PUBLIC UNCLASSIFIED BRIEF

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

BRIEF FOR THE APPELLANTS

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STATEMENT REGARDING ORAL ARGUMENT

This is an appeal from a district court order permanently enjoining the Terrorist Surveillance Program, which was authorized by the President of the United States to protect the Nation from further al Qaeda attacks. Because this case presents issues of the gravest order to the Nation, appellants request oral argument.

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. 1331. R.1 Complaint ¶4. 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, under Fed. R. App. P. 4(a). R.72 Notice of Appeal. This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

Whether—despite finding that the Government had appropriately invoked the state secrets privilege—the district court erred by (1) holding that the state secrets privilege does not preclude adjudication of either plaintiffs' assertion of standing or their claims on the merits; (2) holding unconstitutional a foreign intelligence gathering program determined by the Commander in Chief to be vital to protecting the Nation from further foreign attacks in wartime; or (3) permanently enjoining the Government from utilizing that program "in any way." R.71 Order at 1.

STATEMENT OF THE CASE

The district court entered an unprecedented order enjoining during wartime a foreign intelligence gathering program—known as the Terrorist Surveillance Program ("TSP")—deemed vital by the President and his top national security advisers to protect against future terrorist attacks. The President, acting as Commander in Chief, established the program in the aftermath of the attacks of September 11, 2001, the most deadly foreign attacks on American soil in the Nation's history. As explained in detail in the classified declarations made available to the district court and this

Court *ex parte, in camera*, the TSP has already proven critical to detecting and disrupting al Qaeda terrorist plots during the ongoing conflict.

In this action, various organizations and individuals allege that the TSP—which plaintiffs themselves describe as a secret Government program—is unlawful. The Government formally invoked the state secrets privilege and moved to dismiss the action on that ground.

The district court denied the Government's motion to dismiss and granted summary judgment in favor of plaintiffs. The district court found that the Government properly asserted the state secrets privilege and that disclosing privileged information in court proceedings would harm national security. Nevertheless, the court went on to hold that it could adjudicate both plaintiffs' assertion of standing and their claims on the merits without interfering with the state secrets privilege; concluded that plaintiffs had demonstrated standing and that the TSP is unlawful; and issued a permanent injunction against any further use of the TSP. After the district court denied a stay request, this Court stayed the injunction pending this appeal.

STATEMENT OF FACTS

I. The Terrorist Surveillance Program.

On September 11, 2001, al Qaeda agents who had entered the United States launched coordinated attacks along the East Coast of the United States, killing approximately 3,000 people—the highest single-day death toll from foreign attacks in the Nation's history. The President immediately declared a national emergency in view of "the continuing and immediate threat of further attacks on the United States." 66 Fed. Reg. 48,199 (2001). The United States also launched a large-scale military campaign against al Qaeda's haven in Afghanistan, and Congress authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" of September 11. See Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001). To this date, the Nation's armed forces remain engaged in a global conflict against the al Qaeda terrorist network of the highest possible stakes for America.

The September 11 attacks demonstrated the ability of al Qaeda operatives to infiltrate the United States and take American lives. The President has explained that "[t]he terrorists want to strike America again, and they hope to inflict even greater damage than they did on September the 11th." Press Conference of President Bush (Dec. 19, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/12/

20051219-2.html ("President's Press Conference"). Osama bin Laden and his top associates have repeatedly declared their intent to hit the United States and its allies again, and al Qaeda has successfully carried out deadly attacks in London, Madrid, and Indonesia. Thus, the President has made clear that detecting and thwarting al Qaeda agents in the United States remains a paramount national security concern. See *ibid.*

Against this backdrop, and in light of unauthorized disclosures in the media, the President acknowledged in December 2005 that he had authorized the TSP by directing the National Security Agency ("NSA") to intercept international communications into and out of the United States of persons linked to al Qaeda. See *ibid.* The Government has publicly stated that in order for a communication to be intercepted under this program, there must be reasonable grounds to believe 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. See Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence (Dec. 19, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html. The Government has not revealed the methods and means of the program, however, because of the harm to national security that would result from such disclosure. The President has determined that the NSA's

activities are "critical" to the national security, and "ha[ve] been effective in disrupting the enemy." President's Press Conference, *supra*.

II. Plaintiffs' Suit And The State Secrets Privilege Assertion.

A. The plaintiffs filed this suit alleging that they conduct international telephone calls for journalistic, legal, and scholarly purposes, and that the TSP is unlawful. In response, the United States formally asserted the state secrets privilege and related statutory privileges through the Director of National Intelligence, John Negroponte, and the NSA's Signals Intelligence Director, Major General Richard Quirk, and moved to dismiss. The state secrets privilege applies when "a reasonable danger exists that disclosing the information in court proceedings would harm national security interests," such as by "disclos[ing] intelligence-gathering methods or capabilities." *Tenenbaum v. Simoni*, 372 F.3d 776, 777 (6th Cir. 2004). The privilege requires dismissal of a case if the very subject matter of the action is a state secret (see *Tenet v. Doe*, 544 U.S. 1 (2005); *Totten v. United States*, 92 U.S. 105 (1875)), or if the plaintiff could not prove a *prima facie* case or the defendant could not establish a valid defense, without information protected by the privilege (see *United States v. Reynolds*, 345 U.S. 1 (1953)). See pp. 16-17, *infra*.

Director Negroponte and General Quirk explained in public declarations that disclosing information

> regarding the nature of the al Qaeda threat or to discuss the TSP in any greater detail [than has been made public] * * * would disclose classified intelligence information and reveal intelligence sources and methods, which would enable adversaries of the United States to avoid detection by the U.S. Intelligence Community and/or take measures to defeat or neutralize U.S. intelligence collection, posing a serious threat of damage to the United States' national security interests.

R.37 Negroponte Decl. ¶11; see R.38 Quirk Decl. ¶7. The Government also provided the district court with *ex parte, in camera* classified declarations of both Director Negroponte and General Quirk elaborating on the details of the TSP and the Government's assertion of the state secrets privilege. R.36 Notice of Lodging.

B. [REDACTED TEXT – PUBLIC TEXT CONTINUES ON PAGE 8]

C. In conjunction with its assertion of the state secrets privilege, the Government moved to dismiss or in the alternative for summary judgment. The Government explained that this litigation could not proceed because plaintiffs' allegations of injury were insufficient to establish standing to sue and, in any event, plaintiffs could not demonstrate their standing and the Government could not refute their standing without the disclosure of state secrets. The Government also argued that the state secrets privilege foreclosed adjudication of the case on the merits, both because the very subject matter of the suit was a state secret, and because the plaintiffs could not establish a *prima facie* case and the Government could not assert valid defenses without revealing state secrets. See R.34 Motion to Dismiss. Accordingly, the Government did not respond to plaintiffs' motion for partial summary judgment on the merits of their claims, and instead sought to stay that motion until after the state secrets issue was resolved.

III. The District Court's Permanent Injunction Against The TSP.

The district court denied the Government's motion to dismiss, granted plaintiffs' partial summary judgment motion, and permanently enjoined further use of the TSP. See R.71 Judgment and Permanent Injunction Order (published at 438 F. Supp. 2d 754).[1/]

[1/] The district court granted the Government's summary judgment motion with (continued...)

The district court first determined that the state secrets privilege "has been appropriately invoked." R.70 Memorandum Opinion ("Op.") at 12. It explained that, "[a]fter reviewing [the classified] materials, the court is convinced that the privilege applies 'because a reasonable danger exists that disclosing the information in court proceedings would harm national security interests, or would impair national defense capabilities, disclose intelligence-gathering methods or capabilities, or disrupt diplomatic relations with foreign governments.'" *Ibid.* (quoting *Tenenbaum*, 372 F.3d at 777). The court declined, however, to grant the Government's motion to dismiss on the ground of state secrets privilege.

Rather, the district court concluded that plaintiffs' challenge could proceed on the theory that their "claims regarding the TSP are based solely on what Defendants have publicly admitted." Op. 12-13. It held that plaintiffs had established standing to challenge the TSP because "[p]laintiffs here are not merely alleging that they 'could conceivably' become subject to surveillance under the TSP, but that continuation of the TSP has damaged them." Op. 19.

On the merits, the court focused on plaintiffs' Fourth Amendment claim, holding that "searches conducted without prior approval by a judge or magistrate

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[1/] (...continued)
respect to plaintiffs' "data mining" claim. See Op. 14. Plaintiffs cross-appealed from that aspect of the court's ruling, which the Government will address in its next brief.

