

1 ELECTRONIC FRONTIER FOUNDATION
 CINDY COHN (145997)
 2 cindy@eff.org
 LEE TIEN (148216)
 3 tien@eff.org
 KURT OPSAHL (191303)
 4 kurt@eff.org
 KEVIN S. BANKSTON (217026)
 5 bankston@eff.org
 CORYNNE MCSHERRY (221504)
 6 corynne@eff.org
 JAMES S. TYRE (083117)
 7 jstyre@eff.org
 454 Shotwell Street
 8 San Francisco, CA 94110
 Telephone: 415/436-9333
 9 415/436-9993 (fax)

10 Attorneys for Plaintiffs

11 [Additional counsel appear on signature page.]

12

13

UNITED STATES DISTRICT COURT

14

FOR THE NORTHERN DISTRICT OF CALIFORNIA

15

SAN FRANCISCO DIVISION

16

TASH HEPTING, GREGORY HICKS,)
 CAROLYN JEWEL and ERIK KNUTZEN, on)
 17 Behalf of Themselves and All Others Similarly)
 Situated,)

No. C-06-0672-VRW

18

Plaintiffs,)

CLASS ACTION

19

v.)

**PLAINTIFFS' OPPOSITION TO
 MOTION TO DISMISS AMENDED
 COMPLAINT BY DEFENDANT AT&T,
 CORP.**

20

AT&T CORP., et al.,)

Date: June 23, 2006

21

Time: 9:30 a.m.

22

Defendants.)

Courtroom: 6, 17th Floor

23

Judge: Hon. Vaughn Walker

24

Filed concurrently:

1. Proposed Order

25

2. Motion to Extend Page Limits

26

27

28

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE of contents..... i

ISSUES TO BE DECIDED.....viii

MEMORANDUM OF POINTS AND AUTHORITIES..... 1

I. STATEMENT OF FACTS AND SUMMARY OF ARGUMENT..... 1

II. STANDARDS FOR DECIDING THIS MOTION 3

III. ARGUMENT 4

 A. Plaintiffs Have Standing to Seek Redress for AT&T’s Unlawful Surveillance..... 4

 B. Plaintiffs’ Claims Are Not Subject To Dismissal On Grounds Of Statutory Immunity, or for Failure to Allege Absence of Such Immunity. 9

 1. Plaintiffs Do Not Bear the Burden of Pleading the Absence of Lawful Authorization for AT&T’s Conduct. 9

 2. Lawful Authorization Is an Affirmative Defense for AT&T, not Plaintiffs, to Plead and Prove. 11

 3. Even if Plaintiffs Did Bear the Burden to Plead Lack of Lawful Authorization, They Have Met That Burden. 13

 4. No Amount of Government Authorization Can Immunize AT&T from Liability for the Illegal Surveillance Activities Alleged in the Complaint. 15

 C. Plaintiffs’ Claims Are Not Subject to Dismissal on Grounds of Absolute or Qualified Immunity. 17

 1. Neither Absolute Nor Qualified Immunity Bars the Injunctive and Other Equitable Relief Plaintiffs Seek on Each of Their Claims..... 18

 2. AT&T Is Not One of the Select Few Essential Government Actors Entitled to Absolute Immunity..... 19

 3. AT&T Has No “Absolute Common-Law Immunity.” 20

 a. The Common Law Imposes Damages Liability for Unlawful Searches and Seizures. 20

 b. The Ninth Circuit Has Held that Telecommunications Providers Are Liable for Assisting the Government in Illegal Surveillance. 22

 4. No Qualified Immunity Defense Is Even Potentially Available to AT&T. 24

 a. Qualified Immunity Is Available Only to Individuals, Not Corporations..... 24

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- b. Qualified Immunity Is Unavailable Because Telecommunications Providers Have No Common Law Immunity from Tort Actions and The Purposes of Qualified Immunity Do Not Extend to Them..... 25
- c. Qualified Immunity Does Not Apply to Plaintiffs’ Statutory Claims..... 27
- 5. Qualified Immunity Is Unavailable for Plaintiffs’ Claims Because They Are All Based on Clearly Established Law. 28
- IV. CONCLUSION 29

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Cases

Adams v. U.S., 420 F.3d 1049, 1051 (9th Cir. 2005) 21, 24

American Fire, Theft & Collision Managers, Inc. v. Gillespie, 932 F.2d 816 (9th Cir. 1991) 18

Andresen v. Maryland, 427 U.S. 463 (1976)..... 29

Awbrey v. Great Atlantic & Pacific Tea Co., 505 F.Supp. 604 (N.D. Ga. 1980) 8

Berger v. New York, 388 U.S. 41, 59 (1967)..... 7

Berry v. Funk, 146 F.3d 1003 (D.C. Cir. 1998) 28

Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) 14

Blake v. Wright, 179 F.3d 1003 (6th Cir. 1999)..... 28

Blufome v. Pharmatrak, Inc., 329 F.3d 9 (1st Cir. 2003)..... 12

Brennan v. Concord EFS, Inc., 369 F.Supp.2d 1127 (N.D.Cal. 2005) 9

Columbia Natural Resources, Inc. v. Tatum, 58 F.3d 1101 (6th Cir. 1995) 4

Common Cause v. Dep’t of Energy, 702 F.2d 245 (D.C.Cir. 1983)..... 9

Company v. U.S. (In re U.S.), 349 F.3d 1132 (9th Cir. 2003)..... 27

Craska v. New York Tel. Co., 239 F. Supp. 932 (N.D.N.Y. 1965)..... 24

Critz v. Southern Bell Tel. & Tel. Co., 172 So. 510, 512 (Miss. 1937)..... 26

Dennis v. Sparks, 449 U.S. 24 (1980) 20

Dep’t of Commerce v. United States House of Representatives, 525 U.S. 316 (1999)..... 5

Dep’t of Hous. & Urban Dev. v. Rucker, 535 U.S. 125 (2002)..... 10

Doe v. Smith, 429 F.3d 706 (7th Cir. 2005) 12

Entick v. Carrington, 19 How. St. Tr. 1029 (C.P. 1765)..... 20

Farid v. Smith, 850 F.2d 917 (2d Cir. 1988) 21

Fed. Election Comm’n v. Akins. 524 U.S. 11 (1998) 5

Fowler v. Southern Bell Tel. & Tel. Co., 343 F.2d 150 (5th Cir. 1965)..... 23

Gelston v. Hoyt, 16 U.S. (3 Wheat.) 246 (1818) 20

George v. Carusone, 849 F. Supp. 159 (D. Conn. 1994) 7

1 *Gonzales v. Southwestern Bell Tel. Co.*, 555 S.W.2d 219 (Tex. App. 1977)..... 26

2 *Halkin v. Helms*, 690 F.2d 977 (D.C. Cir. 1982)..... 8

3 *Halperin v. Kissinger*, 807 F.2d 180 (D.C. Cir. 1986)..... 29

4 *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)..... 17, 19, 20, 23

5 *Huff v Michigan Bell Tel. Co.* 278 F. Supp. 76 (E.D.Mich. 1967)..... 5

6 *In re State Police Litigation*, 888 F. Supp 1235 (D. Conn. 1995)..... 7

7 *Jacobson v. Rose*, 592 F.2d 515 (9th Cir. 1978) 22, 23, 26, 28

8 *Joshua L. Bailey & Co. v. Western Union Tel. Co.*, 76 A. 736, 741 (Pa. 1910) 26

