implicitly authorized the President to create a system of military commissions at Guantanamo Bay, Cuba, which differed in significant respects from those authorized by Article 21 of the Uniform Code of Military Justice. "[T]here is nothing in the text or legislative history of the AUMF," the Court wrote, "even hinting that Congress intended to expand or alter the authorization set forth in Article 21 of the UCMJ." *Hamdan*, 126 S. Ct. at 2775 (footnote omitted).

The district court was also correct to reject the government's argument that warrantless surveillance inside the United States is a "fundamental incident of war," Gov't Br. 43, and thus within the authority granted by the AUMF. While the AUMF may authorize activities that are "accepted incident[s] of war," the Program is not within the compass of that phrase. *Hamdi v. Rumsfeld*, 542 U.S. 507, 508 (2004), on which the government relies, provides no support for the government's argument because that case concerned detention of enemy combatants on the battlefield – the very people whom Congress "sought to target in passing the AUMF." *Hamdi*, 542 U.S. at 518 (plurality opinion). Americans inside the United States who make or receive international phone calls and e-mails are obviously not enemy combatants on the battlefield, and they are surely not

the people whom Congress intended to target. *Id.* at 578. In fact, when the Administration sought to include the words "in the United States" after the words "appropriate force" so that the authorization would allow domestic as well as foreign actions, Congress flatly rejected the request. *See* Tom Daschle, *Power We Didn't Grant*, WASH. POST, Dec. 23, 2005, at A21. Congress's rejection of the request was in keeping with "[o]ur history and tradition," which "rebel at the thought that the grant of military power carries with it authority over civilian affairs." *Youngstown*, 343 U.S. at 632 (Jackson, J., concurring).

III. THE PROGRAM VIOLATES THE SEPARATION OF POWERS BECAUSE IT INVOLVES SURVEILLANCE THAT CONGRESS HAS EXPRESSLY PROHIBITED.

Because it involves surveillance conducted in violation of a federal statute, the Program also violates the principle of separation of powers. The President does not have the authority to disregard a statute that Congress has enacted in proper exercise of its constitutional powers. To plaintiffs' knowledge, no court has *ever* held that the President possesses such authority. The government's radical argument is one that deeply misunderstands the structure of our constitutional system and should be rejected unequivocally.

Having suffered the reign of King George III, the Framers of our Constitution believed that "[t]he accumulation of powers, legislative, executive, and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny." *The Federalist No. 47* (James Madison). The Framers therefore "built in to the tripartite Federal Government . . . a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Clinton v. Jones*, 520 U.S. 681, 699 (1997) (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976)). Because the Framers feared the concentration of power in one branch, the Constitution "diffuses power[,] the better to secure liberty." *Youngstown* 343 U.S. at 635 (Jackson, J., concurring).

One corollary of the separation of powers – perhaps the corollary most vital to our democracy – is that the President is not "above the law." *United States v. Nixon*, 418 U.S. 683, 715 (1974). The legislative power is vested in Congress, U.S. Const., Art. I, § 1, and it is the President's role to "take Care that the Laws be faithfully executed," U.S. Const., Art. II, § 3. Accordingly, where Congress has enacted a law within the scope of its constitutionally provided authority, the President lacks authority to disregard it. If the President could disregard duly enacted statutes, "it would render the execution of the laws dependent on his will and pleasure." *United States*

v. Smith, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806). As Justice Kennedy recently cautioned, "[c]oncentration of power puts personal liberty in peril of arbitrary action by officials, an incursion the Constitution's three-part system is designed to avoid." *Hamdan*, 126 S. Ct. at 2800 (Kennedy, J., concurring).

The law at issue here – FISA – is one that Congress plainly had the authority to enact, because the Constitution invests Congress with broad authority in the fields of commerce, foreign intelligence, foreign affairs, and war. *See* U.S. Const., Art. I, § 8, cl. 1; "declare War," *id.* cl. 11; "grant Letters of Marque and Reprisal," *id.*; "make Rules concerning Captures on Land and Water," *id.*; "raise and support Armies," *id.* cl. 12; "provide and maintain a Navy," *id.* cl. 13; "make Rules for the Government and Regulation of the land and naval Forces," *id.* cl. 14; and "make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested . . . in the Government of the United States," *id.* cl. 18. The Constitution also invests Congress with broad authority "to deal with foreign affairs," *Afroyim v. Rusk*, 387 U.S. 253, 256 (1967), and "to legislate to protect civil and individual liberties," *Shelton v. United States*, 404 F.2d 1292, 1298 n. 17 (D.C. Cir. 1968).

The government contends, correctly, that the President possesses authority in some of these fields as well. *See* U.S. Const. Art. II, § 2 ("The President shall be Commander in Chief of the Army and Navy of the United States."). That the President possesses such authority, however, does not mean that he can act in disregard of federal statutes. The Supreme Court addressed precisely this issue in *Youngstown*, which involved President Truman's attempted seizure of the nation's steel mills during the Korean War. The government there argued that the seizures were a permissible exercise of the President's authority as Commander in Chief and of the President's "inherent" authority to respond to emergencies. The Court rejected this argument, finding that the President could not constitutionally disregard a duly enacted statute – the Labor Management Relations Act of 1947 – that implicitly prohibited the seizures. "The President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker," the Court wrote. 343 U.S. at 587. "The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad." *Id.* Justice Jackson noted in concurrence that courts can uphold the President's actions in violation of a federal statute "only by disabling the Congress from acting upon the subject." *Id.* at 637-38. Justice Jackson warned: "Presidential claim to a

power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." *Id.* at 638.

The Supreme Court most recently applied *Youngstown* in *Hamdan v. Rumsfeld*, in which the Court found that military commissions set up by the President to try prisoners held at Guantanamo did not comply with the Uniform Code of Military Justice, a statute enacted by Congress in exercise of its constitutional war powers. *See Hamdan*, 126 S. Ct. at 2774 n.23 (stating that, in a field of shared authority, the President "may not disregard limitations that Congress has, in proper exercise of its own . . . powers, placed on his powers"). In concurrence, Justice Kennedy, citing *Youngstown*, wrote: "This is not a case . . . where the Executive can assert some unilateral authority to fill a void left by congressional inaction. It is a case where Congress, in the proper exercise of its powers as an independent branch of government, and as part of a long tradition of legislative involvement in matters of military justice, has considered the subject of military tribunals and set limits on the President's authority." *Id.* at 2799 (Kennedy, J., concurring). Justice Kennedy continued: "Respect for laws derived from the customary operation of the Executive and Legislative Branches gives some assurance of stability in time of crisis. The

Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment." *Id; see also id.* (Breyer, J. concurring) ("Congress has not issued the Executive a 'blank check.' Indeed, Congress has denied the President the legislative authority to create military commissions of the kind at issue here.").

The application of the *Youngstown-Hamdan* framework in the present context is straightforward. The Executive does not have the authority to disregard FISA any more than it had the authority to disregard the Uniform Code of Military Justice in *Hamdan* or the Labor Management Relations Act in *Youngstown*. Like the statutes that were at issue in those cases, FISA was the result of "a deliberative and reflective process engaging both of the political branches," *Hamdan*, 126 S. Ct. at 2799 (Kennedy, J., concurring), and, when Congress enacted the statute, it "acted with full consciousness of what it was doing and in the light of much recent history," *Youngstown*, 343 U.S. at 602 (Frankfurter, J., concurring). Notably, when it was enacted, FISA was fully supported by the President, the Attorney General, and the directors of the FBI, CIA, and NSA. *See* S. Rep. No. 95-604, pt. I, at 4 (1977); Foreign Intelligence Electronic Surveillance: Hearings Before the Subcomm. on Legislation of the House Permanent Select Comm. on Intelligence, 95th Cong., 2d Sess., at 31 (1978) (Letter from John M.