[are] per se unreasonable." Op. 24. After discussing provisions of the Foreign Intelligence Surveillance Act (50 U.S.C. 1801 *et seq.*) ("FISA") and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (18 U.S.C. 2510 *et seq.*) ("Title III"), Op. 25-28,[2/] the court reiterated that the Fourth Amendment "requires prior warrants for any reasonable search," and concluded that the TSP violates the Fourth Amendment for that reason alone. Op. 31. The court then concluded that because, in its view, the TSP violates the Fourth Amendment, the program "violate[s] the First Amendment Rights of these Plaintiffs as well." Op. 33.

The court went on to state that the TSP violates the constitutional separation of powers because it is inconsistent with FISA. Op. 36-37. However, the court found "irrelevant" the question whether FISA could constitutionally curtail the President's inherent constitutional powers to gather foreign intelligence in wartime, reasoning that, "although many cases hold that the President's power to obtain foreign intelligence information is vast, none suggest[s] that he is immune from Constitutional requirements," including the Fourth Amendment. Op. 41. Finally, the court saw no "practical justifications" for the TSP. Op. 41-42.

[2/] FISA establishes procedures for the Attorney General to obtain from a special Foreign Intelligence Surveillance Court orders approving electronic surveillance for foreign intelligence purposes. See 50 U.S.C. 1804-1805. Title III addresses wiretapping in the general law enforcement context.

SUMMARY OF ARGUMENT

The district court took the unprecedented step of permanently enjoining a foreign intelligence gathering program authorized by the Commander in Chief to protect the Nation from foreign attack in wartime. The court's decision not only dismantles a vital tool that already has helped detect and disrupt al Qaeda plots, but directly contravenes settled case law, including the admonition of the Supreme Court to proceed with great caution in resolving challenges in this extraordinarily sensitive context.

The well-established state secrets privilege precludes litigation of plaintiffs' challenge to the TSP. The TSP is a highly classified foreign intelligence gathering program that the Commander in Chief has authorized in connection with the ongoing armed conflict against an enemy that already has inflicted the deadliest foreign attack on American soil in the Nation's history. The President and his national security advisers have determined that the TSP is necessary to protect the Nation from an ongoing national security threat of the highest order and is vital to waging and winning the ongoing armed conflict. Litigating even the standing of plaintiffs to maintain this action, let alone the legality of the TSP, would reveal extraordinarily sensitive intelligence information that, if disclosed, would cause the Nation grievous injury. Under the state secrets doctrine, this action therefore may not proceed.

Although the district court correctly found that the Government had properly invoked the state secrets privilege, it erred by failing to dismiss this action and, instead, granting summary judgment for plaintiffs. This decision was a product of both a misunderstanding of state secrets doctrine and a vastly oversimplified view of the relevant legal questions on the merits and what factors the court would need to consider in adjudicating plaintiffs' claims. As a threshold matter, the district court erred in determining that it could resolve plaintiffs' standing, and then in concluding that plaintiffs had demonstrated standing. The court recognized that the state secrets privilege protects against disclosure of whether plaintiffs have actually been the subject of surveillance under the TSP (as well as information concerning the scope and operation of the TSP). As a result, plaintiffs could not show standing, and the Government could not refute such a showing, without recourse to privileged materials.

The district court also erred in disposing of this case on the merits. To begin with, the court utterly failed to "proceed with the caution that [the Supreme Court has] indicated is necessary in this setting." *Hamdi v. Rumsfeld*, 542 U.S. 507, 539 (2004) (plurality opinion). In one fell swoop, the court denied the Government's motion to dismiss on the ground of state secrets privilege and granted plaintiffs' motion for summary judgment before the Government had an opportunity to appeal the court's ruling on the privilege, and without considering whether any other

intermediate steps might be appropriate before attempting to adjudicate the case on the merits. The procedure followed by the district court is the antithesis of the "prudent and incremental" decisionmaking called for by the Supreme Court in challenges to the exercise of the President's war powers, and is in stark contrast to the way other courts dealing with parallel challenges have proceeded. *Ibid.*

The substance of the district court's legal analysis fares no better. In an attempt to adjudicate this case without state secrets, the court seriously misstated and oversimplified the applicable legal principles. Thus, the district court held that warrantless searches are per se unreasonable under the Fourth Amendment. If Fourth Amendment law really were that simple, then it might have been possible to adjudicate the Fourth Amendment issue without state secrets. The court's holding, however, is contrary to well-settled Supreme Court precedent. The touchstone of whether a search is valid under the Fourth Amendment is *reasonableness*, and the Supreme Court has made clear in numerous cases that reasonableness is a context-specific inquiry and a warrantless search may be reasonable under the circumstances. Whether the TSP is "reasonable" for Fourth Amendment purposes could be meaningfully evaluated only in light of the particular contours of the terrorist threat against which the TSP is directed; the specific nature and scope of the TSP; the effectiveness of the TSP; and the degree to which the program is or is not intrusive.

Those considerations fall within the heartland of the state secrets privilege that the district court itself recognized was properly invoked.

The district court similarly erred in concluding that the TSP violates the First Amendment. Indeed, the court's First Amendment analysis is grounded entirely on its erroneous Fourth Amendment analysis. The court reasoned that, because the TSP, in the court's view, violates the Fourth Amendment, it follows that the TSP also contravenes the First Amendment. That reasoning is mistaken on its face, and, in any event, litigation over whether the TSP satisfies the First Amendment under any correct view of the relevant doctrine would be foreclosed by the state secrets privilege.

The court also erred to the extent that it concluded that the TSP violates FISA or the separation of powers doctrine. Congress has authorized the President to use the "fundamental incident[s] of waging war" in the ongoing conflict against al Qaeda. *Hamdi*, 542 U.S. at 519. Because the collection of foreign intelligence about the enemy in wartime is a fundamental and time-honored incident of armed conflict, such intelligence gathering is "unmistakably" (*ibid.*) covered by Congress's Authorization for the Use of Military Force and, consequently, is by no means barred by FISA. 50 U.S.C. 1809(a).

Even if the AUMF were ambiguous on this point, the doctrine of constitutional avoidance would require that any such doubt be resolved in favor of the President's

inherent constitutional authority to conduct warrantless foreign intelligence surveillance during wartime by intercepting the international communications of those affiliated with al Qaeda. If the constitutional question of Congress's authority to abridge the President's Commander-in-Chief authority were reached, FISA would be unconstitutional as plaintiffs seek to apply it here. But more to the point, the adjudication of that grave constitutional question would require consideration of the very facts the district court properly concluded were protected by the state secrets privilege, including facts concerning the threat facing our Nation, the nature of the surveillance, and the extent to which FISA would impede the President's ability to discharge his constitutional duty to defend the Nation against attack.

Finally, the scope of the district court's injunction is fatally overbroad. The court made no attempt to tailor its relief to the injury purportedly suffered by plaintiffs. Instead, the court issued the broadest conceivable injunction, prohibiting the Government from using the TSP "in any way." R. 71 Order at 1. The unnecessary breadth of the district court's injunction not only provides an additional basis for reversal, but underscores the blunderbuss manner in which the district court approached the extraordinarily sensitive questions raised by this litigation.

STANDARD OF REVIEW

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

ARGUMENT

I. THE DISTRICT COURT CORRECTLY FOUND THAT THE GOVERNMENT PROPERLY INVOKED THE STATE SECRETS PRIVILEGE.

The district court correctly found that the state secrets privilege applies in this case and bars the disclosure or consideration of classified information concerning the TSP. That finding requires dismissal because this case could not be litigated without the protected facts.

A. The Executive's ability to protect military or state secrets from disclosure has been recognized from the earliest days of the Republic. See *Totten*, *supra*; *Reynolds*, 345 U.S. at 6-7. Because "[g]athering intelligence information" is "within the President's constitutional responsibility for the security of the Nation as the Chief Executive and as Commander in Chief of our Armed forces" (*United States v. Marchetti*, 466 F.2d 1309, 1315 (4th Cir. 1972)), the state secrets privilege derives from the President's Article II powers to conduct foreign affairs and provide for the national defense. *United States v. Nixon*, 418 U.S. 683, 710 (1974).

"[T]he privilege to protect state secrets must head the list" of the various governmental privileges recognized in our courts. *Halkin v. Helms*, 598 F.2d 1, 7 (D.C. Cir. 1978) ("*Halkin I*"). It covers sensitive information that, among other things, would result in "disclosure of intelligence-gathering methods or capabilities." *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983). The privilege also protects

information that may appear innocuous on its face, but which in a larger context could reveal sensitive classified information. See *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998); *Halkin I*, 598 F.2d at 8.