9 *Katz v. U.S.*, 389 U.S. 347 (1967) 7

10 *Kilgore v. Mitchell*, 623 F.2d 631 (9th Cir. 1980)..... 15

11 *LaGuerre v. Reno*, 164 F.3d 1035 (7th Cir. 1998) 17

12 *Laird v. Tatum*, 408 U.S. 1 (1972) 7

13 *Le Crone v. Ohio Bell Tel. Co.*, 201 N.E.2d 533 (Ohio Ct. App. 1963) 26

14 *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804)..... 21

15 *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)..... 4, 8

16 *McClelland v. McGrath*, 31 F.Supp.2d 616 (N.D. Ill. 1998) 16

17 *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232 (1980)..... 3

18 *McLeod v. Pacific States Tel. & Tel. Co.*, 94 P. 568, *on reh.*, 95 P. 1009 (Or. 1908) 26

19 *Mitchell v. Forsyth*, 472 U.S. 511 (1985)..... 17, 19, 20, 24

20 *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) 20

21 *Nami v. Fauver*, 82 F.3d 63 (3d Cir. 1996) 8

22 *Nardone v. U.S.*, 302 U.S. 379 (1937)..... 29

23 *Nat’l Org. for Women v. Scheidler*, 510 U.S. 249 (1994) 13

24 *Nevada v. Burford*, 918 F.2d 854 (9th Cir. 1990) 8

25 *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) 17, 19

26 *Olagues v. Russoniello*, 797 F.2d 1511 (9th Cir. 1986) 7

27 *Owen v. Independence*, 445 U.S. 622 (1980)..... 24, 25

28 *Pelozo v. Capistrano Unified Sch. Dist.*, 37 F.3d 517 (9th Cir. 1994)..... 3

1 *People v. Blair*, 25 Cal. 3d 640 (1979)..... 6

2 *People v. McKunes*, 51 Cal. App. 3d 487 (1975)..... 6

3 *Philadelphia Co. v. Stimson*, 223 U.S. 605 (1912)..... 18, 23

4 *Porter v. Jones*, 319 F.3d 483 (9th Cir. 2003)..... 10

5 *Presbyterian Church (U.S.A.) v. U.S.*, 870 F.2d 518 (9th Cir. 1989)..... 7, 18

6 *Pulliam v. Allen*, 466 U.S. 522 (1984) 18

7 *Richardson v. McKnight*, 521 U.S. 399 (1997) 24, 25, 26, 27

8 *Sanders v. Robert Bosch Corp.*, 38 F. 3d 736 (4th Cir. 1994) 7

9 *Saucier v. Katz*, 533 U.S. 194 (2001) 28

10 *Sierra Club v. Morton*, 405 U.S. 727 (1972)..... 9

11 *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976)..... 4, 8

12 *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602 (1989) 7

13 *Smith v. Nixon*, 606 F.2d 1183 (D.C. Cir. 1979) 22, 23, 26

14 *Southern Bell Tel. & Tel. Co. v. Earle*, 45 S.E. 319, 321 (Ga. 1903)..... 26

15 *Stanford v. Texas*, 379 U.S. 476 (1965) 29

16 *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) 10

17 *Tapley v. Collins*, 211 F.3d 1210 (11th Cir. 2000)..... 28

18 *The Apollon*, 22 U.S. (9 Wheat.) 362 (1824)..... 20

19 *Theofel v. Farey-Jones*, 359 F.3d 1066 (9th Cir. 2004) 14

20 *Thompson v. Dulaney*, 970 F.2d 744 (10th Cir. 1992)..... 11

21 *Tower v. Glover*, 467 U.S. 914 (1984) 25

22 *TwoRivers v. Lewis*, 174 F.3d 987 (9th Cir. 1999)..... 3

23 *Tyler v. Cuomo*, 236 F.3d 1124 (9th Cir. 2000) 3

24 *U.S. v. First City Nat’l. Bank of Houston*, 386 U.S. 361 (1967) 11

25 *U.S. v. Giordano*, 416 U.S. 505 (1974) 16

26 *U.S. v. Goldstein*, 532 F.2d 1305 (9th Cir. 1976)..... 16

27 *U.S. v. Harvey*, 540 F.2d 1345 (8th Cir. 1976)..... 12

28 *U.S. v. Jones*, 839 F.2d 1041 (5th Cir. 1988) 10, 12

1 *U.S. v. King*, 478 F.2d 494 (9th Cir. 1973)..... 16

2 *U.S. v. Lewis*, 406 F. 3d 11 (1st Cir. 2005) 3, 7

3 *U.S. v. Miller*, 688 F.2d 652 (9th Cir. 1982) 7

4 *U.S. v. New York Tel. Co.*, 434 U.S. 159 (1977) 27

5 *U.S. v. Rodriguez*, 968 F.2d 130 (2d Cir. 1992)..... 7

6 *United Presbyterian Church v. Reagan*, 738 F.2d 1375 (D.C. Cir. 1984)..... 7

7 *Vinson v. Southern Bell Tel. & Tel. Co.*, 66 So. 100 (Ala. 1914)..... 26

8 *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136 (9th Cir. 2003)..... 3, 4

9 *Warth v. Seldin*, 422 U.S. 490 (1975)..... 4

10 *Webster v. Doe*, 486 U.S. 592 (1988)..... 17

11 *Western Union Tel. Co. v. Ramsey*, 88 S.W.2d 675, 677 (Ky. Ct. App. 1935)..... 26

12 *Westfall v. Erwin*, 484 U.S. 292 (1988)..... 23

13 *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457 (2001) 12

14 *Wilkes v. Woods*, 19 How. St. Tr. 1153 (K.B. 1763)..... 20

15 *Williams v. Paulos*, 11 F.3d 271 (1st Cir. 1993) 11

16 *Wyatt v. Cole*, 504 U.S. 158 (1992)..... 18, 25, 27, 28

17 *Wyler Summit P’ship v. Turner Broad. Sys., Inc.*, 135 F.3d 658 (9th Cir. 1998)..... 3

18 *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)..... 18

19

20 **Statutes**

21 15 U.S.C. § 78 10

22 18 U.S.C. § 2510 7

23 18 U.S.C. § 2511 passim

24 18 U.S.C. § 2518 15, 27

25 18 U.S.C. § 2520 passim

26 18 U.S.C. § 2701 10

27 18 U.S.C. § 2702 1, 12, 29

28 18 U.S.C. § 2703 29

1 18 U.S.C. § 2707 passim
 2 18 U.S.C. § 2712 13
 3 28 U.S.C. § 2679 23
 4 47 U.S.C. § 605 passim
 5 50 U.S.C. § 1801 passim
 6 50 U.S.C. § 1802 16
 7 50 U.S.C. § 1805 15
 8 50 U.S.C. § 1806 13
 9 50 U.S.C. § 1809 1, 27
 10 50 U.S.C. § 1810 5, 13, 23
 11 50 U.S.C. § 1811 16
 12 50 U.S.C. § 1845 13
 13 Cal. Bus. & Prof. Code § 17200..... 1, 6

14

15 **Other Authorities**

16 86 Ops. Cal. Att’y. Gen. 198, 2003 WL 22996726 (Dec. 18, 2003)..... 6
 17 *Black’s Law Dictionary* 264 (6th ed. 1990) 15
 18 H.R. Rep. No. 99-647 (1986) 10
 19 S. Rep. No. 90-1097 (1968)..... 15
 20 S. Rep. No. 95-604(I) (1978)..... 15
 21 S. Rep. No. 95-604(II) (1978) 15
 22 S. Rep. No. 99-541 (1986)..... 11, 14

23

24 **Law Review Articles and Treatises**

25 2 HARPER & JAMES, *The Law of Torts*, § 29.8 (1st ed., 1956) 20

26

27

28

ISSUES TO BE DECIDED

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1. Is there a justiciable case or controversy before this Court where plaintiffs have suffered and alleged a concrete injury as a result of AT&T's ongoing wholesale and illegal surveillance of their communications and disclosure of their records?