Harmon, Assistant Attorney General, Office of Legal Counsel, to Edward P. Boland, Chairman, House Permanent Select Comm. on Intelligence (Apr. 18, 1978). In his signing statement, President Carter characterized the statute as the result of "the legislative and executive branches of Government work[ing] together toward a common goal."[44]

To use Justice Kennedy's phrase, FISA was a law "derived from the customary operation of the Executive and Legislative Branches." *Hamdan*, 126 S. Ct. at 2799 (Kennedy, J., concurring). It is not open to the President simply to ignore it. *See, e.g., Hamdan*, 126 S. Ct. at 2774 n.23; *Youngstown*, 343 U.S. at 644 (stating that the President "has no monopoly of 'war powers,' whatever they are"); *id.* at 662 (Clark, J., concurring) (stating that "where Congress has laid down specific procedures to deal with the type of crisis confronting the President, he must follow those procedures in meeting the crisis"); *id.* at 633 (Douglas, J., concurring) ("the power to execute the laws starts and ends with the laws Congress has enacted"); *id.* at 603-04 (Frankfurter, J., concurring).[45]

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[44] *See* Jimmy Carter, *Statement on Signing S. 1566 Into Law*, (Oct. 25, 1978) *available at* http://www.cnss.org/Carter.pdf.

[45] *See also* Richard A. Epstein, *Executive Power, The Commander in Chief, and the Militia Clause*, 34 Hofstra L. Rev. 317, 328 (2005) ("The President as commander in chief does not have the power to ignore the general rules set out by the Congress, whether in FISA or anywhere else."); Adam Burton, *Fixing FISA for Long War: Regulating Warrantless*

The President apparently believes that FISA is outdated, inefficient, or burdensome. But as the district court noted, Op. 41-42, the President's doubts about a law's efficiency do not give him the authority to disregard it. "All executive power – from the reign of ancient kings to the rule of modern dictators – has the outward appearance of efficiency." *Youngstown*, 343 U.S. at 629 (Douglas, J., concurring). If the President believes FISA is unwise, he must make his case to Congress, and Congress can amend the law if it sees fit. But "[t]he need for new legislation does not enact it. Nor does it repeal or amend existing law." *Youngstown*, 343 U.S. at 604 (Frankfurter, J., concurring); *see also The Confiscation Cases,* 87 U.S. (20 Wall.) 92, 112-13 (1873); *Little v. Barreme*, 2 Cranch. 170, 177-78 (1804). It is true, of course, that "[l]egislative action may indeed often be cumbersome, time-consuming, and apparently inefficient." *Youngstown*, 343 U.S. at 629 (Douglas, J., concurring). But "[t]he doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power." *Id.* (quoting *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting)).

Surveillance in the Age of Terrorism, 4 Pierce L. Rev. 381, 393-95 (2006) (stating that the "President's 'inherent power' as Commander-in-Chief does not permit him to conduct surveillance outside of FISA").

No derogation from these principles has ever been permitted, even in times of national security crisis. In *Youngstown*, the President argued that his actions were "necessary to avert a national catastrophe." 343 U.S. at 582. In *Hamdan*, the President argued that his actions were a measured response to "the danger to the safety of the United States and the nature of international terrorism." 126 S. Ct. at 2791. The Supreme Court nonetheless held in both cases that the President could not disregard duly enacted statutory law. The government now suggests, as it did in *Youngstown* and *Hamdan*, that the President's actions are a "vital" response to a pressing emergency. Gov't Br. 46. But as the Court observed in another context, "[e]mergency does not create power." *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 425-26 (1934). "The Constitution was adopted in a period of grave emergency. Its grants of power to the federal government . . . were determined in the light of emergency, and they are not altered by emergency." *Id.*; *see also Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120-21 (1866) ("The Constitution of the United States is a law for rules and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the

great exigencies of government."); *Hamdi*, 542 U.S. at 536 (plurality opinion) (stating that even "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens"). Notably, Congress intended FISA to control even in emergencies; the statute speaks directly to this point. *See* 50 U.S.C. §§ 1811 & 1805(f).

Turning separation-of-powers jurisprudence on its head, the government argues that, if the Program does violate FISA, then FISA is an unconstitutional encroachment on the President's constitutional authority "to gather foreign intelligence, defend the Nation against attack, and command the armed forces during wartime." Gov't Br. 46. But if the Program conflicts with FISA (as the government has conceded that it does), it is the Program, not FISA, that is unconstitutional. That is the plain import of *Youngstown* and *Hamdan* and indeed of the very concept of the separation of powers. The President might have constitutional authority to engage in warrantless foreign intelligence surveillance *in the context of Congressional silence*. As the government notes, some courts reached this conclusion before FISA was enacted. Gov't Br. 45.[46] But, through FISA, Congress has

[46] The government suggests that the Foreign Intelligence Surveillance Court of Review ("FISCR") reached this conclusion in *In re Sealed Case*, 310 F.3d 717 (FISA Ct. Rev. 2002), but that case provides no real support for the government's position. The FISCR did not actually analyze the issue of the President's inherent authority but simply made an unsupported

permissibly acted in a field of shared constitutional authority to regulate the exercise of the President's power. The *Youngstown-Hamdan* line of cases makes clear that the President cannot simply ignore limitations that Congress has, in proper exercise of its own authority, placed on his authority. *See, e.g., Hamdan*, 126 S. Ct. at 2774 n.23; *Youngstown*, 343 U.S. at 645-46 (Jackson, J., concurring) (stating that the President's "command power . . . is subject to limitations consistent with a constitutional Republic whose law and policy-making branch is a representative Congress").

The government's argument is especially troubling because the Program involves activity that takes place not on a far-away battlefield but *inside* the nation's borders. But the President's war powers, even broadly construed, cannot supply a basis for unchecked intrusion into the communications of U.S. citizens and others residing within the nation's borders. *Cf. Youngstown,* 343 U.S. at 642 ("[N]o doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture."); *id.* 587 (majority opinion) ("Even though the

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allusion to that authority in *dicta*. The Court had no occasion to address the inherent authority issue because the case involved surveillance under FISA.

'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief has [the authority to seize property inside the United States]. This is a job for the Nation's lawmakers, not for its military authorities.").

The government contends that the doctrine of constitutional avoidance requires this court to uphold the Program, but to support this contention the government mauls the doctrine beyond recognition. The doctrine of constitutional avoidance is a tool of statutory construction that requires courts, when presented with "competing plausible interpretations of a statutory text," to choose the interpretation that does not raise constitutional doubt. *Clark v. Martinez*, 543 U.S. 371, 381 (2005). But the government has not offered a "competing plausible interpretation[]" of FISA and the AUMF. As discussed above, the only plausible interpretation of these statutes is one that renders the Program unlawful. *See* Op. 36 ("[i]n this case, the President has acted, undisputedly, as FISA forbids"). Because the statutory language is clear, the government's reliance on the doctrine of constitutional avoidance is misplaced. To uphold the Program in this context would not avoid the constitutional question but decide it.

IV. THE PROGRAM VIOLATES THE FOURTH AMENDMENT BECAUSE IT INVOLVES THE INTERCEPTION OF PRIVATE COMMUNICATIONS WITHOUT A WARRANT.

A. The Program is presumptively unreasonable under the Fourth Amendment.

The framers drafted the Fourth Amendment in large part to prevent the executive Branch from engaging in the kind of general searches used by King George to harass and invade the privacy of the colonists. *Berger v. New York*, 388 U.S. 41, 58 (1967). It has been settled law for almost forty years that the Fourth Amendment requires the government to obtain a warrant before intercepting the content of a telephone call. *See Katz*, 389 U.S. at 352; *Berger*, 388 U.S. at 51; *Blake v. Wright*, 179 F.3d 1003, 1008 (6th Cir. 1999). Wiretapping "[b]y its very nature . . . involves an intrusion on privacy that is broad in scope," *Berger*, 388 U.S. at 56, and thus bears a dangerous "similarity to the general warrants out of which our Revolution sprang." *id.* at 64 (Douglas, J., concurring). Indeed, "[f]ew threats to liberty exist which are greater than that posed by the use of eavesdropping devices." *Berger*, 388 U.S. at 63. A wiretap "constitutes a dragnet, sweeping in all conversations within its scope – without regard to the participants or the nature of the conversations. It intrudes upon the privacy of those not even

suspected of crime and intercepts the most intimate of conversations." *Id.* at 65 (Douglas, J., concurring).

