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14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16 SAN FRANCISCO DIVISION

17 In re:
18 NATIONAL SECURITY AGENCY TELE-
COMMUNICATIONS RECORDS LITIGATION

MDL Dkt. No. 06-1791-VRW

**REPLY BRIEF IN SUPPORT OF
TELECOMMUNICATIONS CARRIER
DEFENDANTS' MOTION TO DISMISS**

[Fed. R. Civ. P. 12(b)(1), 12(b)(6)]

Date: June 3, 2009
Time: 10:30 a.m.
Courtroom: 6, 17th Floor
Judge: Hon. Vaughn R. Walker

23 This Document Relates To:
24 *McMurray v. Verizon Communications, Inc., et*
25 *al.*, No. 09-cv-0131-VRW

1 The McMurray plaintiffs' opposition (MDL Dkt. 619) to the motions to dismiss filed by the
2 United States (MDL Dkt. 583) and the telecommunications carrier defendants (MDL Dkt. 588) does
3 not respond to the showing made by the private party carriers that they are not properly named as
4 defendants and fails to sustain plaintiffs' due process challenge to § 802 of the Foreign Intelligence
5 Surveillance Act. Moreover, as the government has explained (MDL Dkt. 629), plaintiffs'
6 arguments in support of their separation of powers and takings challenges are wholly unconvincing.
7 Accordingly, this action should be dismissed in its entirety. We note here only several particularly
8 glaring flaws in plaintiffs' contentions.

9
10 **I. PLAINTIFFS DO NOT CONTEST THAT THE CARRIERS ARE NOT PROPER PARTIES TO THIS ACTION**

11 As an initial matter, it is clear that the private party carriers must be dismissed. Plaintiffs
12 offer no response to the carriers' demonstration (Carriers' MTD (MDL Dkt. 588) at 6-8) that they
13 are not proper parties to this suit. Plaintiffs have not alleged that the carriers took any action (much
14 less "state action") that provides a basis for their constitutional challenge to § 802. *See Carriers'*
15 *MTD* at 6-7. Nor have plaintiffs shown that their claims *against the carriers* meet the traceability
16 and redressability requirements for Article III standing. *See id.* at 7-8. The only issue presented by
17 this lawsuit is whether *Congress* acted unconstitutionally when it enacted § 802. Even if there were
18 otherwise any merit to plaintiffs' suit—and there is not—there would be no basis for suing the
19 carriers.

20 **II. PLAINTIFFS HAVE ABANDONED THEIR DUE PROCESS CLAIM**

21 Plaintiffs likewise offer no response to the carriers' showing (Carriers' MTD at 5-6) that
22 plaintiffs' due process cause of action—premised on the notion that Congress cannot change the law
23 applicable to pending causes of action, *see Compl. ¶ 39 (McMurray Dkt. 1, Attach. 2)*—fails to state
24 a claim. As the Court of Appeals recently confirmed, where "Congress has expressed its clear intent
25 that [] legislation be retroactive, 'the constitutional impediments'" are "'modest.'" *Ileto v. Glock,*
26 *___ F.3d ___, 2009 WL 1272629, at *9 (9th Cir. May 11, 2009) (quoting Landgraf v. USI Film*
27 *Prods., 511 U.S. 244, 272 (1994)). "[B]arring irrational or arbitrary conduct, Congress can adjust*

1 the incidents of our economic lives as it sees fit.” *Ileto*, 2009 WL 1272629, at *10 (quoting *Lyon v.*
 2 *Agusta S.P.A.*, 252 F.3d 1078, 1086 (9th Cir. 1989)); *see also Usery v. Turner Elkhorn Mining Co.*,
 3 428 U.S. 1, 15 (1976) (“[L]egislative Acts adjusting the burdens and benefits of economic life come
 4 to the Court with a presumption of constitutionality.”). This standard is easily satisfied here. *See*
 5 *Carriers’ MTD* at 5-6.

6
 7 **III. PLAINTIFFS’ SEPARATION OF POWERS CLAIM IGNORES THE COURT’S
 MEANINGFUL ROLE UNDER SECTION 802**

8 Plaintiffs similarly do not defend their claim that § 802 violates the separation of powers by
 9 permitting the Executive Branch to exercise adjudicative power. Although such an allegation
 10 appears in their complaint (*see* ¶ 34), plaintiffs do not address the carriers’ demonstration (*Carriers’*
 11 *MTD* at 4) that § 802 preserves adjudicative authority in the courts. Instead, plaintiffs’ separation-
 12 of-powers argument now depends on the even more sweeping claim that § 802 “permits *no scope* for
 13 *any* adjudication of the defense” it enacts. *Opp.* at 19 (emphasis added). As the statute’s plain text
 14 makes clear, however, § 802 requires the court to adjudicate whether immunity applies. *See*
 15 *Carriers’ MTD* at 4. The court must determine whether any certification filed by the Attorney
 16 General meets the detailed requirements of § 802(a), and whether the assertions contained in the
 17 certification are supported by “substantial evidence.” *See* 50 U.S.C. § 1885a(a), (b)(1). And,
 18 because Congress has changed the substantive law applicable to the McMurray plaintiffs’ underlying
 19 damages action—not just mandated dismissal of their case—the prohibition of *United States v.*
 20 *Klein*, 80 U.S. (13 Wall.) 128 (1871), simply is not implicated. *See Carriers’ MTD* at 4; *see also*
 21 *Ileto*, 2009 WL 1272629, at *9-10 (rejecting *Klein* challenge to gun manufacturer immunity
 22 legislation even though the Court acknowledged that “members of Congress wanted to preempt *this*
 23 pending case by name” (emphasis in original)).

24
 25 **IV. PLAINTIFFS’ TAKINGS CLAIM IS SQUARELY FORECLOSED BY NINTH
 CIRCUIT PRECEDENT**

26 The carrier defendants adopted the government’s takings arguments by reference in their
 27 motion to dismiss and leave to the government the primary response to plaintiffs with respect to this
 28

1 issue. We simply would emphasize that the basic defect in plaintiffs’ takings challenge was
2 reaffirmed by the Ninth Circuit in the *Ileto* case: A “party’s property right in *any* cause of action
3 does not vest until a final unreviewable judgment is obtained.” *Ileto*, 2009 WL 1272629, at *12
4 (rejecting takings challenge to gun manufacturer immunity legislation) (quoting *Lyon*, 252 F.3d at
5 1086) (emphasis added); *see also* U.S. MTD (MDL Dkt. 583) at 4-6. Plaintiffs’ opposition offers no
6 reason to depart from the *Ileto* court’s directly applicable holding.

7 **CONCLUSION**

8 Accordingly, for the reasons set forth above, in the carriers’ motion to dismiss, and in the
9 government’s motion to dismiss and reply brief, the *McMurray* Complaint should be dismissed.

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Dated: May 22, 2009

Respectfully submitted,

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DECLARATION PURSUANT TO GENERAL ORDER 45, § X.B

I, Brian M. Boynton, hereby declare pursuant to General Order 45, § X.B, that I have obtained the concurrence in the filing of this document from the other signatories listed above.

I declare under penalty of perjury that the foregoing declaration is true and correct.

Executed on May 22, 2009, at Washington, D.C.

By: /s/ Brian M. Boynton
Brian M. Boynton

Attorney for Verizon Communications Inc.