2. May AT&T continue to violate the established federal and state rights of millions of its customers by merely raising the possibility that the government provided it with some purported authorization to do so?

3. Should the Court create *sua sponte* an entirely new and unprecedented category of common law absolute or qualified immunity for AT&T, to excuse it from blatant violations of federal and state law?

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS AND SUMMARY OF ARGUMENT

This case is a class action brought on behalf of all residential customers and subscribers of defendants AT&T Corp. and AT&T Inc. Plaintiffs allege that defendants are violating a number of federal and California statutes and, as agents of the government, the First and Fourth Amendments.¹ They do so by intercepting and disclosing to the National Security Agency (“NSA”) the domestic and international communications of millions of Americans, as well as by disclosing their entire databases of phone and Internet records, including those communications and records of plaintiffs.

Plaintiffs further allege that defendants have received no court order or other judicial authorization for their wholesale surveillance, and that defendants have received no other lawful authorization that comports with the procedures of the Foreign Intelligence Surveillance Act of 1978 (“FISA”), 50 U.S.C. §§ 1801, *et seq.*, or Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (“Title III”), 18 U.S.C. §§ 2511 *et seq.*, which are the exclusive means by which the government may domestically intercept or conduct electronic surveillance on wire or electronic communications. 18 U.S.C. § 2511(2)(f).

Specifically, Plaintiffs’ Amended Complaint (“Complaint,” Dkt 8) alleges, *inter alia*, an “illegal collaboration” between Defendant AT&T Corp. (“AT&T”) and the government, Complaint ¶ 8, whereby “AT&T [] has opened its key telecommunications facilities and databases to direct access by the NSA and/or other government agencies, intercepting and disclosing to the government the contents of its customers’ communications as well as detailed communications records about millions of its customers, including Plaintiffs and class members.” *Id.* at ¶ 6. AT&T’s unauthorized cooperation with the government is “without judicial or other lawful authorization,” *id.* at ¶ 81, and was undertaken “intentionally, with deliberate indifference, or with reckless disregard of, Plaintiffs’ and class members’ constitutional rights,” *id.* at ¶ 87, “willful[ly]

¹ Specifically, plaintiffs allege statutory violations including without limitation: 50 U.S.C. § 1809, 18 U.S.C. § 2511, 47 U.S.C. § 605 and 18 U.S.C. § 2702 on behalf of a nationwide class and allege all of those plus a violation of Cal. Bus. & Prof. Code § 17200 on behalf of the California sub-class.

1 and for purposes of direct or indirect commercial advantage or private financial gain.” *Id.* at ¶ 114.

2 AT&T’s conduct is part of an NSA surveillance program (“the Program”) far broader than
3 the so-called “Terrorist Surveillance Program” initially admitted by the government, which the
4 government and AT&T contend is limited to international communications in which there is a
5 reasonable suspicion that either the sender or the receiver is connected to Al Qaeda. AT&T Corp.
6 Mot. to Dismiss (“MTD”) (Dkt 86), at 3. This broader Program, the existence of which has been
7 widely reported and of which plaintiffs have provided evidence under seal, “intercepts millions of
8 communications made or received by people inside the United States,” Complaint ¶ 39, and
9 “collects . . . a vast amount of communications traffic data.” *Id.* at ¶ 40. As the Complaint further
10 alleges, AT&T is providing “large volumes of domestic and international telephone and Internet
11 traffic” to the broader Program by intercepting and disclosing to the NSA the “streams of domestic,
12 international and foreign telephone and Internet communications” transmitted through its “key
13 telecommunications facilities,” *id.* at ¶¶ 38, 42-43, and by disclosing the contents of its entire
14 database of phone call and Internet records. *Id.* at ¶¶ 51-52, 61.

15 The complaint does not allege that these interceptions and disclosures have been targeted at
16 plaintiffs as potential terrorist threats or suspects; rather, the entire thrust of the complaint is that
17 AT&T and the government’s illegal collaboration is *untargeted*, such that plaintiffs’
18 communications were and are intercepted for the government, and their records disclosed to the
19 government, indiscriminately. The gravamen of the Complaint is not that plaintiffs have some
20 unspecified fear that they *may* have been wrongfully ensnared in the Terrorist Surveillance
21 Program, as AT&T claims. Instead, it alleges that plaintiffs’ *have already been* ensnared in the
22 broader Program’s fishing expedition through the entirety of AT&T’s networks and databases. The
23 Complaint therefore alleges a concrete injury to plaintiffs’ statutory and constitutional rights and
24 presents a clear case and controversy.

25 AT&T also uses a straw man argument to contend that plaintiffs failed to plead the absence
26 of “blanket immunity” under statute. There are three reasons why this argument fails. First,
27 Congress has not established such a heightened pleading requirement; rather, to avoid liability, it is
28 AT&T’s burden to show that its conduct is in accord with a valid court order or certification

1 authorized by statute that it has relied upon in good faith. Second, even if there were a requirement
2 that plaintiffs allege AT&T's conduct as being in bad faith and without good faith reliance on any
3 valid court order or certification, as AT&T argues, the allegations in the Complaint already satisfy
4 it. Finally, Congress has plainly not authorized or immunized the surveillance alleged here, which
5 goes far beyond the limits of Title III and FISA.

6 AT&T's claims that some form of common law absolute or qualified immunity excuses its
7 illegal conduct are equally baseless. Not only are the doctrines inapplicable to a private
8 corporation's violations of clearly established constitutional and statutory restrictions on
9 surveillance, they are superceded by Congress' statutory defenses. Moreover, even if somehow
10 applicable, neither doctrine can require the dismissal of plaintiffs' equitable claims. Therefore,
11 AT&T's motion to dismiss must be denied.²

12 II. STANDARDS FOR DECIDING THIS MOTION

13 "On a motion to dismiss, all well-pleaded allegations of material fact are taken as true and
14 construed in a light most favorable to the non-moving party." *Wylor Summit P'ship v. Turner*
15 *Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998) (citation omitted). The standard is the same for
16 "purposes of ruling on a motion to dismiss for want of standing." *Tyler v. Cuomo*, 236 F.3d 1124,
17 1131 (9th Cir. 2000). As the Supreme Court has stated, "a complaint should not be dismissed
18 unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim
19 which would entitle him to relief.'" *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232,
20 246 (1980) (citation omitted). Furthermore, courts must assume that all general allegations
21 "embrace whatever specific facts might be necessary to support them," *Pelozo v. Capistrano*
22 *Unified Sch. Dist.*, 37 F.3d 517, 521 (9th Cir. 1994), and courts adopt whatever inference supports
23 a valid claim. *TwoRivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1999); *see also Warren v. Fox*
24 *Family Worldwide, Inc.*, 328 F.3d 1136, 1140 (9th Cir. 2003) (at pleading stage, plaintiffs "need
25

26 _____
27 ² Co-defendant AT&T Inc. has made a separate motion to dismiss on 12(b)(2) jurisdiction
28 grounds (Dkt 79), and joined in this motion by AT&T Corp. This Opposition applies both to
AT&T Corp.'s motion and to AT&T Inc.'s joinder in it.