An assertion of the state secrets privilege must be "accorded the 'utmost deference' and the court's review of the claim of privilege is narrow." *Kasza, supra*; accord *Tenenbaum*, 372 F.3d at 777. The courts must honor its assertion whenever "a reasonable danger exists that disclosing the information in court proceedings would harm national security interests." *Ibid.* "When properly invoked, the state secrets privilege is absolute. No competing public or private interest can be advanced to compel disclosure of information found to be protected by a claim of privilege." *Ellsberg*, 709 F.2d at 57.

If the very subject matter of the action is a state secret, the case must be dismissed. See *Tenet*, 544 U.S. at 8; *Totten*, 92 U.S. at 106-07; *Kasza*, 133 F.3d at 1166. Similarly, if "the plaintiff cannot prove the *prima facie* elements of her claim without nonprivileged evidence," or the privilege "'deprives the *defendant* of information that would otherwise give the defendant a valid defense to the claim," the case must be dismissed. *Kasza*, 133 F.3d at 1166; accord *Tenenbaum*, 372 F.3d at 777.

B. After reviewing classified materials the Government submitted for *ex parte, in camera* review, the district court correctly found that the Government had properly

invoked the state secrets privilege, and that "'the information for which the privilege is claimed qualifies as a state secret'" because "'a reasonable danger exists that disclosing the information in court proceedings would harm national security interests.'" Op. 12 (quoting *Tenenbaum*, 372 F.3d at 777).

Because the very subject matter of the action—the TSP—is a state secret, dismissal is required. Indeed, plaintiffs themselves have stressed throughout that "[t]his case challenges the legality of a *secret* government program." Pls.' Opp. to Mot. for Stay Pending Appeal 1 (emphasis added). That concession goes a long way toward plaintiffs conceding themselves out of court. To be sure, the President has acknowledged the *existence* of the TSP, but, as the district court recognized, the details of the program are protected by the state secrets privilege. See Op. 11-13. Here, it is the disclosure of those details that would harm the national security, in part by alerting al Qaeda to the means and methods used to intercept their communications. See Negroponte Decl. ¶¶11-12.

The Supreme Court has directed the dismissal of cases because their very subject matter was a secret even though the existence of the program was publicly known at some level of generality. It was, of course, generally known that the Government hired spies during the Civil War and the Cold War, even though the details of such activities remained secret. See *Tenet, supra* (barring action involving alleged hiring of Cold War spy); *Totten, supra* (Civil War spy). There is no reason

for any different analysis with respect to the espionage program at issue here, where "a reasonable danger exists" that the litigation could require disclosure of sensitive national security information. *Tenenbaum*, 372 F.3d at 777.

At a minimum, any litigation about the TSP could be premised only on the three general facts the Government has publicly disclosed: the TSP exists; it operates without warrants; and it intercepts only communications that originate or conclude in a foreign country, and only if there are reasonable grounds to believe that a party to the communication is affiliated with al Qaeda. See Op. 13. However, without additional, classified facts, plaintiffs cannot establish standing, let alone a prima facie case, and the Government cannot assert valid defenses. The district court thus erred in refusing to dismiss this action on the ground of state secrets privilege.

II. THE DISTRICT COURT ERRED IN CONCLUDING THAT PLAINTIFFS COULD ESTABLISH STANDING WITHOUT DISCLOSING STATE SECRETS.

The district court erred by finding that plaintiffs established their standing to sue, even though the state secrets privilege prevented them from establishing that they have been or likely will be subject to surveillance under the TSP.

Article III of the Constitution "limits the jurisdiction of federal courts to 'Cases' and 'Controversies,'" and "the core component of standing is an essential and unchanging part of th[is] case-or-controversy requirement." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992). To have Article III standing, a plaintiff must

establish three elements—injury, causation, and redressability—and each of those elements must be proven with sufficient evidence at summary judgment. See *id.* at 560-61. To meet the injury requirement, a plaintiff must show that he suffered an injury in fact to a "legally protected interest" that is "concrete and particularized" and "'actual or imminent, not 'conjectural' or 'hypothetical.'" *Id.* at 560.

A plaintiff with Article III standing must also establish "prudential" standing by proving that he is "a proper proponent, and the action a proper vehicle, to vindicate the rights asserted." See *Lac Vieux Desert Band v. Michigan Gaming Control Bd.*, 172 F.3d 397, 403 (6th Cir. 1999). To do so, "'a plaintiff must 'assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Coal Operators & Assocs. v. Babbit*, 291 F.3d 912, 916 (6th Cir. 2002). To advance a statutory claim, a plaintiff must also show that his particular injury "'fall[s] within the 'zone of interests' regulated by the statute in question.'" *Ibid.*

A. Plaintiffs Cannot Establish Standing Because The State Secrets Privilege Prevents Testing Their Allegations That They Have Been Or Likely Will Be Subject To Surveillance Under The TSP.

Plaintiffs cannot meet the standing requirements because the state secrets privilege precludes confirmation or denial of their "allegations regarding whether they have been subject to surveillance by the NSA," as well as their "allegations

concerning intelligence activities, sources, methods, or targets" of the TSP. Negroponte Decl. ¶12; see Quirk Decl. ¶8. Because the state secrets privilege prevents plaintiffs from demonstrating that the Government is intercepting or likely will intercept their communications under the TSP, plaintiffs cannot prove, and the Government cannot confirm or deny, that they suffer from an injury that is "'actual or imminent," as opposed to merely "'conjectural' or 'hypothetical,'" *Lujan*, 504 U.S. at 560.

[REDACTED TEXT – PUBLIC TEXT CONTINUES ON PAGE 22]

1. Plaintiffs' inability to establish standing consistent with the state secrets privilege is confirmed by established Fourth Amendment jurisprudence. "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." *United States v. Williams*, 354 F.3d 497, 510-11 (6th Cir. 2003). Thus, when litigants challenge electronic surveillance, "persons who [a]re not parties to unlawfully overheard conversations * * * d[o] not have standing to contest the legality of the surveillance" on Fourth Amendment grounds. *Rakas v. Illinois*, 439 U.S. 128, 136 (1978). So too, persons who are not subject to surveillance lack standing to challenge a surveillance program.

Halkin v. Helms, 690 F.2d 977 (D.C. Cir. 1982) ("*Halkin II*"), illustrates the point. There, as here, the plaintiffs claimed that Government surveillance and interception of their international communications violated the Fourth Amendment in a case in which the state secrets privilege barred litigation over whether plaintiffs' communications were actually intercepted. The plaintiffs thus relied on the claim that their names were included on "watchlists" used to govern NSA surveillance, and they argued that this fact demonstrated a "substantial threat" that their communications would actually be intercepted. See *id.* at 983-84, 997. The D.C. Circuit nevertheless affirmed dismissal of the plaintiffs' Fourth Amendment claim, "hold[ing] that appellants' inability to adduce proof of actual acquisition of their communications"

rendered the plaintiffs "incapable of making the showing necessary to establish their standing to seek relief." *Id.* at 998.

Ellsberg v. Mitchell is to the same effect. Like *Halkin* and the present case, *Ellsberg* involved a challenge to Government surveillance where the Government invoked the state secrets privilege. The D.C. Circuit again held that dismissal was warranted where a plaintiff could not, absent recourse to state secret materials, establish that he was actually subject to surveillance. As the court explained, "[a]n essential element of each plaintiff's case is proof that he himself has been injured. Membership in a group of people, 'one or more' members of which were exposed to surveillance, is insufficient to satisfy that requirement." 709 F.2d at 65.

In keeping with that settled Fourth Amendment law, FISA authorizes only "aggrieved person[s]" to obtain judicial review of surveillance. 50 U.S.C. 1806(e), (f), 1810. Congress defined an "aggrieved person" as one "who is the target of an electronic surveillance" or "whose communications or activities were subject to electronic surveillance" (50 U.S.C. 1801(k)), in order to ensure that the term is "coextensive [with], but no broader than, those persons who have standing to raise claims under the Fourth Amendment with respect to electronic surveillance." H.R. Rep. No. 95-1283, at 66 (1978). FISA thus makes clear that litigants who cannot establish their status as "aggrieved persons" will "not have standing to file a motion under [50 U.S.C. 1806] or under any other provision" of the statute. *Id.* at 89-90.

Because the state secrets privilege prevents plaintiffs from attempting to demonstrate that their own communications have been or likely will be intercepted, plaintiffs cannot establish their standing, either under general Article III principles or under the specific authorities governing Fourth Amendment and FISA claims.