Any search conducted without a warrant is presumptively unreasonable. "Over and again this Court has emphasized that the mandate of the Fourth Amendment requires adherence to judicial processes, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions." *Katz*, 389 U.S. at 357 (citation, internal punctuation, and footnotes omitted); *see also United States v. Karo*, 468 U.S. 705, 717 (1984); *Payton v. New York*, 445 U.S. 573, 586 (1980); *Chimel v. California*, 395 U.S. 752, 762-63 (1969). The warrant requirement is no mere "formalit[y]" – it is a crucial safeguard against abuses by executive officers. *McDonald v. United States*, 335 U.S. 451, 455 (1948). "The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals." *McDonald*, 335 U.S. at 455-56; *see also U.S. v. Chambers,* 395 F.3d 563 (6th Cir. 2005).

Because the Program authorizes the interception of calls and e-mails without a warrant, the district court correctly held that it is "presumptively

unreasonable." Op. 30. As the district court further recognized, the Program does not fall into one of the "specifically established and well-delineated exceptions" to the warrant requirement. Op. 30. The government does not actually defend the program on the merits; instead the government argues that it was improper for the district court to decide the Fourth Amendment claim without more facts. But the question of whether there exists a relevant exception to the warrant requirement is a purely legal one, and no facts could make reasonable a program of warrantless surveillance inside the nation's borders.

B. No exception to the warrant requirement permits a Program of warrantless surveillance inside this nation's borders.

1. The warrant requirement applies with full force to foreign intelligence surveillance within the United States.

The Supreme Court has never recognized an exception to the warrant requirement for intelligence surveillance inside the United States. In *United States v. United States District Court*, 407 U.S. 297 (1972) ("*Keith*"), the Supreme Court expressly rejected such an exception, noting that the Fourth Amendment's promise of privacy "cannot properly be guaranteed if security surveillances may be conducted solely within the discretion of the Executive Branch ...." *Id.* at 316-17. The Court observed that "[s]ecurity surveillances

are especially sensitive because of the inherent vagueness of the domestic security concept, the necessarily broad and continuing nature of intelligence gathering, and the temptation to utilize such surveillances to oversee political dissent." *Id.* at 320. The Court rejected the government's argument that a warrant requirement would "fracture the secrecy essential to official intelligence gathering," and it noted that the judiciary had substantial experience handling sensitive and confidential issues in other contexts. *Id.* at 320-321.

Keith concerned surveillance relating to domestic security threats rather than foreign security threats but the *Keith* Court's reasoning applies with equal force here. A neutral intermediary between Americans and executive officers is no less necessary because the threat comes from foreign agents rather than domestic ones. In the absence of judicial oversight, no one can be sure that surveillance targets *are* foreign agents. As a result, foreign intelligence surveillance presents exactly the same danger that the government will be tempted to use such surveillance "to oversee political dissent." *Id* at 320. At the same time, the judiciary is, if anything, *more* qualified to deal with national security issues than it was when *Keith* was decided, because it now has almost thirty years of experience with FISA.

In fact, FISA forecloses any argument that the warrant requirement can be dispensed with simply because the executive branch claims that its actions are directed at foreign agents. As the Senate Intelligence Committee explained, FISA "embodies a legislative judgment that court orders and other procedural safeguards are necessary to insure that electronic surveillance by the U.S. government within this country conforms to the fundamental principles of the Fourth Amendment." S. Rep. No. 95-701 at 13 (1978), *reprinted in* 1978 U.S.C.C.A.N. at 3982; *see also id.* at 3977; S. Rep. No. 96-604 at 5 (1978), *reprinted in* 1978 U.S.C.C.A.N. at 3906.

FISA is a measure of the government's constitutional obligation under the Fourth Amendment. Indeed, courts have routinely looked to FISA (and Title III) to determine that obligation in other contexts. *See, e.g., United States v. Mesa-Rincon*, 911 F.2d 1433, 1438 (10th Cir. 1990) (relying on FISA standards as guidance in determining constitutional standards for domestic video surveillance); *United States v. Cuevas-Sanchez*, 821 F.2d 248, 252 (5th Cir. 1987) (relying on Title III standards to determine whether video surveillance complies with the Fourth Amendment); *United States v. Biasucci,* 786 F.2d 504, 510 (2d Cir. 1986) (looking to Title III "as a measure of the government's constitutional obligation" (internal quotation marks omitted) with respect to audio surveillance); *United States v. Torres,*

751 F.2d 875, 884 (7th Cir. 1984) (holding that video surveillance that does not meet particularity requirement under Title III would violate the Fourth Amendment even though Title III did not explicitly cover such surveillance); *see also United States v. Truong Dinh Hung*, 629 F.2d 908, 915 n.4 (4th Cir. 1980).

The government cites a number of cases that recognized a foreign intelligence exception to the warrant requirement.[47] But virtually all of those cases were decided before Congress enacted FISA.[48] Even if this Court's analysis could disregard FISA, none of the cases cited by the government articulated a persuasive basis for distinguishing *Keith*.

2. The "special needs" doctrine does not justify an exception from the warrant requirement.

The government argues that foreign intelligence presents a "special need" not subject to the Fourth Amendment's ordinary requirements, but the special needs doctrine has no application here. First, a hallmark of the special needs cases is that they have involved either searches in which the

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[47] *See., e.g., Truong*, 629 F.2d at 912-15; *United States v. Butenko*, 494 F.2d 593, 604-05 (3d Cir. 1974) (en banc); *United States v. Buck*, 548 F.2d 871, 875 (9th Cir. 1977); *United States v. Brown*, 484 F.2d 418, 426 (5th Cir. 1973).

[48] The only post-FISA case cited by the government in this context is *In re Sealed Case,* in which the FISCR suggested the existence of a foreign intelligence exception in *dicta*, without analysis, and referencing only pre-FISA cases. *In re Sealed Case,* 310 F.3d at 742; *see also* n. 46 *supra*.

intrusion on privacy is minimal, *see, e.g., Terry v. Ohio*, 392 U.S. 1 (1968) (stop-and-frisk); *Illinois v. Lidster,* 540 U.S. 419 (2004) (brief highway stops to identify crime witnesses), or contexts in which individuals have a reduced expectation of privacy, *see, e.g., United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (border searches); *Bell v. Wolfish,* 441 U.S. 520 (1979) (prisons); *Vernonia School District 47J v. Acton,* 515 U.S. 646 (1995) (student drug tests); *National Treasury Employees Union v. Von Raab,* 489 U.S. 656 (1989) (employee drug tests); *Samson v. California,* 126 S. Ct. 2193 (2006) (parolees). As discussed above, however, the expectation of privacy is at its zenith in private conversations. *See supra* at 42.

Second, the special needs doctrine has no application where the government is targeting particular people for warrantless searches rather than selecting them randomly or according to another system that does not involve executive discretion. *Cf. Chandler v. Miller,* 520 U.S. 305, 309 (1997) (stating that special needs doctrine represents a "closely guarded category of constitutionally permissible *suspicionless* searches" (emphasis added)); *U.S. v. Martinez-Fuerte,* 428 U.S. at 559 (upholding constitutionality of checkpoint because "checkpoint operations both appear to and actually involve less discretionary enforcement activity"); *U.S. v. Brignoni-Ponce*, 422 U.S. 873, 882 (1975) (rejecting roving patrol stops that

would have subjected citizens to search "solely at the discretion of Border Patrol officers"). Where the government selects people for random searches, the courts have held that executive discretion is limited by the nature of the program. Here, however, executive discretion is central to the Program's operation, and judicial supervision is therefore indispensable.