1 only show that the facts alleged, if proved, would confer standing upon him.” (citations omitted)).³

2 III. ARGUMENT

3 A. Plaintiffs Have Standing to Seek Redress for AT&T’s Unlawful Surveillance.

4 Plaintiffs have standing because they allege that they (1) have suffered an actual and
5 threatened injury as (2) a result of the putatively illegal conduct of AT&T that (3) “is likely to be
6 redressed by a favorable decision.” *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26,
7 38, 41 (1976); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). The Complaint
8 squarely meets all the standing requirements. For example, the Complaint alleges that:

9 On information and belief, AT&T Corp. has opened its key telecommunications
10 facilities and databases to direct access by the NSA and/or other government
11 agencies, intercepting and disclosing to the government the contents of its
customers’ communications as well as detailed communications records about
millions of its customers, *including Plaintiffs and class members*.

12 Complaint ¶ 6 (emphasis added); *see also id.* at ¶¶ 43, 44, 47, 52, 60, 61, 85, 86, 95, 97, 103, 105,
13 107, 113, 121, 128, 141. These allegations are more than sufficient to establish plaintiffs’
14 standing.⁴

15 Specifically, plaintiffs have alleged widespread injury, both actual and threatened, that can
16 be directly traced to AT&T’s collaboration with the government’s warrantless surveillance
17 Program in violation of the First and Fourth Amendment of the United States Constitution, as well
18 as state and federal statutes. The actual or threatened injury required by Article III may exist solely
19 by virtue of “statutes creating legal rights, the invasion of which creates standing.” *Warth v. Seldin*,
20 422 U.S. 490, 500 (1975). Plaintiffs have alleged facts sufficient for standing under each state and
21

22
23 ³ *Warren* also notes that courts may look to extrinsic facts, such as matters of public record,
introduced to challenge standing. *Id.* at 1139. While AT&T cites to this proposition (AT&T Motion
24 to Dismiss (“MTD”) at 4), it has introduced no facts showing that it did not intercept plaintiffs’
communications or disclose their records. Accordingly, AT&T’s motion must be treated as a facial,
25 not factual, attack under Fed. R. Civ. P. 12(b)(1).

26 ⁴ AT&T attempts to convince this Court to narrowly construe allegations of AT&T’s
surveillance of “all or a substantial number of” the communications of the plaintiffs and the class
27 as “not all, but only a ‘substantial number’ of” such communications. MTD at 25. The plain
inference from the Complaint, however, is that AT&T is indiscriminately surveilling the
28 communications of all its customers, including plaintiffs. *See Columbia Natural Resources, Inc. v.*
Tatum, 58 F.3d 1101, 1109 (6th Cir. 1995) (“When an allegation is capable of more than one
inference, it must be construed in the plaintiff’s favor.”).

1 federal statute in the Complaint:

- 2 • Plaintiffs have standing under 18 USC § 2520 because they have alleged a violation of
 3 Title III. *See, e.g.*, Complaint ¶ 108. Unless the surveillance is authorized by 18 U.S.C.
 4 § 2511(2)(a)(ii), “any person whose wire, oral, or electronic communication is
 5 intercepted, disclosed, or intentionally used in violation of this chapter” has standing to
 6 pursue a civil suit under Title III. Not only have plaintiffs alleged interception,
 7 disclosure, and intentional use (*see, e.g.*, Complaint ¶¶ 6, 43-44, 46), plaintiffs have
 8 alleged the surveillance is without “lawful authorization,” Complaint ¶ 81, taking it
 9 outside the ambit of Section 2511(2)(a)(ii).⁵
- 10 • Plaintiffs have standing under 50 U.S.C. § 1810 because they are aggrieved persons
 11 pursuant to FISA. *See, e.g.*, Complaint ¶ 98. Pursuant to 50 USC § 1801(k), an
 12 “‘Aggrieved person’ means . . . any . . . person whose communications or activities
 13 were subject to electronic surveillance.” Plaintiffs are “aggrieved” because they have
 14 repeatedly alleged that their communications or activities were subject to electronic
 15 surveillance. *See* Complaint ¶¶ 42-63.⁶
- 16 • Plaintiffs have standing under 47 U.S.C. § 605(e)(3)(A), because plaintiffs have alleged
 17 that AT&T divulged or published their wire and electronic communications in violation
 18 of 47 U.S.C. § 605(a). *See* Complaint ¶¶ 6, 46, 52, 64, 113-116. Furthermore, a
 19 telephone company’s placement of a wiretapping mechanism on a telephone line is an
 20 “interception” within the meaning of § 605. *Huff v Michigan Bell Tel. Co.* 278 F. Supp.
 21 76, 77 (E.D.Mich. 1967).

22
 23
 24 ⁵ As discussed below, such an allegation is not necessary to plead a violation of the statute.
 However, even assuming that plaintiffs did have to allege that AT&T’s conduct was not authorized
 by 18 U.S.C. § 2511(2)(a)(ii), its pleading on this point was sufficient. *See* Section III.B. *infra*.

25 ⁶ This also disposes of any concern about prudential standing. “History associates the word
 26 ‘aggrieved’ with a congressional intent to cast the standing net broadly-beyond the common-law
 interests and substantive statutory rights upon which ‘prudential’ standing traditionally rested.”
 27 *Fed. Election Comm’n v. Akins*. 524 U.S. 11, 12 (1998); *see also Dep’t of Commerce v. United*
 28 *States House of Representatives*, 525 U.S. 316, 327 (1999) (Congress’ use of “any person
 aggrieved” in the Census Act, 13 U.S.C. § 209(b), “eliminated any prudential concerns in [that]
 case.”)

- 1 • Plaintiffs have standing under 18 U.S.C. § 2707, because they have alleged that they
2 were “aggrieved by [AT&T’s] violation of [18 U.S.C. § 2702] in which the conduct
3 constituting the violation [was] engaged in with a knowing or intentional state of mind.”
4 18 U.S.C. § 2707(a); *see* Complaint ¶¶ 119-132. For example, plaintiffs have alleged
5 that AT&T divulged their call detail records to the government (Complaint ¶¶ 52-61), as
6 was recently confirmed by reporting in USA Today. *See* Leslie Cauley, *NSA has*
7 *massive database of Americans’ phone calls*, USA Today, May 11, 2006, at p. A1.
- 8 • Plaintiffs have standing under Calif. Bus. & Prof. Code § 17200 *et seq.* because they
9 have alleged injury (lost money and property in the form of fees paid, Complaint ¶ 147)
10 due to AT&T’s unfair, unlawful and/or fraudulent business practices described above.
11 In addition to the statutory and constitutional violations described above, plaintiffs have
12 alleged two more violations of law that comprise an unlawful business practice under
13 California law: installation of unauthorized pen registers and tap and trace devices
14 (Complaint ¶¶ 43, 140) and unauthorized disclosure of customer proprietary network
15 information (Complaint ¶¶ 53-61) that AT&T obtained by virtue of its provision of
16 telecommunications services. *See* Complaint ¶¶ 138-147. Moreover, plaintiffs have
17 alleged a violation of their California Constitutional right to privacy, which is both
18 unfair and unlawful. *See People v. Blair*, 25 Cal. 3d 640, 653-55 (1979) (California
19 Constitutional right to privacy protects telephone records) and *People v. McKunes*, 51
20 Cal. App. 3d 487, 490-91 (1975) (a person’s constitutional right of privacy is violated
21 by the government’s obtaining from the telephone company, without having secured a
22 subpoena or other court order, records of telephone calls between that person and a
23 telephone company subscriber); *see also* 86 Ops. Cal. Att’y. Gen. 198, 2003 WL
24 22996726 at *4 (Dec. 18, 2003) (“[T]he California Constitution allows the placement of
25 pen registers and trap and trace devices [for acquisition of dialing information] only if a
26 judicial ruling is first obtained that the law enforcement officers are entitled to the
27 records.”).