2. The district court tried to avoid that critical problem by ruling that plaintiffs "establish[ed] that their communications would be monitored under the TSP" and that they "continue to experience" harm from the Government's "monitoring of their telephone conversations and email communications." See Op. 13, 22. This conclusion is plainly wrong and without support in the public record.

Plaintiffs themselves avoided contending that their conversations are actually surveilled under the TSP. Their complaint simply alleges that "plaintiffs have a well-founded belief that their communications are being intercepted under the Program" based on the identities and locations of the persons with whom they communicate, and the nature of their communications. Complaint ¶2. Plaintiffs' declarations merely state that they "believe" their communications are monitored because plaintiffs claim to communicate with persons abroad whom they contend "are likely targets of the program" as it has been publicly described by the Government. See, *e.g.*, R.4 Ex. I Diamond Decl. ¶10; R.4 Ex. J, Hollander Decl. ¶13. These statements reflect only plaintiffs' beliefs, not facts sufficient to meet their burden of establishing standing.

B. Plaintiffs Cannot Establish Standing To Assert Their First Amendment Claim Based On An Alleged Chilling Effect On Themselves Or Others.

The district court erroneously held that plaintiffs had established standing based on an alleged chilling effect on the exercise of their First Amendment rights. As an initial matter, the district court erred by treating the question of plaintiffs' standing to bring their *First Amendment* claim as dispositive of their standing to bring their *other* claims. See Op. 17-23; *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1867 (2006) (plaintiff must "demonstrate standing for each claim he seeks to press"). More fundamentally, the district court erred by holding that standing can be based on a chilling effect on the exercise of First Amendment rights by plaintiffs, or others. That reasoning is directly foreclosed by binding precedent. See *Laird v. Tatum*, 408 U.S. 1 (1972); *Sinclair v. Schriber*, 916 F.2d 1109 (6th Cir. 1990).[3/]

1. In *Laird*, "most if not all of the [plaintiffs]" established that they had "been the subject of Army surveillance reports." *Tatum v. Laird*, 444 F.2d 947, 954 n.17 (D.C. Cir. 1971), *rev'd on other grounds*, 408 U.S. 1 (1972). They therefore argued that the surveillance of their activities had "chilled" their exercise of First

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[3/] Moreover, even if plaintiffs had demonstrated a sufficient injury to a "legally protected interest" that would establish Article III standing to pursue their First Amendment claim, and even if that the same injury could confer Article III standing to pursue their Fourth Amendment and FISA-based claims, plaintiffs nevertheless failed to establish standing for the latter claims, as explained above.

Amendment rights. *Laird*, 408 U.S. at 13. The Supreme Court nevertheless held that the plaintiffs failed to demonstrate "'a direct injury as the result of [the Government's] action" because their decision to curtail their expressive activity reflected a "subjective 'chill'" that did not qualify as a "specific present objective harm or a threat of specific future harm" caused by the Government's surveillance. *Id.* at 13-14.

The Court in *Laird* explained that "none" of its decisions in which Government action violated the First Amendment because of its "'chilling' effect" on expressive activity had involved standing predicated on a plaintiff's knowledge of Government activity and his "fear that, armed with the fruits of those activities, the [Government] might" take other injurious action. *Id.* at 11. These cases instead involved harms directly caused by "the challenged exercise of governmental power" because the "complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions he was challenging." *Ibid.*

The district court below failed to grasp this critical point: while a "'[c]hilling effect' [may be] cited as the *reason* why [a] governmental imposition is invalid" *on the merits*, it does not qualify under *Laird* "as the *harm* which entitles the plaintiff to challenge" the Government's action. *United Presbyterian Church v. Reagan*, 738 F.2d 1375, 1378 (D.C. Cir. 1984) (Scalia, J.). Only when such action directly causes a "concrete harm * * * apart from the 'chill' itself" can plaintiffs have standing to

press a First Amendment challenge. See *ibid.* (citing examples); *Fifth Ave. Peace Parade Comm. v. Gray*, 480 F.2d 326, 331-32 (2d Cir. 1973).

In *Sinclair*, this Court likewise held that the plaintiffs' decision to discontinue expressive activity due to the acknowledged and unlawful surveillance of their conversations was "precisely the kind of 'subjective chill' which *Laird* held to be nonactionable." 916 F.2d at 1110-12, 1115. Like *Laird*, *Sinclair* makes clear that a plaintiff's cessation of expressive activity simply reflects a "subjective chill" which is not itself a concrete injury fairly traceable to Government conduct. Cf. *Gordon v. Warren Consol. Bd. of Educ.*, 706 F.2d 778, 781 (6th Cir. 1983) (chill from surveillance does not satisfy "'causation' component" of standing).

2. The district court's attempts to distinguish *Laird* are unavailing. At the outset, the court's assertion that the *Laird* plaintiffs "alleged only that they *could conceivably* become subject to the Army's domestic surveillance program" (Op. 19) is manifestly incorrect. Both *Laird* and *Sinclair* involved the established, actual surveillance of the plaintiffs in each case. Accordingly, plaintiffs here—who, as discussed, cannot establish that they were subject to surveillance in the first place—have a much weaker standing claim than that rejected in *Laird* and *Sinclair*.

The district court further erred in reasoning that *Laird* is inapplicable because plaintiffs have not only alleged their own chill, but also have asserted that TSP "surveillance has chilled [*others*] from communicating with them." Op. 20. The

alleged chilling effect on *third parties,* however, is plainly insufficient to establish plaintiffs' own standing. Because plaintiffs cannot rely on their *own* chilling to establish standing under *Laird*, it follows *a fortiori* that they cannot rely on *third parties'* chilling. Neither plaintiffs nor the overseas third parties with whom they wish to communicate would have standing under *Laird* to challenge the TSP based on their own decisions to refrain from communication, *i.e.*, their own subjective chill. Yet under the district court's reasoning, if two parties who communicate with each other both assert subjective chill, then both would have standing because each could claim to be injured by the *other's* independent decision to refrain from expressive activity. Far from evading *Laird*, that theory is *weaker* than the one rejected in *Laird* because it is based on conjecture concerning third parties.

If "a plaintiff's asserted injury arises from the government's allegedly unlawful [action directly affecting] *someone else*, much more is needed" to prove standing. *Lujan*, 504 U.S. at 562. Standing "is ordinarily 'substantially more difficult' to establish" in such cases because the causal chain linking the claimed harm to the Government "hinge[s] on the response of the * * * third party to the government action." *Ibid.* Thus, such injuries are not deemed "'fairly traceable'" to Government action if they are "'the result of the independent action of some third party not before the court,'" unless it is proven that the third-party response causing the harm is itself

directly "produced by [the] determinative or coercive effect" of Government action. *Bennett v. Spear*, 520 U.S. 154, 168-69 (1997).

Here, the independent decisions of third parties who allegedly refuse to communicate with plaintiffs are not directly produced by a coercive effect of the TSP. Instead, just as plaintiffs' own decision to curtail their expressive activity is not a concrete injury fairly traceable to the Government under *Laird*, neither is the identical decision of overseas third parties. Moreover, under plaintiffs' own theory, the people they would like to telephone are suspected terrorists who might be subject to FISA-authorized surveillance or surveillance by their own (foreign) governments. See R.47 Pls.' Reply Memo. in Supp. of Mot. for Partial Summ. J. 2-3. Thus, even if a chilling effect could give rise to a cognizable injury for standing purposes, it is at best speculative to assert that any chilling effect is caused by *the TSP*, as opposed to other sources, or that any injury from a chilling effect would be redressed by enjoining the TSP.[4/]

[REDACTED TEXT – PUBLIC TEXT CONTINUES ON PAGE 30]

[4/] Plaintiffs' argument also fails as an evidentiary matter. While a few plaintiffs proffered affidavits stating that unidentified persons overseas "told" plaintiffs they are "reluctant or unwilling to communicate" because they fear TSP interception (see, *e.g.*, R.47 Ex. P, Dratel Decl. ¶10), such self-serving hearsay is insufficient to establish that the actual reason underlying the decision not to communicate with plaintiffs is, in truth, a subjective fear of TSP surveillance. See *Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp.*, 176 F.3d 921, 927 (6th Cir. 1999).