Third, the special needs doctrine applies only where "the warrant and probable cause requirement [are] impracticable." *O'Connor v. Ortega*, 480 U.S. 709, 720, 725 (1987) (plurality opinion). FISA makes clear that the warrant and probable cause requirements are workable here. Op. 41-42. The statute includes "numerous concessions to stated Executive needs," including "reducing the probable cause requirement to a less stringent standard, provision of a single court of judicial experts, and extension of the duration of approved wiretaps from thirty days (under Title III) to a ninety day term." Op. 31. Indeed, FISA accommodates any special need the government could plausibly describe, because it also permits for warrantless surveillance during emergencies. *Id.*

Notably, statistics released annually by the Justice Department suggest that FISA has not at all hampered the ability of the executive branch to monitor foreign agents. According to those statistics, the government submitted almost 19,000 surveillance applications to the FISA Court

between 1978 and 2004. *See* FISA Annual Reports to Congress 1979-2004, at <http://www.fas.org/irp/agency/doj/fisa/#rept>. The FISC denied only four of these applications; granted approximately 180 applications with modifications; and granted the remaining 18,451 without modifications. *Id.* If FISA is to be criticized, it must be criticized not because it is overly restrictive but because it is insufficiently so.

C. The Program is manifestly unreasonable.

The government insists that the trial court erred because it refused to consider whether the Program is "reasonable." But the Program does not comply with the Fourth Amendment unless it falls into one of the closely-guarded exceptions to the warrant requirement, which it does not. *See Mincey v. Arizona*, 437 U.S. 385, 390 (1978). The proper inquiry is a purely legal one – whether there is an applicable exception to the warrant requirement – not whether the Program is reasonable in some free-floating sense of the word. *Cf. Keith*, 407 U.S. at 317 ("It may well be that, in the instant case, the Government's surveillance . . . was a reasonable one which readily would have gained prior judicial approval. But . . . the Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised.").

In any event, the Program is manifestly unreasonable. As an initial matter, the Supreme Court has never upheld as reasonable a surveillance program that violates the requirements of a duly enacted statute. Further, the courts have never upheld as reasonable a program of electronic surveillance not supported by probable cause. The Supreme Court's Fourth Amendment cases clearly "indicate that even a search that may be performed without a warrant must be based, as a general matter, on probable cause." *Skinner v. Ry. Labor Executives' Ass'n,* 489 U.S. 602, 624 (1989); *see also Kirk v. Louisiana*, 536 U.S. 635, 638 (2002) (per curiam) (probable cause required even where exigent circumstances justify warrantless search of home); *Almeida-Sanchez v. United States,* 413 U.S. 266, 269 (1973) (probable cause required for warrantless searches of automobiles). While "stop and frisk" searches and other searches based on "special needs" are sometimes permitted upon a lesser quantum of suspicion, *see, e.g., Terry,* 392 U.S. 1, the logic of those cases turns on the fact that the searches are minimally intrusive, which is not at all the case here.

The lack of a probable cause requirement is particularly problematic because the decision to initiate surveillance is made by NSA shift supervisors. Even some circuits that upheld a foreign intelligence exception to the warrant requirement prior to FISA held that the exception is available

only "if there has been a specific authorization by the President, or by the Attorney General as his chief legal advisor, for the particular case." *United States v. Ehrlichman*, 546 F.2d 910, 925 (D.C. Cir. 1976); *accord*, *Katz*, 389 U.S. at 364 (White, J., concurring); *Brown*, 484 F.2d at 426. Relying on NSA shift supervisors to safeguard the privacy rights of Americans would resurrect the precise evil against which the Fourth Amendment was directed, by "plac[ing] the liberty of every man in the hands of every petty officer." *Stanford v. Texas,* 379 U.S. 476, 481 (1965) (quoting *Boyd v. United States,* 116 U.S. 616, 625 (1886)) (internal quotation marks omitted).

V. THE PROGRAM VIOLATES THE FIRST AMENDMENT BECAUSE IT INVOLVES THE SURVEILLANCE OF PROTECTED COMMUNICATIONS BUT FAILS TO COMPLY WITH CONSTITUTIONALLY MANDATED SAFEGUARDS.

As the district court correctly recognized, Op. 31-33, unfettered executive authority to search and surveil the content of telephone calls and e-mails threatens not only the right to privacy but the freedom of expression as well. *See Marcus v. Search Warrant*, 367 U.S. 717, 729 (1961) (the Bill of Rights "was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression"); *see also Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978); *Keith*, 407 U.S. at 313; *Stanford*, 379 U.S. at 485; *Zweibon*

v. Mitchell, 516 F.2d 594, 635-36 (D.C. Cir. 1975) (en banc) (plurality opinion).

The Program involves the surveillance of activity protected by the First Amendment but fails to comply with constitutionally mandated safeguards. As the Supreme Court has noted, "only a judicial determination" provides "the necessary sensitivity to freedom of expression." *Freedman v. Maryland*, 380 U.S. 51, 58 (1965); *see also City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750 (1988); *Marcus*, 367 U.S. at 73. Yet the Program operates without judicial supervision of any kind. The lack of judicial supervision allows the NSA to impair First Amendment rights at will, without ever having to prove that its surveillance is warranted by a compelling government interest and that it is the least restrictive alternative. *Gibson v. Fla. Legislative Investigative Comm.*, 372 U.S. 539, 546 (1963); *Marshall v. Bramer*, 828 F.2d 355, 359 (6th Cir. 1987); *In re Grand Jury Proceedings*, 776 F.2d 1099, 1102-1103 (2d Cir. 1985). In fact, warrantless surveillance cannot be the least restrictive alternative given that FISA, a statute that accommodates the same government interest, has proved workable for over a quarter of a century.

VI. THE STATE SECRETS PRIVILEGE POSES NO BAR TO DETERMINING THE LEGALITY OF THE WARRANTLESS WIRETAPPING PROGRAM.

A. The state secrets privilege is a narrowly construed evidentiary privilege, not an immunity doctrine.

The district court correctly refused to dismiss plaintiffs' challenge to the Program on the basis of the state secrets privilege.[49] The court properly rejected the application of the privilege to information government officials had publicly admitted, Op. 13-14, and held that the legality of the Program could be determined based on public, non-privileged, and undisputed evidence, Op. 14-15. Two other courts have similarly rejected the government's attempt to avoid judicial scrutiny of the Program. *Al-Haramain Islamic Foundation v. Bush,* --- F. Supp. 2d ---, 2006 WL

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[49] Though the district court accepted much of the government's privilege claim, it is unclear whether the court held that the privilege applied only to specific material submitted by the government *ex parte*, or whether the court held that the privilege would apply to all discoverable information about the wiretapping and datamining programs. *Compare* Op. 12 (holding "privilege applies" because disclosure of "the information" would cause harm to national security (internal citation omitted)) *with* Op. 15 (holding the "privilege applies to Plaintiffs' data-mining claims" but "does not apply to Plaintiffs' remaining claims"). The question is irrelevant to the government's appeal, however, because the district court properly held that privileged information was unnecessary to resolve the legality of the Program. Should this Court determine that more facts are necessary for plaintiffs' case or the government's defenses, the Court should remand the case to the district court. *See infra* at 67-70.

2583425 (D. Or. Sept. 7, 2006); *Hepting v. AT & T Corporation,* 439 F. Supp. 2d 974 (N.D. Cal. 2006).

The state secrets privilege is a common law evidentiary rule that permits the government to "block discovery in a lawsuit of any information that, if disclosed, would adversely affect national security." *Ellsberg v. Mitchell,* 709 F.2d 51, 56 (D.C. Cir. 1983); *see also United States v. Reynolds,* 345 U.S. 1, 10 (1953); *Tenenbaum v. Simonini*, 372 F.3d 776, 777 (6th Cir. 2004). The privilege is usually invoked and evaluated in response to particular discovery requests, not as the basis for dismissal of legal claims.[50] It protects only evidence that would *legitimately* cause harm to national security, *see, e.g., Ellsberg*, 709 F.2d at 57, should be narrowly construed, *see, e.g., Jabara,* 75 F.R.D. at 480, and is properly invoked on an item-by-item basis rather than over broad categories of information, *see, e.g., In re United States,* 872 F.2d 472, 478 (D.C. Cir. 1989).