28 In addition to having standing under the above statutes, plaintiffs have also alleged direct

1 injury to their rights under the First and Fourth Amendments to the United States Constitution,
 2 based on AT&T's warrantless and unreasonable search and seizure of communications and records
 3 in which plaintiffs have a reasonable expectation of privacy. Complaint ¶¶ 79, 81, 85.⁷ These
 4 searches and seizures in violation of plaintiffs' Fourth Amendment rights have further violated and
 5 chilled their First Amendment rights to speak and receive speech anonymously, and to associate
 6 privately. *Id.* at ¶¶ 80, 85; *see, e.g., Katz v. U.S.*, 389 U.S. 347 (1967) (holding electronic voice
 7 surveillance to be a "search and seizure"); *Berger v. New York*, 388 U.S. 41, 59 (1967) (same);
 8 *Olagues v. Russoniello*, 797 F.2d 1511 (9th Cir. 1986) (*en banc*), vacated as moot, 484 U.S. 806
 9 (1987) (finding standing under First Amendment where plaintiffs subjected to surveillance,
 10 distinguishing *Laird v. Tatum*, 408 U.S. 1 (1972)); *Presbyterian Church (U.S.A.) v. U.S.*, 870 F.2d
 11 518 (9th Cir. 1989) (church has First Amendment standing where individual members were
 12 chilled).

13 Attempting to support its straw man arguments, AT&T inappositely cites to a case where
 14 the plaintiffs did not specifically allege that they had been subject to surveillance. MTD at 21; *see*
 15 *United Presbyterian Church v. Reagan*, 738 F.2d 1375, 1380 (D.C. Cir. 1984) ("[Appellants] have
 16 not adequately averred that any specific action is threatened or even contemplated against them.").⁸

17 _____
 18 ⁷ Although AT&T is a private party, plaintiffs have alleged agency (Complaint ¶¶ 82-85),
 19 and a private party's conduct counts as state action for Fourth Amendment purposes "if the private
 20 party act[s] as an instrument or agent of the Government." *Skinner v. Railway Labor Executives'*
 21 *Ass'n*, 489 U.S. 602, 614 (1989); *see also U.S. v. Miller*, 688 F.2d 652, 657 (9th Cir. 1982)
 (holding that private action counts as government conduct if, at the time of the search, the
 government knew of or acquiesced in the intrusive conduct, and the party performing the search
 intended to assist law enforcement efforts).

22 ⁸ AT&T attempts to further muddy the waters with a footnote argument, MTD at 20, n.12,
 23 claiming that plaintiffs must specifically allege that a person has reviewed plaintiffs'
 24 communications before an injury has occurred. However, the statutes clearly establish standing for
 25 anyone whose communications have been intercepted or subjected to electronic surveillance, i.e.,
 26 whose communications have been acquired by a device, without reference to whether they are
 27 listened to or read afterwards. *See* 18 U.S.C. § 2510(4) (definition of "intercept" in Title III) and 50
 28 U.S.C. § 1801(f)(2) (relevant definition of "electronic surveillance" in FISA); *see, e.g., U.S. v.*
Rodriguez, 968 F.2d 130, 136 (2d Cir. 1992) (holding that "when the contents of a wire
 communication are captured or redirected in any way, an interception occurs at that time."); *In re*
State Police Litigation, 888 F. Supp. 1235, 1264 (D. Conn. 1995) (holding that "it is the act of
 diverting, and not the act of listening, that constitutes an 'interception.'"); *Jacobson v. Rose*, 592
 F.2d 515, 522 (9th Cir. 1978) (same); *U.S. v. Lewis*, 406 F. 3d 11, 18 n. 5 (1st Cir. 2005) (same);
Sanders v. Robert Bosch Corp., 38 F. 3d 736, 740 (4th Cir. 1994) (same); *George v. Carusone*, 849
 F. Supp. 159, 163 (D. Conn. 1994) (same); *see also Awbrey v. Great Atlantic & Pacific Tea Co.*,

1 Here, by contrast, plaintiffs repeatedly allege that AT&T is conducting massive, wholesale
 2 surveillance of ordinary customers, including themselves, and AT&T does not even attempt to
 3 argue that those who actually *are* illegally surveilled do not have standing. While AT&T neither
 4 confirms nor denies the allegations, whether plaintiffs will ultimately be able to prove their claims
 5 is not at issue in this motion. *Nami v. Fauver*, 82 F.3d 63, 65 (3d Cir. 1996); *see also Lujan*, 504
 6 U.S. at 566 (allegation of injury may be sufficient to survive a motion to dismiss, even if, on a
 7 motion for summary judgment, the facts do not exist to support the allegation); *Simon*, 426 U.S. at
 8 45 n.25 (same).⁹

9 At its core, the Complaint alleges that AT&T is, as a factual matter, subjecting plaintiffs
 10 and millions of other innocent Americans to illegal surveillance and disclosure of private records.
 11 This is not a complaint on behalf of members of an organization who might be surveilled as
 12 possible terrorists; nor is it a complaint by concerned citizens based solely on their desire to change
 13 government policy, where standing is predicated on a right to require that the Government be
 14 administered according to law. *Cf. Nevada v. Burford*, 918 F.2d 854, 856-57 (9th Cir. 1990) (“An
 15 asserted right to have the Government act in accordance with law is not sufficient, *standing alone*,
 16 to confer jurisdiction on a federal court.” (citations omitted) (emphasis added)).

17 Rather, the named plaintiffs and the class they represent have alleged that AT&T has
 18 intercepted and disclosed their private communications and records. The fact that the class consists
 19 of millions of AT&T customers does not turn this case into an unjusticiable generalized grievance.
 20

21 505 F.Supp. 604, 606-607 (N.D. Ga. 1980) (allegations of continued, indiscriminate wiretapping
 22 sufficient to survive motion for summary judgment without evidence of specific phone calls tapped
 23 or listened to). Similarly, the statutes plainly prohibit AT&T from “knowingly divulging to any
 24 person or entity” the contents of plaintiffs’ communications or records pertaining to them, without
 25 reference to what that person or entity eventually does with the disclosed material. 18 U.S.C. §
 26 2702(a).⁶

25 For this reason, AT&T’s citation to *Halkin v. Helms*, 690 F.2d 977 (D.C. Cir. 1982), is
 26 unpersuasive. “In the present case, there can be little doubt that the complaint alleged facts –
 27 interception of plaintiffs’ private communications – which if proved would constitute an injury in
 28 fact, permitting plaintiffs to go forward in an effort to prove the truth of those allegations and any
 consequent liability of the defendants.” *Id.* at 999. Rather, the court dismissed for lack of standing
 in that case because it had already ruled that the facts necessary to prove those allegations were
 privileged state secrets, an issue addressed in a separate motion. *See Plaintiffs’ Opposition to
 Gov’t’s Motion to Dismiss (“Opp. To Gov’t Mot.”)* (to be filed June 8).

1 *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972) (“[T]he fact that particular environmental
 2 interests are shared by the many rather than the few does not make them less deserving of legal
 3 protection through the judicial process.”); *Common Cause v. Dep’t of Energy*, 702 F.2d 245, 251
 4 (D.C.Cir. 1983) (“[T]he widespread character of an alleged injury does not demean the standing of
 5 those who are in fact injured.”).