3. No case cited by the district court suggests a different conclusion. Cf. Op. 20-22. In those cases, a challenged Government action targeted the plaintiff, and the courts found standing based on an injury to the targeted plaintiff *directly caused* by the Government's action. Thus, for example, when a litigant sustains an injury to his reputation because he is the *target* of a Government investigation or surveillance, some courts have concluded that this reputational harm directly caused by Government action can confer standing if that injury is sufficiently concrete to have an impact on the plaintiff's business activity. See, *e.g.*, *Presbyterian Church v. United States*, 870 F.2d 518, 522-23 (9th Cir. 1989) (surveillance targeting churches causing harm "analogous to" reputational and professional injury); *Clark v. Library of Congress*, 750 F.2d 89, 93 (D.C. Cir. 1984) (targeted investigation causing concrete harm to reputation and employment); *Jabara v. Kelley*, 476 F. Supp. 561, 568 (E.D. Mich. 1979) (injury to reputation and business resulting from targeted investigation), *vacated on other grounds sub nom. Jabara v. Webster*, 691 F.2d 272 (6th Cir. 1982); *Ozonoff v. Berzak*, 744 F.2d 224, 226, 229 (1st Cir. 1984) (plaintiff risked losing job opportunity because Government's contract with his potential employer required plaintiff's participation in "loyalty screening" program). Because plaintiffs here do not claim and cannot attempt to prove without state secrets that they are the *targets* of surveillance under the TSP or will likely become targets, they lack standing.

III. THE DISTRICT COURT ERRED IN HOLDING THAT THIS CASE COULD PROCEED TO JUDGMENT ON THE MERITS IN FAVOR OF PLAINTIFFS.

A. The District Court Erred In Attempting To Reach Around The State Secrets Privilege And Resolve The Merits Of Plaintiffs' Claims.

The state secrets privilege not only prevents plaintiffs from establishing their standing, it also precludes consideration of the merits of their claims. Under a correct understanding of the relevant legal tests, consideration of plaintiffs' challenges to the TSP on the merits would require a number of sensitive and factbound inquiries that could not be made without divulging state secrets. As explained below, these considerations include the reasonableness of the TSP under the Fourth Amendment, the extent of the President's authority under the Authorization for the Use of Military Force and the Constitution to engage in warrantless electronic surveillance of al Qaeda, and whether any attempt by Congress to preclude the Commander in Chief from using the TSP would unconstitutionally impede his right and duty to defend the Nation in the current circumstances.

The district court avoided those inquiries and the resulting state-secrets bar only by misstating the governing legal principles. Thus, the court held that the TSP violated the Fourth Amendment because that amendment "requires warrants for any reasonable search." Op. 31. If the Fourth Amendment truly established a per se rule that warrantless searches were unconstitutional, then it arguably would be possible

to adjudicate plaintiffs' Fourth Amendment claim without resort to state secrets. But, as explained below, the Supreme Court has long recognized that warrantless searches may be constitutional so long as they are reasonable under the circumstances—a context-specific inquiry that directly calls for consideration of information protected by the state secrets privilege.

Although the district court's reasoning is difficult to follow, the court appears to have rested all of its other holdings on its fundamentally mistaken Fourth Amendment analysis. The court held that the TSP violated the First Amendment because it violated the Fourth Amendment. Op. 33. It also said that the TSP violated the constitutional separation of powers because it does not comply with FISA, but in doing so the court declined to consider, for example, whether FISA could constitutionally restrict the President's constitutional authority in this area, considering that question "irrelevant" in light of its Fourth Amendment holding. Op. 41.

Even apart from its mistaken legal analysis, the district court contravened the Supreme Court's admonition that lower courts should proceed in a "prudent and incremental" fashion in war powers cases. *Hamdi*, 542 U.S. at 539 (plurality opinion). In particular, the court erred by entering summary judgment against the Government without affording it an opportunity to challenge the denial of its motion to dismiss on the ground of state secrets privilege, much less consider whether any

intermediate steps might be warranted before attempting to adjudicate the case on the merits. The two other courts that declined to dismiss similar challenges to the TSP on state secrets grounds both certified their decisions for immediate appellate review under 28 U.S.C. 1292(b), without first attempting to adjudicate the merits of the cases. See *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 1011 (N.D. Cal. 2006); *Al-Haramain Islamic Foundation, Inc. v. Bush*, 2006 WL 2583425, at *17 (D. Or. 2006); cf. *Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899 (N.D. Ill. 2006). The court's decision denying the Government's motion to dismiss on the ground of the state secrets privilege, granting plaintiffs' motion for summary judgment, and enjoining the TSP in its entirety—in one judicial act—is the antithesis of "prudent and incremental" judicial decisionmaking.

B. Plaintiffs' Fourth And First Amendment Claims Cannot Be Adjudicated Without Disclosing State Secrets.

The district court erred in holding the TSP unconstitutional on the ground that the Fourth Amendment "requires prior warrants for any reasonable search." See Op. 31. Established Fourth Amendment jurisprudence makes clear that warrants are not always required, and that plaintiffs' Fourth Amendment claim cannot be adjudicated because facts protected by the state secrets privilege would be needed to resolve that claim properly.

1. The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV, cl. 1. The Amendment's "'central requirement'" is "reasonableness." *Illinois v. McArthur*, 531 U.S. 326, 330 (2001); accord *Samson v. California*, 126 S. Ct. 2193, 2201 n.4 (2006).

Reasonableness, in turn, is determined by assessing "the degree to which [the search] intrudes upon an individual's privacy" and the "degree to which it is needed for the promotion of legitimate governmental interests" in the context of the "'totality of the circumstances'" surrounding the search. See *Samson*, 126 S. Ct. at 2197. Because this reasonableness inquiry depends on all of the circumstances surrounding a search and the nature of the search itself, the Supreme Court has repeatedly explained that "neither a warrant, nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance." *National Treasury Employees Union v. Von Rabb*, 489 U.S. 656, 665 (1989) ("*NTEU*"); see *McArthur*, 531 U.S. at 330.

2. At least two different exceptions to the warrant requirement are satisfied here: the President's inherent authority to conduct warrantless surveillance of foreign powers, and the Fourth Amendment's "special needs" doctrine.

a. The President has inherent constitutional authority, notwithstanding the Fourth Amendment, to conduct warrantless surveillance of communications involving

foreign powers such as al Qaeda and its agents. The Supreme Court has expressly reserved that question, *United States v. U.S. District Court*, 407 U.S. 297, 308, 321-22 & n.20 (1972) ("*Keith*"), and every court of appeals that has since considered it has held that the President possesses "inherent authority" under the Constitution, not trumped by the Fourth Amendment, "to conduct *warrantless* searches to obtain foreign intelligence information." *In re Sealed Case*, 310 F.3d 717, 742 & n.26 (FIS Ct. of Rev. 2002) (emphasis added); accord *United States v. Butenko*, 494 F.2d 593, 602-06 (3d Cir. 1974) (en banc); *United States v. Truong*, 629 F.2d 908, 912-17 (4th Cir. 1980); *United States v. Brown*, 484 F.2d 418, 425-26 (5th Cir. 1973); *United States v. Buck*, 548 F.2d 871, 875-76 (9th Cir. 1977). The Supreme Court in *Keith* likewise listed ample authority for the "view that warrantless surveillance, though impermissible in domestic security cases, may be constitutional where foreign powers are involved" (407 U.S. at 322 n.20), and not one court of appeals has ever held otherwise. Indeed, this proposition is now so firmly entrenched that the Foreign Intelligence Surveillance Court of Review—the appellate tribunal charged with reviewing foreign surveillance decisions—has stated, in an opinion the district court did not cite, that it would "take for granted that the President does have that authority." *In re Sealed Case*, 310 F.3d at 742.[5/]

[5/] While a plurality of the D.C. Circuit suggested in dicta that foreign intelligence (continued...)

Although no warrant is required here, the Fourth Amendment requires that all searches be reasonable. Under the foreign intelligence doctrine, searches are reasonable as long as they are conducted to secure foreign intelligence information. See *Truong*, 629 F.2d at 916-17; *Butenko*, 494 F.2d at 606; *Brown*, 484 F.2d at 421, 425; cf. *In re Sealed Case*, 310 F.3d at 742-45; *United States v. Duggan*, 743 F.2d 59, 73 (2d Cir. 1984). Inquiry into the facts surrounding a decision to conduct TSP surveillance, however, would run headlong into the state secrets privilege. As explained above, facts concerning the program's "intelligence activities, sources, methods, or targets" can be neither confirmed nor denied. Negroponte Decl. ¶¶11-12.

b. The same holds true under the Fourth Amendment's "special needs" doctrine. "[W]here a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." *NTEU*, 489 U.S. at 665-66.