The Supreme Court laid out the proper use of the state secrets privilege in *Reynolds*, over fifty years ago. There, the government asserted the privilege in discovery to block disclosure of a flight accident report. 345 U.S. at 3. The Court upheld the claim of privilege but did not dismiss the

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[50] *See, e.g., Jabara v. Kelley,* 75 F.R.D. 475, 478-79, 490 (E.D. Mich. 1977); *ACLU v. Brown*, 619 F.2d 1170 (7th Cir. 1980) (en banc); *Ellsberg,* 709 F.2d at 54-55; *Halkin v. Helms*, 690 F.2d 977, 985 (D.C. Cir. 1982) (*"Halkin II"*); *Halkin v. Helms*, 598 F.2d 1, 4 (D.C. Cir. 1978) (*"Halkin I*).

suit. Rather, because the privileged information was not necessary to plaintiffs' case, the Court remanded the case for further discovery. *Id.* at 11. Following *Reynolds*, courts have held that the privilege is not to be lightly accepted because of the "serious potential for defeating worthy claims for violations of rights that would otherwise be proved . . . ." *In re United States*, 872 F.2d at 476. Outright dismissal of a suit on the basis of the privilege, which deprives a litigant of her constitutional right to petition the courts for relief, is "drastic," *Fitzgerald v. Penthouse Intern. Ltd.*, 776 F.2d 1236, 1242 (4th Cir. 1985), and "draconian," *In re United States,* 872 F.2d at 477. Accordingly, courts have refused to dismiss suits prematurely based on the government's unilateral assertion that state secrets are necessary and relevant to adjudicating all of the claims – particularly without first considering all non-privileged evidence.[51]

The district court recognized that dismissal on the basis of the state secrets privilege is proper only in two narrow circumstances, neither of which supports dismissal here: (1) where the "very subject matter" of the

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[51] *See, e.g., Clift v. United States*, 597 F.2d 826, 830 (2d. Cir. 1979); *Heine v. Raus,* 399 F.2d 785, 791 (4th Cir. 1968); *In re United States,* 872 F. 2d. at 477; *Ellsberg,* 709 F.2d 66-70; *Attn'y Gen. of the United States v. The Irish People, Inc.*, 684 F.2d 928, 955 (D.C. Cir. 1982); *Crater Corp. v. Lucent Technologies Inc.,* 423 F.3d 1260, 1269 (Fed. Cir. 2005); *Monarch Assur. P.L.C. v. United States*, 244 F.3d 1356, 1364-65 (Fed. Cir. 2001); *Al-Haramain,* 2006 WL 2583425 at *10-11; *Hepting,* 439 F. Supp. 2d at 994; *Spock v. United States*, 464 F. Supp. 510, 519 (S.D.N.Y. 1978).

lawsuit is itself a state secret, *see DTM Research L.L.C. v. A.T.&T. Corp.*, 245 F.3d 327, 333-34 (4th Cir. 2001), or (2) where a court determines, after consideration of non-privileged evidence, that plaintiff cannot present a *prima facie* case, or that defendant cannot present a *valid* defense, without resort to privileged evidence, *see Ellsberg*, 709 F. 2d at 64 n.55; *Molerio v. F.B.I.*, 749 F. 2d 815, 822, 826 (D.C. Cir. 1984).

B. The very subject matter of this action is not a state secret.

The "very subject matter" doctrine, derived from the *Totten* line of cases, is "narrow" and rarely applied. *Fitzgerald,* 776 F.2d at 1241 n. 7, 1243-44.[52] Far too much about the program has been officially disclosed to plausibly call the "very subject matter" of this suit a state secret. Op. 11-12; *see also supra* at 3-4, 24-25. As another district court explained when similarly rejecting the government's motion to dismiss a lawsuit challenging the Program, "the existence of the Surveillance Program is not a secret, the subjects of the program are not a secret, and the general method of the

[52] The district court correctly concluded that the line of cases from *Totten v. United States,* 92 U.S. 105 (1875) to *Tenet v. Doe* do not apply to this case because "there is no secret espionage relationship between the Plaintiff[s] and the government." Op. 11; *see also Hepting,* 439 F. Supp. 2d at 991-994, *Terkel v. AT & T Corp,* 441 F. Supp. 2d 899 (N.D. Ill. 2006).

program . . . is not a secret." *Al-Haramain*, 2006 WL 2583425 at *6; *see also Hepting*, 439 F. Supp. 2d at 992-93 (same).[53]

The government has engaged in an aggressive campaign to convince the American public of the program's legality, necessity, and efficacy. The Department of Justice has issued a 42-page White Paper discussing in detail its legal defenses and justifications for the program.[54] Government officials have publicly promoted and defended the legality, scope, and basis for the program before Congress;[55] in countless public appearances, radio addresses, news conferences, congressional campaign speeches, rallies, and even in public web discussions.[56] The state secrets privilege does not protect

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[53] *See also Turkmen v. Ashcroft*, No. 02-CV-2307, slip op. (E.D.N.Y, Oct. 3, 2006) (based in part on the extensive public disclosures about the surveillance program, ordering the government to disclose *ex parte* whether government, including the NSA, had ever intercepted conversations between plaintiffs and counsel).

[54] *See* Dep't of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* (Jan. 19, 2006) (*available at* http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf).

[55] *See, e.g., The Worldwide Terror Threat: Hearing Before the S. Select Comm. on Intelligence*, 109th Cong. (2006), *available at* 2006 WL 246499 (testimony of John Negroponte, Director of National Intelligence and Gen. Michael Hayden, then Principal Deputy Director of National Intelligence); *Oversight on the Dep't of Justice: Hearing Before the H. Comm. on the Judiciary*, 109th Cong. (2006) (testimony of Alberto Gonzales, Att'y Gen. of the United States).

[56] *See, e.g.,* Remarks to the Georgia Public Policy Foundation in Atlanta, Georgia, 42 WEEKLY COMP. PRESS DOC. 1576-1583 (Sept. 7, 2006); Remarks on the Terrorist Surveillance Program, 42 WEEKLY COMP. PRES.

information that is already acknowledged and widely known.[57] As the Supreme Court has recently held, there is a significant distinction between a matter that is covert and *unacknowledged,* and a matter that is covert but acknowledged: in the latter circumstance, even claims against intelligence services may proceed. *See Tenet v. Doe,* 544 U.S. 1, 9-10 (2005).[58] The

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DOC. 911 (May 11, 2006); The President's News Conference, 42 WEEKLY COMP. PRES. DOC. 125-29 (Jan. 26, 2006); Remarks Following a Visit to the National Security Agency at Fort Meade, Maryland, 42 WEEKLY COMP. PRES. DOC. 121-23 (Jan. 25, 2006) (public remarks by President Bush); Remarks at a Rally for the Michigan National Guard and Joint Services (July 10, 2006); Commencement Address at the United States Naval Academy (May 26, 2006); Remarks at a Rally for the Troops at Charleston Air Force Base (Mar. 17, 2006); Remarks at a Rally for the Troops at Fort Leavenworth (Jan. 6, 2006) (public remarks by Vice President Cheney); Alberto Gonzales, "Ask the White House" (Jan. 25, 2006), http://www.whitehouse.gov/ask/20060125.html.