6 **B. Plaintiffs’ Claims Are Not Subject To Dismissal On Grounds Of Statutory**
 7 **Immunity, or for Failure to Allege Absence of Such Immunity.**

8 AT&T wrongly argues that plaintiffs have failed to plead the absence of “absolute
 9 immunity” under 18 U.S.C. § 2511(2)(a)(ii) (the “law enforcement assistance exception”), which
 10 authorizes service providers such as AT&T to assist in lawful surveillance. Neither the applicable
 11 notice pleading standards, Congress’ intent, nor the plain language and structure of the statute
 12 creates such a pleading burden on plaintiffs. To the contrary, it is AT&T’s burden to plead and
 13 prove its affirmative defenses, including one based on the argument that its conduct was lawfully
 14 authorized and undertaken in good faith. Nonetheless, even if plaintiffs do carry such a burden, the
 15 allegations in the Complaint meet it. Finally, regardless of burden, AT&T’s conduct is wholly
 16 unlawful, going far beyond the bounds of Title III or FISA, and is therefore neither authorized nor
 17 immunized.

18 **1. Plaintiffs Do Not Bear the Burden of Pleading the Absence of Lawful**
 19 **Authorization for AT&T’s Conduct.**

20 “FRCP 8(a), which states that a plaintiff’s pleadings must contain ‘a short and plain
 21 statement of the claim showing that the pleader is entitled to relief,’ provides the standard for
 22 judging whether such a cognizable claim exists. . . . This standard is a liberal one that does not
 23 require a plaintiff to set forth all the factual details of the claim; rather, all that the standard requires
 24 is that a plaintiff give the defendant fair notice of the claim and the grounds for making that claim.”
 25 *Brennan v. Concord EFS, Inc.*, 369 F.Supp.2d 1127 (N.D.Cal. 2005) (citing *Lee v. City of Los*
 26 *Angeles*, 250 F.3d 668, 679 (9th Cir. 2001); *Leatherman v. Tarrant County Narcotics Intell &*
 27 *Coordination Unit*, 507 U.S. 163 (1993)). Plaintiffs here meet the liberal notice pleading standard.
 28 Tellingly, AT&T makes no claim that it has not received fair notice of plaintiffs’ claims.

1 The Supreme Court has repeatedly rejected efforts to impose “heightened pleading”
 2 standards in cases like this one in which no statute or rule expressly dictates. In *Swierkiewicz v.*
 3 *Sorema N.A.*, 534 U.S. 506 (2002), the Court held:

4 Rule 8(a)’s simplified pleading standard applies to all civil actions, with limited
 5 exceptions. Rule 9(b), for example, provides for greater particularity in all
 6 averments of fraud or mistake. This Court, however, has declined to extend such
 exceptions to other contexts.... Thus, complaints in these cases, as in most others,
 must satisfy only the simple requirements of Rule 8(a).

7 534 U.S. at 513; *Porter v. Jones*, 319 F.3d 483, 495 (9th Cir. 2003) (applying *Sorema*; “we are to
 8 follow those pleading rules established in the Federal Rules of Civil Procedure and by statute,
 9 and . . . we are not to establish our own.”).

10 Despite the established rule that heightened pleading requirements are improper except
 11 where expressly instructed by Congress,¹⁰ and the plain lack of any express instructions from
 12 Congress in the statutes at issue, AT&T attempts to conjure up technical pleading requirements
 13 based on a partial reading of the legislative history. But where the statute’s language is plain, no
 14 resort to legislative history is necessary. *Dep’t of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125,
 15 132 (2002) (“[R]eference to legislative history is inappropriate when the text of the statute is
 16 unambiguous.”).

17 However, even if the court were to consider the legislative history presented by AT&T, it is
 18 unpersuasive. The specific pleading requirements contemplated in the Senate Report for the
 19 Electronic Communications Privacy Act of 1986 (“ECPA”), 18 U.S.C. §§ 2701 *et seq.*, which
 20 AT&T cites, are wholly unreflected in the statute itself, and are also absent from the House’s
 21 discussion of the same amendments to 18 U.S.C. § 2520. *See* H.R. Rep. No. 99-647, at 50 (1986).

22
 23 ¹⁰ Congress knows how to use specific language to indicate technical pleading
 requirements, such as in cases involving securities fraud:

24 *[T]he complaint shall specify each statement alleged to have been misleading, the*
 25 *reason or reasons why the statement is misleading, and, if an allegation regarding*
 26 *the statement or omission is made on information and belief, the complaint shall*
 27 *state with particularity all facts on which that belief is formed.... [T]he complaint*
shall, with respect to each act or omission alleged to violate this chapter, state with
particularity facts giving rise to a strong inference that the defendant acted with the
required state of mind.

28 15 U.S.C. § 78u-4(b) (emphasis added). The statutes at issue here contain no such express
 requirements.

1 Both the House and the Senate Reports, however, do include language indicating that in order to
 2 obtain dismissal, a provider such as AT&T has the burden of showing the existence of a court order
 3 or other lawful authorization, and of showing that it acted in accord with that authorization in good
 4 faith:

5 The term “good faith” as used in this section includes the receipt of a facially valid
 6 court order. Thus, the fact that the provider of electronic communication service
 7 also has received such a court order, means the provider would be entitled to a
 dismissal of a civil course of action *upon a showing that such provider acted within
 the scope of the court order.*

8 *Id.* (emphasis added); *see also* S. Rep. No. 99-541, at 27 (1986), as reprinted in 1986 U.S.C.C.A.N.
 9 3555, 3581 (using nearly identical language). Thus, even considering the legislative history,
 10 AT&T’s argument that Congress somehow meant to infer a heightened pleading standard even
 11 while it did not specify one in the text must fail. Rather, it is AT&T’s burden to affirmatively plead
 12 the lawfulness of its conduct.¹¹

13 **2. Lawful Authorization Is an Affirmative Defense for AT&T, not**
 14 **Plaintiffs, to Plead and Prove.**

15 AT&T has the burden of affirmatively showing that its conduct was lawfully authorized,
 16 pursuant to the well-established principle of statutory construction holding that the party seeking
 17 the benefit of an exception to a statutory prohibition bears the burden of proof. *See U.S. v. First*
 18 *City Nat’l. Bank of Houston*, 386 U.S. 361, 366 (1967). Consistent with this rule, the exceptions to
 19 Title III, which are grouped together in subsection 18 U.S.C. § 2511(2), have been consistently
 20 characterized by courts as affirmative defenses. *See, e.g., Doe v. Smith*, 429 F.3d 706 (7th Cir.

21
 22 ¹¹ Lacking sufficient support for express pleading requirements in the statutes or their
 23 legislative history, AT&T cites two non-germane cases, *Williams v. Paulos*, 11 F.3d 271 (1st Cir.
 24 1993), and *Thompson v. Dulaney*, 970 F.2d 744 (10th Cir. 1992). These cases lend no support for
 25 AT&T’s argument, and in fact support the plaintiffs’ position. These cases focus on the “use” and
 26 “disclosure” prohibitions under Title III, §§ 2511(1)(c) and 2511(1)(d), which are violated only
 27 when illegally intercepted communications are used or disclosed with knowledge of the illegal
 28 interception. 18 U.S.C. §§ 2511(1)(c), (1)(d); *see Williams*, 11 F.3d at 284; *Thompson*, 970 F.2d at
 749. These cases stand only for the proposition that the plaintiff bears the burden of proving that
 the defendant knew of the illegality, and do not address the burden of pleading. *See Williams*, 11
 F.3d at 284; *Thompson*, 970 F.2d at 749. Rather, *Williams* supports plaintiffs’ contention that
 statutory exceptions need not be raised in the complaint but rather must be raised by AT&T, by
 holding that a plaintiff’s burden of proof “includes a showing that any statutory exceptions *asserted
 by a defendant*, do not, in fact, apply.” *Williams*, 11 F.3d at 284 (emphasis added).