The "special needs" doctrine applies in "a variety of contexts," including

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[5/] (...continued)
surveillance authorized by the President would likely be subject to the Fourth Amendment's warrant requirement absent exigent circumstances (see *Zweibon v. Mitchell*, 516 F.2d 594, 651 (D.C. Cir. 1975) (en banc plurality)), the D.C. Circuit has since repeatedly made clear that this "suggest[ion]" was indeed "dicta." See *Ellsberg*, 709 F.2d at 66 n.63; see also, *e.g.*, *Halkin II*, 690 F.2d at 1000 n.82.

warrantless searches used to detect and prevent drunk driving, drug use by students and federal officials, airline hijackings, and terrorist bombings. See *MacWade v. Kelly*, 460 F.3d 260, 263, 268 (2d Cir. 2006); *Board of Educ. v. Earls*, 536 U.S. 822, 835-36 (2002); *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000). It is "settled" that the Government's need to "discover" and "prevent the development of hazardous conditions" can qualify as a special need justifying warrantless and suspicionless searches. See *NTEU*, 489 U.S. at 668. There is no basis for concluding that the Constitution permits warrantless searches of high school students' lockers for drugs, but not warrantless searches of international communications with the enemy.

To the contrary, the TSP clearly satisfies the "special needs" doctrine as its purpose is to detect and prevent further terrorist attacks by foreign agents from within the United States. The presence of special considerations here is further demonstrated by the rules applicable to warrantless interception of letters and items crossing the Nation's international borders. The "long-standing right of the sovereign to protect itself" by controlling what crosses the border dictates that the Fourth Amendment analysis in this context "rest[s] on different considerations and different rules of constitutional law" than that applied to ordinary law-enforcement searches. See *United States v. Ramsey*, 431 U.S. 606, 616, 619-20 (1977); *United States v. Boumelhem*, 339 F.3d 414, 420-23 (6th Cir. 2003).

In applying the "special needs" doctrine, reasonableness is determined by

conducting a "fact-specific balancing" of the Government interests underlying the search and the associated intrusion into privacy interests. See *Earls*, 536 U.S. at 830; *Chandler v. Miller*, 520 U.S. 305, 314 (1997); *International Union v. Winters*, 385 F.3d 1003, 1009 (6th Cir. 2004). A court must weigh (1) the nature and immediacy of the Government interests (*Earls*, 536 U.S. at 834) and (2) whether the program is "reasonably effective" in advancing these interests (*id.* at 837-38), against (3) the nature of the privacy interest (*id.* at 830-32), and (4) the degree to which the search intrudes on that interest under the specifics of the program, such as the details of the search and the "uses to which the [information is] put" (*id.* at 832-34).

The state secrets privilege protects the information required for this fact-specific inquiry, such as information concerning the nature of the al Qaeda threat; facts supporting the need for speed and flexibility in conducting surveillance beyond that traditionally available under the FISA; details concerning the TSP's targeting decisions, its effectiveness in detecting and preventing terrorist attacks, and other operational information; and other specifics concerning the scope and nature of TSP surveillance. Thus, the district court erred in failing to dismiss the plaintiffs' Fourth Amendment claim. See *Halkin II*, 690 F.2d at 1000 (ruling that it is "impossible" to adjudicate Fourth Amendment claim challenging warrantless surveillance where state secrets privilege covers factual matters relevant to reasonableness inquiry).

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3. The district court's truncated First Amendment ruling appears to be entirely dependent on, and therefore fails for the same reasons as, the court's misguided Fourth Amendment analysis. In the key passage of its First Amendment ruling, the court simply reasoned that, because the TSP "violate[s] the Fourth [Amendment] in failing to procure judicial orders as required by FISA," it "accordingly has violated the First Amendment rights of these plaintiffs as well." Op. 33. The court's decision thus simply fails to provide any independent First Amendment analysis. That is perhaps not surprising, given that no court has previously suggested that a foreign intelligence program restricts the freedom of speech, much less violates the First Amendment. Nor is there any reason to think that the relevant First Amendment analysis would be any less context-dependent or any less precluded by the state secrets doctrine.

C. Plaintiffs' FISA And Separation Of Powers Claims Cannot Be Adjudicated Without Disclosing State Secrets.

The district court also erred to the extent that it ruled that surveillance under the TSP violates FISA, and thereby contravenes the Constitution's separation of powers. Op. 33-39. The court's separation of powers ruling appears to be based on its (erroneous) conclusion that the TSP violates the First and Fourth Amendments, and not on the applicability of FISA, because the district court specifically declined to consider the issues that would be necessary to resolve FISA's applicability.

FISA prohibits "electronic surveillance" under color of law "except as authorized by statute." 50 U.S.C. 1809(a). Plaintiffs' claim that the TSP's interception of international communications violates the FISA therefore is dependent on establishing at least three separate propositions: first, that the conduct they have standing to challenge qualifies as "electronic surveillance;" second, that Congress's Authorization for Use of Military Force does not provide statutory authorization for TSP surveillance; and, third, that FISA would be constitutional if read, as plaintiffs suggest, to curtail dramatically the President's inherent constitutional authority to conduct foreign intelligence surveillance to protect the Nation in a time of armed conflict.

Although the district court's opinion includes conclusory language stating that the President "violate[d] the Separation of Powers" by "violat[ing] the provisions of FISA" (Op. 36-37), the court made none of the requisite rulings; to the contrary, it expressly avoided the determinations essential to plaintiffs' FISA claim and instead recited generalities about the Framers' rejection of "hereditary Kings." Op. 40. The court never decided that any allegedly intercepted communication involving plaintiffs qualifies as "electronic surveillance." And instead of deciding whether the AUMF constitutes statutory authorization for TSP surveillance, the court concluded that "the AUMF resolution, if indeed it is construed as replacing FISA, gives no support to Defendants here" because plaintiffs had established First and Fourth Amendment

violations. See Op. 39. The district court also declined to decide whether Congress, through FISA, could constitutionally curtail the President's constitutional authority to conduct foreign intelligence surveillance, finding that question "irrelevant" in light of its First and Fourth Amendment rulings. Op. 41.

If the issue otherwise could be adjudicated, it would be imprudent for this Court to address plaintiffs' FISA claim without a district court decision addressing the predicate questions necessary to the resolution of that claim in the first instance. Cf. *Hamdi*, 542 U.S. at 539 (plurality opinion) (cautioning courts to approach war powers cases in "prudent and incremental" fashion). But there is a more fundamental problem with this claim. Plaintiffs cannot establish a violation of FISA, and the defendants cannot present valid defenses concerning the AUMF and the President's constitutional authority, without information protected by the state secrets privilege.

1. The FISA regulates "electronic surveillance," which, in turn, includes four categories of conduct. The only ones conceivably relevant to this case involve the acquisition of the contents of (1) certain wire or radio communications "acquired by intentionally targeting [a] United States person," (2) certain wire communications for which the "acquisition occurs in the United States," and (3) certain non-wire and non-radio communications through the installation or use of a surveillance device in the United States. See 50 U.S.C. 1801(f)(1)-(2), (4). Plaintiffs present no evidence that they themselves are "targets" of the TSP (which targets members and affiliates

of al Qaeda), present no evidence that any TSP interception actually occurs in the United States, and present no evidence that the TSP is directed at non-wire and non-radio communications through the installation or use of a surveillance device in the United States. Furthermore, plaintiffs would have to rely on highly classified information concerning the TSP's "targeting" decisions and its interception methods to carry their burden of proving that the TSP implicates "electronic surveillance" regulated by the FISA. Such information is protected from disclosure by the state secrets privilege.

2. Even if plaintiffs could show that the TSP's alleged interception of their communications qualifies as "electronic surveillance," the FISA makes such surveillance unlawful "except as authorized by statute." See 50 U.S.C. 1809(a). Congress's Authorization for the Use of Military Force provides such authorization.

In enacting the AUMF, Congress expressly recognized the "unusual and extraordinary threat" of further terrorist attacks against the United States, as well as the President's "authority under the Constitution to take action to deter and prevent [such] acts of international terrorism" in order to "protect United States citizens both at home and abroad." See AUMF pmbl., 115 Stat. 224 (2001). Congress therefore authorized the President to "use all necessary and appropriate force" against those responsible for the attacks "to prevent any future acts of international terrorism" against the Nation. *Id.* § 2(a). This statutory mandate "clearly and unmistakably"

constitutes an "explicit authorization" to engage in activities that are "fundamental incident[s] of waging war," even though the AUMF does not use "specific language" to enumerate such activities. *Hamdi*, 542 U.S. at 518-19 (plurality opinion).