[57] *See, e.g., Jabara,* 75 F.R.D. at 493 (where NSA interception of plaintiff's communications already revealed to Congress, "it would be a farce to conclude" that information "remain[ed] a . . . state secret."); *Spock,* 464 F. Supp. at 519-20 (refusing to dismiss a challenge to warrantless NSA surveillance where surveillance had "already received widespread publicity," and, thus, would "reveal[ ] no important state secret"); *In re United States*, 872 F.2d at 478; *Ellsberg*, 709 F.2d at 61; *see also Snepp v. United States,* 444 U.S. 507, 513 n.8 (1980) (suggesting that government would have no interest in censoring information already "in the public domain"); *Capital Cities Media, Inc. v. Toole*, 463 U.S. 1303, 1306 (1983); *Virginia Dept. of State Police v. The Washington Post*, 386 F.3d 567, 579 (4th Cir. 2004).

[58] *See, e.g., Kronisch v. United States,* 150 F.3d 112, 116 (2d Cir. 1998) (CIA clandestine LSD program); *Birnbaum v. United States,* 588 F.2d 319 (2d Cir. 1978) (CIA covert mail opening program); *Heine,* 399 F.2d 785 (defamation and covert CIA spies); *Air-Sea Forwarders, Inc. v. Air Asia Co. Ltd.,* 88 F.2d 176 (9th Cir. 1989) (CIA cover company); *Monarch Assur. P.L.C,* 244 F.3d at 1364 (covert CIA financing).

mere fact that this suit concerns foreign intelligence gathering is also insufficient to transform the subject matter into a state secret. Courts review the legality of executive branch foreign intelligence activity routinely without confronting any state secrets problem.[59] Courts evaluating challenges to warrantless surveillance, even NSA surveillance, have never considered the "very subject matter" a state secret. *See, e.g., Jabara v. Webster,* 691 F.2d 272; *Jabara,* 75 F.R.D. 475; *Ellsberg,* 709 F.2d 51; *Halkin I,* 598 F.2d 1; *Spock,* 464 F. Supp. 510. In fact, FISA itself provides for judicial review of foreign intelligence surveillance. Notably, every other court recently to address the question has rejected the government's argument that the "very subject matter" of the NSA's electronic surveillance program is a state secret. In the words of the *Hepting* court, "to defer to a blanket assertion of secrecy" would be "to abdicate" judicial duty, where "the very subject matter of [the] litigation has been so publicly aired." 439 F. Supp. 2d at 995; *see also id.* at 993 (finding that "AT&T's assistance in national security surveillance [was] hardly the kind of 'secret' that the *Totten* bar and the state secrets privilege were intended to protect or that a potential

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[59] *See, e.g., In re Sealed Case,* 310 F.3d 717 (Foreign Intel. Surv. Ct. of Review 2002); *United States v. Duggan,* 743 F.3d 59 (2d Cir. 1984); *United States v. Pelton,* 835 F.2d 1067 (4th Cir. 1987); *Doe v. Ashcroft,* 334 F.Supp.2d 471(S.D.N.Y. 2004); *Doe v. Gonzales,* 386 F. Supp. 2d 66 (D. Conn. 2005).

terrorist would fail to anticipate."); *Al-Haramain*, 2006 WL 2583425 at *9 (holding that the government had already "lifted the veil of secrecy on the existence of the Surveillance Program"); *Terkel v. AT&T Corp.,* 441 F. Supp. 2d at 907 (dismissing a challenge to AT&T's disclosure of customer records to the NSA without prejudice, but rejecting argument that the very subject matter of the datamining program was a state secret).

C. State secrets are not necessary or relevant to proving plaintiffs' claims or any valid defense to those claims.

The district court rightly held that plaintiffs established standing and a *prima facie* case that the Program violated FISA and the Constitution. Op. 13-14. The court also correctly rejected the government's argument that it could not defend against plaintiffs' claims without state secrets as "disingenuous and without merit," observing that the government had "repeatedly told the general public that there is a valid basis in law . . . without revealing or relying on any classified information." Op. 14-15.

The government's reliance on *Halkin* and *Ellsberg* to suggest that state secrets could defeat plaintiffs' standing is misplaced. First, the *Halkin* plaintiffs were actually *required* to prove that they had been wiretapped to prevail on their damages claims; plaintiffs seek no damages here. *Cf. Halkin I,* 598 F.2d at 6 (noting that "the acquisition of the plaintiffs'

communications [was] a fact vital to their claim"); *Halkin II,* 690 F.2d at 990; *see also Ellsberg,* 709 F.2d at 53. Second, the *Halkin* plaintiffs sought an injunction to stop surveillance of *particular individuals* — an injunction that would have been meaningless absent proof that each plaintiff had been wiretapped. *Halkin I,* 598 F.2d at 3; *Halkin II,* 690 F.2d at 981; *see also Jabara v. Kelley,* 476 F. Supp. 561 (E.D. Mich. 1979), *vacated on other grounds in* 691 F.2d 272 (6th Cir. 1982). By contrast, plaintiffs here seek to invalidate a surveillance program that violates the law on its face. Information about the identities of those under surveillance is not required to establish their claim. Finally, and most importantly, unlike *Halkin,* plaintiffs have proved, with entirely non-privileged evidence, that the program is causing concrete and ongoing harm to their ability to carry out their professional duties – harms that will continue regardless of whether plaintiffs are actually being wiretapped.

The government's AUMF defense presents the purely legal question of whether the AUMF authorized a judicially unsupervised program of electronic surveillance inside the United States. The defense turns on statutory construction, not facts – privileged or otherwise. *See supra* at 26-30. No set of facts, hypothetical or real, could bring the warrantless wiretapping of Americans, on American soil, within the scope of the AUMF.

Courts have repeatedly answered legal questions that involve the laws of war, incidents of war, and even actions on the battlefield without resort to state secrets and without causing harm to national security. *See, e.g., Hamdi,* 542 U.S. 507; *Madsen v. Kinsella,* 343 U.S. 341 (1952); *Ex parte Quirin,* 317 U.S. 1 (1942); *Dooley v. United States,* 182 U.S. 222 (1901); *The Prize Cases (The Amy Warwick),* 67 U.S. 635 (1862); *Mitchell v. Harmony,* 54 U.S. (13 How.) 115, 133 (1851).

Likewise, no additional facts could support to the government's claim that the President has the "inherent authority" to violate FISA. The President has no authority to violate laws validly enacted by Congress, or the Constitution, no matter what his motivations may be, and no matter what kind of threat or emergency is posed. *See supra* at 30-41. Details regarding the specific nature of the al Qaeda threat, whether privileged or not, therefore provide no defense to the President's action. The Supreme Court needed no facts about the specific threats posed by the Korean War or the precise need for steel to determine that the President exceeded his authority when he seized the steel mills in *Youngstown*, and needed no information about the particular conflict between the United States and France, or about the specific danger posed by ships coming from France, to hold that the President had no authority to seize such ships in *Little v. Bareme*. Those

cases, like the present case, presented a pure question of law regarding the separation of powers.

Plaintiffs' Fourth Amendment claim can also be resolved without further facts or state secrets. Warrantless surveillance is presumptively unreasonable. Determining whether the program justifies an exception to the warrant requirement does not require this Court to delve into the details of the program any more than determining whether there was a domestic intelligence exception required the Supreme Court, in *Keith,* to delve into the specifics of the Executive's domestic intelligence efforts. Facts concerning a particular "decision to conduct TSP surveillance" or details about "intelligence activities, sources, methods, or targets," Gov't Br. 36 (internal quotation marks omitted), are irrelevant to the legal inquiry. Neither *Keith* nor pre-FISA cases evaluating the purported foreign intelligence exception to the warrant requirement suggested that state secrets posed a bar to resolution of the purely legal claims. *Cf. Keith,* 407 U.S. 297; *Truong Dinh Hung*, 629 F.2d 908; *Brown,* 484 F.2d 418; *see also Zweibon,* 516 F.2d 594. Given that FISA has provided a workable framework for foreign intelligence surveillance for over a quarter of a century, no additional facts justify a departure from the warrant requirement. Similarly, because the government has already conceded that the program involves no judicial oversight, there

is no set of facts that could transform the Program into one that meets the requirements of the First Amendment.[60]