1 2005) (reversing dismissal for failure to state a claim of wiretap lawsuit because plaintiff met
 2 notice pleading standard and was not required to “anticipate or attempt to defuse potential
 3 defenses” such as consent, § 2511(2)(d), in the complaint); *Blufome v. Pharmatrak, Inc. (In re*
 4 *Pharmatrak, Inc.)*, 329 F.3d 9, 19 (1st Cir. 2003) (burden of showing consent under § 2511(2)(d) is
 5 on the party seeking the benefit of the exception); *U.S. v. Jones*, 839 F.2d 1041, 1050 (5th Cir.
 6 1988) (in criminal case, burden is on government to show consent under color of law under
 7 § 2511(2)(c) in order to avoid suppression of intercepted communications); *U.S. v. Harvey*, 540
 8 F.2d 1345, 1352 n.9 (8th Cir. 1976) (in criminal case, burden is on government to demonstrate
 9 applicability of provider exception under § 2511(2)(a)(i) in order to avoid suppression). As with
 10 these other exceptions, it is AT&T’s burden to affirmatively plead facts showing that it is entitled
 11 to benefit from the law enforcement assistance exception in § 2511(2)(a)(ii).

12 Placing the burden of pleading the absence of such exceptions on plaintiffs would further
 13 contradict the overall structure and intent of the relevant statutes. Title III contains more than a
 14 dozen statutory exceptions, many with subparts and exceptions to exceptions.¹² ECPA, upon which
 15 plaintiffs also rely, is similarly constructed.¹³ Congress gave no indication that it intended these
 16 two statutes to create a maze of complex pleading demands that plaintiffs must negotiate or face
 17 the loss of their claims. To the contrary, it is much more logical and consistent for Congress to
 18 have intended defendants, who are in the possession of the relevant facts, to choose the appropriate
 19 defenses to plead in each particularized case. *Cf. Pharmatrak*, 329 F.3d at 19 (party asserting the
 20 consent exception is likelier to possess evidence of consent).

21 AT&T’s argument otherwise suggests that Congress “hide[s] elephants in mouseholes.”
 22 *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 468 (2001). For if every plaintiff subject to
 23 surveillance were required to plead the non-existence of valid authorization under 18 U.S.C.

25 ¹² See, e.g., 18 U.S.C. §§ 2511(2)(a)(i) (provider protection); 2511(2)(a)(ii) (law
 26 enforcement and intelligence assistance); 2511(2)(b) (FCC monitoring); 2511(2)(c) (consent under
 27 color of law); 2511(2)(d) (consent not under color of law); 2511(2)(e) (FISA-related); 2511(2)(g)(i)
 (readily accessible to the general public); 2511(2)(g)(ii)(III) (intercepting radio communications in
 the amateur, CB, and GMRS spectrum bands).

28 ¹³ See 18 U.S.C. §§ 2702(b) (listing eight different exceptions for disclosure of
 communications) and 2702(c) (six for disclosure of customer records).

1 § 2511(2)(a)(ii), even though the fact of such authorization cannot be obtained without “legal
 2 process,” *id.*, meritorious cases would risk being dismissed prematurely before the factual question
 3 of authorization could be resolved through discovery. *See* MTD 10-11 (arguing that plaintiffs could
 4 never allege facts sufficient to state a claim because such facts are “completely unavailable to
 5 plaintiffs.”).

6 This Catch-22 posed by AT&T’s argument is clearly contradicted by the statutes. Again,
 7 Title III allows disclosure of such facts “as required by legal process” such as discovery, *see* 18
 8 U.S.C. § 2511(2)(a)(ii), and to the extent the government objects that such disclosures would harm
 9 national security, it can invoke the procedures of 50 U.S.C. §§ 1806(f) and 1845(f), which allow *ex*
 10 *parte*, *in camera* inspection by the court and disclosure to plaintiffs as necessary to assess the
 11 surveillance’s legality. *Id.*¹⁴ It cannot be that Congress contemplated discovery of such facts under
 12 those provisions, yet intended for cases seeking such discovery to be dismissed at the pleading
 13 stage. Such a construction is contrary to Congress’ clear intent to provide specific civil causes of
 14 action for those aggrieved by unlawful surveillance, whether conducted by the government or
 15 private parties, and even when conducted for foreign intelligence purposes. *See, e.g.*, 18 U.S.C.
 16 § 2520 (for violation of Title III), 50 U.S.C. § 1810 (for violation of FISA), 18 U.S.C. § 2707 (for
 17 violation of ECPA), and 18 U.S.C. § 2712 (for violations of Title III, FISA or ECPA by the United
 18 States). Furthermore, demanding that plaintiffs plead particular facts regarding a certification that
 19 may or may not exist is unnecessary because “on a motion to dismiss we presume that general
 20 allegations embrace those specific facts that are necessary to support the claim.” *Nat’l Org. for*
 21 *Women v. Scheidler*, 510 U.S. 249, 256 (1994).

22 **3. Even if Plaintiffs Did Bear the Burden to Plead Lack of Lawful**
 23 **Authorization, They Have Met That Burden.**

24 Even assuming *arguendo* that AT&T is correct, and plaintiffs were required to plead in the
 25

26
 27 ¹⁴ These statutes specifically authorize the court to consider information that the
 28 government contends may harm national security. Therefore, AT&T’s attempt to analogize them to
 the common-law state secrets privilege and argue that they were intended to “preclude judicial
 inquiry,” MTD 9-10, is completely unavailing. For further discussion, see Opp. to Gov’t Mot.

1 particular manner suggested in the partial legislative history it cites, plaintiffs have done so.
 2 According to the Senate Report cited by AT&T, “The complaint must allege that a wire or
 3 electronic communications service provider . . . acted without a facially valid court order or
 4 certification,” “acted beyond the scope of a court order or certification,” or “acted on bad faith;”
 5 “[a]cting in bad faith would include failing to read the order or collusion.” S. Rep. No. 99-541, at
 6 26 (1986), as reprinted in 1986 U.S.C.C.A.N. 3555, 3580.¹⁵ While even under AT&T’s view,
 7 plaintiffs need only allege one of these options, plaintiffs have already alleged all of them.

8 Plaintiffs have alleged actions in excess or in absence of any valid court order or
 9 certification by alleging that AT&T acted without “lawful authorization.”¹⁶ Complaint ¶ 81.
 10 Plaintiffs have also alleged AT&T acted in bad faith, because plaintiffs allege more than “simply
 11 bad judgment or negligence,” but rather the “conscious doing of wrong because of dishonest
 12 purpose or moral obliquity.” See *Theofel v. Farey-Jones*, 359 F.3d 1066, 1074 n.2 (9th Cir. 2004),
 13 *cert. denied*, 543 U.S. 813 (2004), quoting *Black’s Law Dictionary* 139 (6th ed. 1990) (defining
 14 bad faith). In particular, plaintiffs allege that AT&T’s wholly unauthorized collaboration with the
 15 government was undertaken “intentionally, with deliberate indifference, or with reckless disregard
 16 of Plaintiffs’ and class members’ constitutional rights,” Complaint ¶ 87, “willful[ly] and for
 17 purposes of direct or indirect commercial advantage or private financial gain.” *Id.* at ¶ 114; *see also*
 18 *id.* at ¶¶ 29-30, noting AT&T’s reliance on the federal government as a major client.