The collection of foreign intelligence targeting one's enemy is an established and fundamental incident of armed conflict. Indeed, the "interception of enemy messages, wireless and other," is an accepted and customary means of wartime surveillance, and the "laws of war recognize and sanction this aspect of warfare." See Morris Greenspan, *The Modern Law of Land Warfare* 325-26 (1959); see also Hague Regulations, art. 24 (1907) ("the employment of measures necessary for obtaining information about the enemy and the country [is] considered permissible"); *The Commercen*, 14 U.S. 382, 404 (1816) (Marshall, C.J., dissenting) (noting "belligerent right to intercept all communications addressed to the enemy"). Because foreign intelligence gathering is a fundamental incident of war, interception of international communications involving individuals reasonably believed to be agents of al Qaeda under the TSP is "clearly and unmistakably" (*Hamdi*, 542 U.S. at 518-19) authorized by the AUMF.[6/]

[6/] In *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2775 (2006), the Court assumed that the AUMF "activated the President's war powers," but concluded that the AUMF did not alter the authority set forth in Article 21 of the Uniform Code of Military Justice ("UCMJ") to convene military commissions. Section 109(a) of FISA, however, contains an explicit escape clause ("except as authorized by statute") not found in (continued...)

While the district court noted that Congress stated in 1978 that Title III and the FISA were the "exclusive means" by which electronic surveillance could be conducted (see Op. 38; 18 U.S.C. 2511(2)(f)), Congress supplemented that existing authorization when it enacted the AUMF in 2001 to authorize the President to conduct surveillance targeting those associated with al Qaeda. This specific authorization, focusing directly on those whom the President determined were responsible for the 9/11 attacks, represents a targeted expansion of the President's statutory authority to address al Qaeda's extraordinary threat. Plaintiffs' contrary construction is especially implausible in light of the AUMF's express acknowledgment and endorsement of the President's "authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." AUMF, pmbl.

Because the TSP and the AUMF are tied to the President's war powers, however, any further analysis of whether the TSP is authorized by the AUMF would entail consideration of information protected by the state secrets privilege, including

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[6/] (...continued)
Article 21 of the UCMJ. In that regard, FISA is directly analogous to the statute at issue in *Hamdi*, which similarly barred the detention of an American citizen "except pursuant to an Act of Congress." 18 U.S.C. 4001(a). Just as the AUMF—as the *Hamdi* plurality held—supplies the statutory authorization contemplated by Section 4001(a), it provides the statutory authorization contemplated by FISA.

the nature of the al Qaeda threat and whether the TSP's operations are suitably targeted to capture al Qaeda communications.

3. Even if the AUMF were ambiguous on this point, the doctrine of constitutional avoidance would require that any such doubt be resolved in favor of the President's inherent constitutional authority to intercept the international communications of those affiliated with al Qaeda. Plaintiffs' contrary reading of the AUMF and FISA to foreclose the President's authority to authorize the TSP would present a grave constitutional question of the highest order.

The "President alone" is "constitutionally invested with the entire charge of hostile operations." *Hamilton v. Dillin*, 88 U.S. 73, 87 (1874); see *Ex parte Milligan*, 71 U.S. 2, 139 (1866) (Chase, C.J., concurring) (Congress may not "interfere[] with the command of the forces and the conduct of campaigns" as that "power and duty belong to the President as commander-in-chief"). As discussed, every court of appeals to have decided the question has held that the President has the inherent constitutional authority to conduct warrantless surveillance of foreign powers within or without the United States. The Foreign Intelligence Surveillance Court of Review thus "t[ook] for granted" that the President had such authority and that "FISA could not encroach on the President's constitutional power." *In re Sealed Case*, 310 F.3d at 742.

Where an otherwise acceptable statutory construction would "raise serious constitutional problems," courts "are obligated to construe the statute to avoid such problems" if "an alternative interpretation of the statute is 'fairly possible.'" *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001). This principle takes on particular importance in the national security context, where "courts traditionally have been reluctant to intrude upon the authority of the Executive." *Department of Navy v. Egan*, 484 U.S. 518, 527, 530 (1988). The "clear statement doctrine" likewise requires that statutes not be read as interfering with the President's powers unless Congress has made clear an intent to confront the constitutional questions that would be raised. See *Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991); see also *Franklin v. Massachusetts*, 505 U.S. 788, 800 (1992). Thus, especially in light of the AUMF, FISA should not be interpreted as attempting to override the President's Article II constitutional powers to gather foreign intelligence during armed conflicts.

4. If FISA were construed to bar the TSP, it would be an unconstitutional encroachment on the Executive's constitutional authority (and duty) to gather foreign intelligence, defend the Nation against attack, and command the armed forces during wartime. A statute may not "impede the President's ability to perform his constitutional duty." *Morrison v. Olson*, 487 U.S. 654, 691 (1988); see also *id.* at 696-97. As discussed, the President, acting as Commander in Chief, has determined that the TSP is "vital" to defending against future attacks by al Qaeda. President's

Press Conference, *supra*. The basis for that determination is detailed in the classified declarations made available to the district court and this Court.

Moreover, the doctrine of constitutional avoidance would require, at a minimum, that the courts address the grave constitutional question in the narrowest manner possible. And resolving the question in that fashion would require consideration of factual information protected by the state secrets privilege, including information concerning the nature of the al Qaeda threat and the need for, and efficacy of, the TSP in responding to that threat. The constitutionality of any limits placed on the President's authority to gather foreign intelligence against the enemy in wartime cannot be measured without a precise understanding of the program at issue.

IV. THE DISTRICT COURT ERRED IN ISSUING AN OVERBROAD INJUNCTION.

Even if the district court's substantive rulings were correct, it erred in issuing equitable relief that was not appropriately tailored to the specific claims of injury before it. Equitable relief must be "strictly tailored to accomplish only that which the situation specifically requires." *Aluminum Workers Int'l Union v. Consolidated Aluminum Corp.*, 696 F.2d 437, 446 (6th Cir. 1982). Therefore, any grant of "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Sharpe v. Cureton*, 319 F.3d 259, 273 (6th

Cir. 2003). The district court here made no effort either to tailor its injunction to redress only plaintiffs' claims, or to explore the possibility of doing so with the Government, but instead simply enjoined the TSP in its entirety and prohibited the Government from utilizing the TSP "in any way," R.71 Order at 1. That careless approach is consistent with the heavy-handed manner in which the district court approached this sensitive case. At a minimum, the court's overbroad injunction should be vacated with instructions to explore the possibility of devising an appropriately constructed order addressing plaintiffs' claims.

CONCLUSION

For the foregoing reasons, the district court's judgment should be vacated and this case dismissed.

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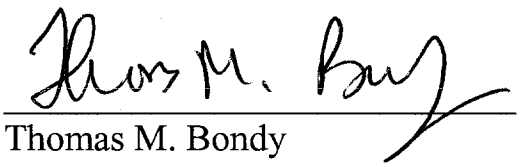
CERTIFICATE OF COMPLIANCE

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 14,000 words, and was prepared in 14-point Times New Roman font using Corel WordPerfect 12.0.



Thomas M. Bondy

ADDENDUM

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U.S. Constitution, Amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Constitution, Amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Authorization for Use of Military Force, preamble, § 2(a)

Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens; and

Whereas, such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad; and

Whereas, in light of the threat to the national security and foreign policy of the United States posed by these grave acts of violence; and

Whereas, such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States; and

Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * *

SEC. 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) IN GENERAL.—That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines

planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

* * * *

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

50 U.S.C. 1801(f), (i), (k)

§ 1801. Definitions

As used in this subchapter:

* * * *

(f) "Electronic surveillance" means--

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

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

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

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

* * * *

(i) "United States person" means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section.

* * * *

(k) "Aggrieved person" means a person who is the target of an electronic surveillance or any other person whose communications or activities were subject to electronic surveillance.