VII. THE TRIAL COURT ERRED BY DISMISSING PLAINTIFFS' DATAMINING CLAIMS BASED ON THE STATE SECRETS PRIVILEGE.

In addition to challenging defendants' warrantless interception of calls and e-mails that originate or end in the United States, plaintiffs challenged the NSA's datamining of communications records. R.1 Complaint, ¶¶ 53, 192-195. Although the parties had not moved past the pleading stage on these claims, the trial court erroneously granted defendants' motion to dismiss them based on the state secrets privilege. Op. 14-15, 42. Because "an aggrieved party should not lightly be deprived of the constitutional right to petition the courts for relief, " *Spock v. United States*, 464 F. Supp. at 519,

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[60] The injunction issued by the district court is appropriately tailored to address the substantive violations. There is no requirement that an injunction affect only the parties. *See e.g.*, *Washington v. Reno*, 35 F.3d 1093, 1103-04 (6th Cir. 1994) (modifying injunction but upholding its application to non-parties); *Bano v. Union Carbide Corp.*, 361 F.3d 696, 716 (2d. Cir. 2004) (a narrowly tailored injunction does not preclude the power of the federal courts to "enjoin [a party] from committing acts elsewhere"). In fact, a district court enjoys "a wide range of discretion in framing an injunction in terms it deems reasonable to prevent wrongful conduct." *Forschner Group, Inc., v. Arrow Trading Co. Inc.,* 124 F.3d 402, 406 (2d Cir. 1997) (internal citation omitted). The injunction is proper because the court invalidated the program on its face. *Nat'l Mining Ass'n v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1409 (D.C. Cir. 1988); *see also Sable Communications of California, Inc., v. F.C.C.*, 692 F. Supp. 1208 (C.D. Cal. 1988), *affirmed*, 492 U.S. 115 (1989).

the dismissal of claims prior to discovery based solely on the government's unilateral and categorical assertion that a case cannot proceed without state secrets is almost always improper. *See supra* at 55-57. Accordingly, courts have not hesitated to reject untimely or inappropriate claims of privilege.[61]

Contrary to the government's argument, the "very subject matter" of the Datamining Program is no state secret. Rather, the media have widely reported that the NSA is sifting through millions of Americans' communications records. *See Hepting*, 439 F. Supp. 2d at 988-89. Consumers have brought numerous lawsuits against telecommunications companies challenging the disclosure of records to the NSA. *See In re NSA Telecom. Records Litig.*, MDL No. 1791, Transfer Order, 1 n.1 (Aug. 9, 2006), *available at* http://www.jpml.uscourts.gov/MDL-1791-TransferOrder.pdf. The Director of the Department of Homeland Security has publicly defended the NSA's Datamining Program.[62] For these reasons, the *Hepting* court was "hesitant to conclude that the existence or non-

[61] *See, e.g., In re United States,* 872 F. 2d. at 477 (refusing "to dismiss the plaintiff's complaint merely on the basis of [the government's] unilateral assertion that privileged information lies at the core of th[e] case."); *supra* at 56 n. 51 (cases rejecting untimely dismissal); *see also Jabara,* 75 F.R.D. at 492-93; *Ellsberg,* 709 F.2d at 60 (rejecting parts of the government's privilege claim).

[62] Morton Kondracke, *NSA data mining is legal, necessary, Chertoff says*, REPORTER-TIMES, Jan. 25, 2006, *available at* http://www.reporter-times.com/?module=displaystory&story_id=30032&format=html.

existence of the [NSA datamining] program necessarily constitute[d] a state secret" given that "[c]onfirming or denying the existence of [that] program would only affect a terrorist who was insensitive" to the publicly admitted content interception aspects of the NSA program. 439 F. Supp. 2d at 997.

The trial court's dismissal of plaintiffs' datamining claims was also improper because it was premature to conclude that plaintiffs would need privileged evidence to establish a *prima facie* case. Op. 14. Prior to discovery, neither a court nor the parties can know or properly evaluate whether privileged evidence will be necessary or even relevant to the litigation. Attempting to discern the "impact of the government's assertion of the state secrets privilege" before the plaintiffs' claims have developed and the relevancy of privileged material has been determined "is akin to putting the cart before the horse." *Crater Corp.,* 423 F.3d at 1268; *see also In re United States,* 872 F.2d at 478 (affirming the district court's refusal to accept a "broad application of the privilege to all of petitioner's information, before the relevancy of that information ha[d] ever been determined"); *Hepting,* 439 F. Supp. 2d at 994.

Before resorting to dismissal, the district court should have more thoroughly probed the government's claim of privilege.[63] Further, it is unclear whether the district court accepted the government's categorical claim of privilege over *all* aspects of the Datamining Program,[64] or whether the district court examined the specific datamining evidence that it alleged was privileged.[65] Even if the district court had decided that the underlying evidence was properly privileged after examining it, the court had a duty to use "creativity and care" to devise "procedures which [would] protect the privilege and yet allow the merits of the controversy to be decided in some form." *Fitzgerald,* 776 F.2d at 1238 n.3. The district court should have permitted plaintiffs to try to prove their datamining claims with non-privileged evidence. To the extent any non-privileged information could be

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[63] *See Reynolds,* 345 U.S. at 11 (the plaintiff's need for allegedly privileged information "will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate."); *see also ACLU v. Brown,* 619 F.2d 1170, 1173 (7th Cir. 1980) (en banc); *Jabara,* 75 F.R.D. at 479.

[64] *See supra* at 54 n.49; *cf. In re United States,* 872 F.2d at 478 ("an item-by-item determination of privilege will amply accommodate the Government's concerns"); *National Lawyers Guild v. Attorney General,* 96 F.R.D. 390, 403 (S.D.N.Y. 1982) (privilege must be asserted on an document-by-document basis).

[65] *See, e.g., Ellsberg,* 709 F.2d at 59 n.37 ("[w]hen a litigant must lose if the claim is upheld and the government's assertions . . . careful *in camera* examination of the material is not only appropriate, but obligatory.") (internal citations omitted); *ACLU v. Brown,* 619 F.2d at 1173.

disentangled from privileged information, [66] plaintiffs should have had the opportunity to obtain such non-privileged information in discovery.[67] In civil cases, courts often utilize seals, protective orders, discovery in secure locations, or appoint special masters, to protect any sensitive information – including classified information – in civil proceedings.[68] Alternatively, the court could have played a more active role in "marshalling the evidence on both sides" by making "representative findings of fact from the files" and providing non-sensitive summaries of the information to the plaintiffs, *see, e.g.*, *The Irish People, Inc.*, 684 F.2d at 954, or even by posing questions

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[66] *Ellsberg*, 709 F.2d at 57 (court should make every effort to ensure that "sensitive information . . . [is] disentangled from nonsensitive information to allow for the release of the latter; *see also In re United States,* 872 F.2d at 479.

[67] Courts have routinely allowed nonsensitive discovery to proceed even after upholding a state secrets claim regarding other evidence. *See, e.g., Reynolds,* 345 U.S. at 11; *Monarch Assur. P.L.C.*, 244 F.3d at 1364; *Crater Corp.*, 255 F.3d at 1365; *In re Under Seal*, 945 F.2d 1285, 1287 (4th Cir. 1991); *Ellsberg*, 709 F.2d at 54; *The Irish People, Inc.*, 684 F.2d at 931; *Halkin I*, 598 F. 2d at 6; *see also Halkin II,* 690 F.2d at 984 (dismissing case only after the parties had fought "the bulk of their dispute on the battlefield of discovery")

[68] *See Loral Corp. v. McDonnell Douglas Corp,* 558 F.2d 1130, 1132 (2d Cir. 1977); *In re Under Seal,* 945 F.2d at 1287; *Heine,* 399 F.2d at 787; *In re United States,* 872 F.2d at 480; *Air-Sea Forwarders, Inc. v. United States,* 39 Fed. Cl. at 436-37; *In re Guantanamo Detainee Cases,* 344 F. Supp. 2d 174 (D.D.C. 2004); *United States v. Lockheed Martin Corp.,* 1998 WL 306755 (D.D.C. May 29, 1998).

about the merits to the government.[69] Yet another alternative available to the trial court, as a last resort, would have been to examine the evidence *in camera* and *ex parte*, at the appropriate point in the case, and to make a determination on the merits. In *Molerio*, for example, the court evaluated privileged and non-privileged evidence and resolved the claims on the merits. *Molerio*, 749 F.2d at 825; *see also Ellsberg*, 709 F.2d at 69 n.78.

Rather than hastily dismissing plaintiffs' datamining claims, the district court should have followed the measured approach taken by the *Hepting* court. After expressing skepticism about whether the NSA's Datamining Program should be considered a state secret, the court declined to dismiss claims regarding AT&T's participation in that program. *Hepting*, 439 F. Supp. 2d at 997. Rather, the court held that plaintiffs could later revisit the discovery issue in light of any future disclosures. *Id.* at 998. In summary, the dismissal of plaintiffs' datamining claims in the present case was avoidable and should be reversed. "Only when no amount of effort and care on the part of the court and the parties will safeguard privileged material is dismissal [on state secrets grounds] warranted." *Fitzgerald*, 776 F.2d at 1244.

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[69] *See, e.g.*, *United States v. Ehrilichman*, 376 F. Supp. at 32 n.1 ("courts have broad authority to inquire into national security matters so long as proper safeguards are applied").

CONCLUSION

For the reasons stated above, this Court should affirm the district court's judgment in so far as it enjoined the wiretapping program and reverse the district court's dismissal of plaintiffs' claims against the datamining program.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is in compliance with Rule 32(a)(7) of the Federal Rules of Appellate Procedure. The brief contains no more than 16,500 words, and was prepared in 14-point Times New Roman font using Microsoft Word.

Reid Rowe

ADDENDUM

DESIGNATION OF APPENDIX CONTENTS

The Plaintiffs designate the following record items for inclusion in the Appendix:

District Court Docket Entries

R. 6, Statement of Undisputed Facts

R. 4, Statement of Undisputed Facts, Exhibit A, The President's Radio Address, 41 WEEKLY COMP. PRES. DOC. 1880

R. 4, Statement of Undisputed Facts Exhibit B, Excerpt from Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence, Press Briefing (Dec. 19, 2005)

R. 4, Statement of Undisputed Facts Exhibit C, Excerpt from General Michael Hayden, Principal Deputy Director of National Intelligence, Address to the National Press Club (Jan. 23, 2006)

R. 4, Statement of Undisputed Facts Exhibit D, Excerpt from President's News Conference, 41 WEEKLY COMP. PRES. DOC. 1885 (Dec. 19, 2005)

R. 4, Statement of Undisputed Facts, Exhibit E, Excerpt from James Taranta, *A Strong Executive*, WALL STREET JOURNAL, Jan. 28, 2006, at A8

R. 4, Statement of Undisputed Facts, Exhibit F, Excerpt from Letter from William E. Moschella, Assistant Attorney General, to Pat Robert, Chairman of Senate Select Committee on Intelligence; John D. Rockefeller IV, Vice Chairman of Senate Select Committee on Intelligence; Peter Hoekstra, Chairman, Permanent Select Committee on Intelligence; Jane Harman, Ranking Minority Member, Permanent Select Committee on Intelligence (Dec. 22, 2005)

R. 4, Statement of Undisputed Facts, Exhibit G, Excerpt from Alberto Gonzales, "*Ask the Whitehouse*" (Jan. 25, 2006)

R. 4, Statement of Undisputed Facts, Exhibit H, Excerpt from *Wartime Executive Power and the NSA's Surveillance Authority: Hearing Before the Senate Judiciary Comm.*, 109th Cong. (2006), available on Westlaw at 2006 WL 270364 (F.D.C.H.)

R. 4, Statement of Undisputed Facts, Exhibit I, Declaration of Larry Diamond

R. 4, Statement of Undisputed Facts, Exhibit J, Declaration of Nancy Hollander

R. 4, Statement of Undisputed Facts, Exhibit K, Declaration of Tara McKelvey

R. 4, Statement of Undisputed Facts, Exhibit L, Declaration of William Swor

R. 47, Plaintiffs' Reply in Support of Motion for Partial Summary Judgment, Exhibit M, Declaration of Leonard M. Niehoff

R. 47, Plaintiffs' Reply in Support of Motion for Partial Summary Judgment, Exhibit N, Declaration of Barnett R. Rubin

R. 47, Plaintiffs' Reply in Support of Motion for Partial Summary Judgment, Exhibit O, Declaration of Nazih Hassan

R. 47, Plaintiffs' Reply in Support of Motion for Partial Summary Judgment, Exhibit P, Declaration of Joshua L. Dratel

R. 47, Plaintiffs' Reply in Support of Motion for Partial Summary Judgment, Exhibit Q, Declaration of Mohammed Abdrabboh

R. 47, Plaintiffs' Reply in Support of Motion for Partial Summary Judgment, Exhibit R, Declaration of Nabih Ayad

Foreign Intelligence Surveillance Act, as amended,
50 U.S.C. § 1801 *et seq.*

50 U.S.C. § 1801 (a), (b), (h)

§ 1801. Definitions

As used in this subchapter:

* * * *

(a) "Foreign power" means--

(1) a foreign government or any component thereof, whether or not recognized by the United States;

(2) a faction of a foreign nation or nations, not substantially composed of United States persons;

(3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments;

(4) a group engaged in international terrorism or activities in preparation therefor;

(5) a foreign-based political organization, not substantially composed of United States persons; or

(6) an entity that is directed and controlled by a foreign government or governments.

(b) "Agent of a foreign power" means--

(1) any person other than a United States person, who--

(A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section;

(B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person's presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; or

(C) engages in international terrorism or activities in preparation therefore; or

(2) any person who--

(A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States;

(B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States;

(C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, for or on behalf of a foreign power;

(D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or

(E) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C) or knowingly conspires with any person to engage in activities described in subparagraph (A), (B), or (C).

* * * *

(h) "Minimization procedures", with respect to electronic surveillance, means--

(1) specific procedures, which shall be adopted by the Attorney General, that are reasonably designed in light of the purpose and technique of the particular surveillance, to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information;

(2) procedures that require that nonpublicly available information, which is not foreign intelligence information, as defined in subsection (e)(1) of this section, shall not be disseminated in a manner that identifies any United States person, without such person's consent, unless such person's identity is necessary to understand foreign intelligence information or assess its importance;

(3) notwithstanding paragraphs (1) and (2), procedures that allow for the retention and dissemination of information that is evidence of a crime which has been, is being, or is about to be committed and that is to be retained or disseminated for law enforcement purposes; and

(4) notwithstanding paragraphs (1), (2), and (3), with respect to any electronic surveillance approved pursuant to section 1802(a) of this title, procedures that require that no contents of any communication to which a United States person is a party shall be disclosed, disseminated, or used for any purpose or retained for longer than 72 hours unless a court order under section 1805 of this title is obtained or unless the Attorney General determines that the information indicates a threat of death or serious bodily harm to any person.

50 U.S.C. § 1806(a)

§ 1806. Use of information

(a) Compliance with minimization procedures; privileged communications; lawful purposes

Information acquired from an electronic surveillance conducted pursuant to this subchapter concerning any United States person may be used and disclosed by Federal officers and employees without the consent of the United States person only in accordance with the minimization procedures required by this subchapter. No otherwise privileged communication obtained in accordance with, or in violation of, the provisions of this subchapter shall lose its privileged character. No information acquired from an electronic surveillance pursuant to this subchapter may be used or disclosed by Federal officers or employees except for lawful purposes.

CERTIFICATE OF SERVICE

I certify that on this 13th day of November, 2006, I served the Brief for the Appellees by FedEx next-day courier, upon the following counsel:

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