* * * *

50 U.S.C. 1804(a)

§ 1804. Applications for court orders

(a) Submission by Federal officer; approval of Attorney General; contents

Each application for an order approving electronic surveillance under this subchapter shall be made by a Federal officer in writing upon oath or affirmation to a judge having jurisdiction under section 1803 of this title. Each application shall require the approval of the Attorney General based upon his finding that it satisfies the criteria and requirements of such application as set forth in this subchapter. It shall include--

(1) the identity of the Federal officer making the application;
(2) the authority conferred on the Attorney General by the President of the United States and the approval of the Attorney General to make the application;
(3) the identity, if known, or a description of the specific target of the electronic surveillance;
(4) a statement of the facts and circumstances relied upon by the applicant to justify his belief that--
(A) the target of the electronic surveillance is a foreign power or an agent of a foreign power; and
(B) each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power;

(5) a statement of the proposed minimization procedures;
(6) a detailed description of the nature of the information sought and the type of communications or activities to be subjected to the surveillance;
(7) a certification or certifications by the Assistant to the President for National Security Affairs or an executive branch official or officials designated by the President from among those executive officers employed in the area of national security or defense and appointed by the President with the advice and consent of the Senate--

(A) that the certifying official deems the information sought to be foreign intelligence information;

(B) that a significant purpose of the surveillance is to obtain foreign intelligence information;

(C) that such information cannot reasonably be obtained by normal investigative techniques;

(D) that designates the type of foreign intelligence information being sought according to the categories described in section 1801(e) of this title; and

(E) including a statement of the basis for the certification that--

(i) the information sought is the type of foreign intelligence information designated; and

(ii) such information cannot reasonably be obtained by normal investigative techniques;

(8) a statement of the means by which the surveillance will be effected and a statement whether physical entry is required to effect the surveillance;
(9) a statement of the facts concerning all previous applications that have been made to any judge under this subchapter involving any of the persons, facilities, or places specified in the application, and the action taken on each previous application;
(10) a statement of the period of time for which the electronic surveillance is required to be maintained, and if the nature of the intelligence gathering is such that the approval of the use of electronic surveillance under this subchapter should not automatically terminate when the described type of information has first been obtained, a description of facts supporting the belief that additional information of the same type will be obtained thereafter; and
(11) whenever more than one electronic, mechanical or other surveillance device is to be used with respect to a particular proposed electronic surveillance, the coverage of the devices involved and what minimization procedures apply to information acquired by each device.

* * * *

50 U.S.C. 1805(a), (f)

§ 1805. Issuance of order

(a) Necessary findings

Upon an application made pursuant to section 1804 of this title, the judge shall enter an ex parte order as requested or as modified approving the electronic surveillance if he finds that--

(1) the President has authorized the Attorney General to approve applications for electronic surveillance for foreign intelligence information;
(2) the application has been made by a Federal officer and approved by the Attorney General;
(3) on the basis of the facts submitted by the applicant there is probable cause to believe that--
(A) the target of the electronic surveillance is a foreign power or an agent of a foreign power: Provided, That no United States person may be considered a foreign power or an agent of a foreign power solely upon the basis of activities protected by the first amendment to the Constitution of the United States; and
(B) each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power;
(4) the proposed minimization procedures meet the definition of minimization procedures under section 1801(h) of this title; and
(5) the application which has been filed contains all statements and certifications required by section 1804 of this title and, if the target is a United States person, the certification or certifications are not clearly erroneous on the basis of the statement made under section 1804(a)(7)(E) of this title and any other information furnished under section 1804(d) of this title.

* * * *

(f) Emergency orders

Notwithstanding any other provision of this subchapter, when the Attorney General reasonably determines that--

(1) an emergency situation exists with respect to the employment of electronic surveillance to obtain foreign intelligence information before an order authorizing such surveillance can with due diligence be obtained; and

(2) the factual basis for issuance of an order under this subchapter to approve such surveillance exists;

he may authorize the emergency employment of electronic surveillance if a judge having jurisdiction under section 1803 of this title is informed by the Attorney General or his designee at the time of such authorization that the decision has been made to employ emergency electronic surveillance and if an application in accordance with this subchapter is made to that judge as soon as practicable, but not more than 72 hours after the Attorney General authorizes such surveillance. If the Attorney General authorizes such emergency employment of electronic surveillance, he shall require that the minimization procedures required by this subchapter for the issuance of a judicial order be followed. In the absence of a judicial order approving such electronic surveillance, the surveillance shall terminate when the information sought is obtained, when the application for the order is denied, or after the expiration of 72 hours from the time of authorization by the Attorney General, whichever is earliest. In the event that such application for approval is denied, or in any other case where the electronic surveillance is terminated and no order is issued approving the surveillance, no information obtained or evidence derived from such surveillance shall be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in or before any court, grand jury, department, office, agency, regulatory body, legislative committee, or other authority of the United States, a State, or political subdivision thereof, and no information concerning any United States person acquired from such surveillance shall subsequently be used or disclosed in any other manner by Federal officers or employees without the consent of such person, except with the approval of the Attorney General if the information indicates a threat of death or serious bodily harm to any person. A denial of the application made under this subsection may be reviewed as provided in section 1803 of this title.

* * * *

50 U.S.C. 1806(e), (f)

§ 1806. Use of information

* * * *

(e) Motion to suppress

Any person against whom evidence obtained or derived from an electronic surveillance to which he is an aggrieved person is to be, or has been, introduced or otherwise used or disclosed in any trial, hearing, or other proceeding in or before any

court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the evidence obtained or derived from such electronic surveillance on the grounds that--

(1) the information was unlawfully acquired; or
(2) the surveillance was not made in conformity with an order of authorization or approval.

Such a motion shall be made before the trial, hearing, or other proceeding unless there was no opportunity to make such a motion or the person was not aware of the grounds of the motion.

(f) In camera and ex parte review by district court

Whenever a court or other authority is notified pursuant to subsection (c) or (d) of this section, or whenever a motion is made pursuant to subsection (e) of this section, or whenever any motion or request is made by an aggrieved person pursuant to any other statute or rule of the United States or any State before any court or other authority of the United States or any State to discover or obtain applications or orders or other materials relating to electronic surveillance or to discover, obtain, or suppress evidence or information obtained or derived from electronic surveillance under this chapter, the United States district court or, where the motion is made before another authority, the United States district court in the same district as the authority, shall, notwithstanding any other law, if the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States, review in camera and ex parte the application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted. In making this determination, the court may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other materials relating to the surveillance only where such disclosure is necessary to make an accurate determination of the legality of the surveillance.

* * * *

50 U.S.C. 1809(a)

§ 1809. Criminal sanctions

(a) Prohibited activities

A person is guilty of an offense if he intentionally--

(1) engages in electronic surveillance under color of law except as authorized by statute; or
(2) discloses or uses information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through electronic surveillance not authorized by statute.

* * * *

50 U.S.C. 1810

§ 1810. Civil liability

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

(a) actual damages, but not less than liquidated damages of $1,000 or $100 per day for each day of violation, whichever is greater;
(b) punitive damages; and
(c) reasonable attorney's fees and other investigation and litigation costs reasonably incurred.

50 U.S.C. 1811

§ 1811. Authorization during time of war

Notwithstanding any other law, the President, through the Attorney General, may authorize electronic surveillance without a court order under this subchapter to acquire foreign intelligence information for a period not to exceed fifteen calendar days following a declaration of war by the Congress.

Title III, Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. 2510 *et seq.*

18 U.S.C. 2511(2)(f)

§ 2511. Interception and disclosure of wire, oral, or electronic communications prohibited

* * * *

(2) * * * *

(f) Nothing contained in this chapter or chapter 121 or 206 of this title, or section 705 of the Communications Act of 1934, shall be deemed to affect the acquisition by the United States Government of foreign intelligence information from international or foreign communications, or foreign intelligence activities conducted in accordance with otherwise applicable Federal law involving a foreign electronic communications system, utilizing a means other than electronic surveillance as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, and procedures in this chapter or chapter 121 and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire, oral, and electronic communications may be conducted.

* * * *

DESIGNATION OF APPENDIX CONTENTS

The Government designates the following record items for inclusion in the Appendix:

District Court Docket Entries

R.1, Complaint, 1/17/06

R.4 Ex. I, Diamond Declaration, 3/9/06

R.4 Ex. J, Hollander Declaration, 3/9/06

R.37, Negroponte Declaration, 5/27/06

R.38, Quirk Declaration, 5/27/06

R.47 Ex. P, Dratel Declaration, 6/5/06

R.70, District Court Opinion, 8/17/06

R.71, District Court Order, 8/17/06

R.72, Defendants' Notice of Appeal, 8/17/06

R.76, Plaintiffs' Notice of Appeal, 8/24/06

R.88, Transcript of Oral Ruling Denying Stay Pending Appeal, 9/28/06

CERTIFICATE OF SERVICE

I certify that on the 13th day of October, 2006, I served two copies of the original unclassified version of the foregoing brief upon the counsel below by FedEx next-day courier. I further certify that on this 16th day of October 2006, I served two copies of the corrected unclassified version of the foregoing brief upon the following counsel by FedEx next-day courier:

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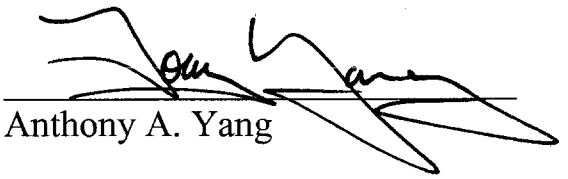

Anthony A. Yang