19 AT&T’s alleged misconduct, plaintiffs further plead, was the result of an “illegal
 20 collaboration” between it and the government, Complaint ¶ 8, whereby AT&T committed the
 21 complained of acts of interception and disclosure at the government’s “instigat[ion]” or
 22 “direct[ion],” or with its “tacit[] approv[al],” *id.* at ¶ 82, but “without judicial or other lawful
 23

24
 25 ¹⁵ The legislative history that AT&T cites as supporting dismissal belies any notion of an
 26 “absolute” statutory immunity, since the Senate Report language plainly contemplates civil suits
 even in the presence of a certification or court order where the communications provider acted
 beyond its scope or in bad faith. *Id.*

27 ¹⁶ *Cf. Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (“Petitioner’s complaint
 28 does not explicitly state that the agents had no probable cause for his arrest, but it does allege that
 the arrest was ‘done unlawfully, unreasonably and contrary to law,’” *id.* at 390 n. 1; “fairly read, it
 alleges as well that the arrest was made without probable cause.” *Id.* at 389).

1 authorization.” *id.* at ¶ 81. These allegations clearly plead “collusion” between AT&T and the
 2 government, i.e., “an agreement between two or more persons...to obtain an object forbidden by
 3 law,” *Black’s Law Dictionary* 264 (6th ed. 1990); the forbidden object, of course, is surveillance of
 4 plaintiffs’ communications outside of the procedures of FISA and Title III, which are the exclusive
 5 means by which such surveillance may be conducted.

6 **4. No Amount of Government Authorization Can Immunize AT&T from**
 7 **Liability for the Illegal Surveillance Activities Alleged in the Complaint.**

8 Just as “the overriding principle in both *Berger* and *Katz*,” the Supreme Court’s primary
 9 precedents on wiretapping, “was the necessity for judicial control over electronic surveillance and a
 10 neutral predetermination of the scope of the search,” *Kilgore v. Mitchell*, 623 F.2d 631, 635 (9th
 11 Cir. 1980), so were the statutes designed to ensure judicial control over wiretapping. *See* S. Rep.
 12 No. 90-1097 (1968), as reprinted in 1968 U.S.C.C.A.N. 2122, 2113 (Title III “conforms to the
 13 constitutional standards set out” in *Berger* and *Katz*); S. Rep. No. 95-604(I) at 6 (1978), as
 14 reprinted in 1978 U.S.C.C.A.N. 2904, 3908 (FISA meant to “spell out that the executive cannot
 15 engage in electronic surveillance within the United States without a prior judicial warrant.”).¹⁷

16 Because of the overriding principle that the Fourth Amendment mandates judicial control
 17 over electronic surveillance, the instances under Title III and its sister statute FISA in which the
 18 Executive can initiate or continue surveillance without prior judicial approval are strictly cabined
 19 to four situations. *See* 50 U.S.C. § 1805(f) (allowing emergency FISA surveillance so long as court
 20 order obtained within 72 hours); 18 U.S.C. § 2518(7) (allowing emergency Title III surveillance so
 21

22
 23 ¹⁷ The counter-argument to AT&T’s proposition that FISA does not reach any surveillance
 24 by the NSA, MTD at 12 n. 8, is already within the legislative history it cites: FISA “does not deal
 25 with *international* signals intelligence activities as currently engaged in by the National Security
 26 Agency and electronic surveillance conducted *outside* the United States.” S. Rep. No. 95-604(II) at
 27 64 (1978), as reprinted in 1978 U.S.C.C.A.N. 3904, 3965 (emphasis added). FISA’s definition of
 28 “electronic surveillance” plainly includes any domestic acquisition, *see* 50 U.S.C. § 1801(f)(2)
 (includes “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... if such acquisition occurs in
 the United States”), as well as any international acquisition targeted at Americans. *See* 50 U.S.C.
 § 1801(f)(1) (includes “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,” regardless of location).

1 long as application for court order made within 48 hours); 50 U.S.C. § 1802 (allowing warrantless
2 FISA surveillance of up to one year, only where solely directed at foreign powers and where there
3 is no substantial likelihood of acquiring communications of U.S. persons, and requiring that any
4 certifications upon which surveillance is based be immediately transmitted to the FISA court); 50
5 U.S.C. § 1811 (allowing warrantless FISA surveillance fifteen days following declaration of war).
6 As the procedures of Title III and FISA are the “exclusive means” by which domestic interceptions
7 and electronic surveillance may be conducted, they are the *only* situations allowing warrantless
8 surveillance, and none of them is at all analogous to the ongoing warrantless dragnet surveillance
9 alleged here.

10 In this Circuit, the requirements of Title III, which “were designed to protect the general
11 public from abuse of the awesome power of electronic surveillance,” *U.S. v. King*, 478 F.2d 494,
12 505 (9th Cir. 1973), “are not to be loosely interpreted,” *id. at 503*.¹⁸ When Congress enacted Title
13 III, it intended to “make doubly sure that the statutory authority [for wiretaps] be used with
14 restraint and only where the circumstances warrant the surreptitious interception of wire and oral
15 communications.” *U.S. v. Giordano*, 416 U.S. 505, 515 (1974). Consequently, government agents
16 “are not free to ask or direct [the phone company] to intercept *any* phone calls or disclose their
17 contents, at least not without complying with the judicial authorization provisions of the Wiretap
18 Act,” *McClelland v. McGrath*, 31 F.Supp.2d 616, 619 (N.D. Ill. 1998), and “all wire tapping by the
19 telephone company is subject to close scrutiny by the courts. . . .” *U.S. v. Goldstein*, 532 F.2d 1305,
20 1311 (9th Cir. 1976).

21 AT&T argues that if it has “authorization” from the government, it may avoid liability for
22 plain violations of the statutes, since “communications carriers authorized to assist the government
23

24 ¹⁸ The *King* court further warned:

25 Concerns for the evils of crime is increasing in the United States, and not without
26 justification. However, in such times it is especially important that the law not be
27 bent in the name of expediency, especially not by the highest law enforcement
28 official in the land.

478 F.2d at 505 (finding that Attorney General certification authorizing interceptions failed to meet formal requirements of Title III).

1 in foreign intelligence surveillance” are completely immune to liability. MTD at 6. Yet AT&T’s
 2 use of the word “authority” is completely untethered from the statutory language, and Title III does
 3 not include such broad language. Instead, it only allows communications carriers to provide
 4 information, facilities, or technical assistance for interceptions and electronic surveillance to
 5 “persons authorized by law” to conduct such surveillance, and only when provided with a signed
 6 court order or a certification by the Attorney General or other specified persons that “no warrant or
 7 court order is required by law” and “that all statutory requirements have been met.” 18 U.S.C.
 8 § 2511(2)(a)(ii). As Title III and FISA’s statutory requirements are the “exclusive means” by
 9 which such surveillance may occur domestically, *see* 18 U.S.C. § 2511(2)(f), Section 2511(2)(a)(ii)
 10 only authorizes AT&T to assist with surveillance done in accord with court orders and
 11 certifications that are issued within the bounds of those statutes.¹⁹ To the extent AT&T is
 12 conducting surveillance based on a certification that clearly goes beyond these bounds, its only
 13 resort is to plead and eventually prove the affirmative defense that it was acting in good faith. *See*
 14 18 U.S.C. § 2520(d) (good faith defense to civil suit for illegal wiretapping); 18 U.S.C. § 2707(e)
 15 (same for violations of ECPA).

16 **C. Plaintiffs’ Claims Are Not Subject to Dismissal on Grounds of Absolute or**
 17 **Qualified Immunity.**

18 The doctrines of absolute and qualified immunity provide defenses to damages liability for
 19 individual government officers who act in violation of constitutional or federal statutory law. *Nixon*
 20 *v. Fitzgerald*, 457 U.S. 731, 744-50 (1982); *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982). While
 21 absolute immunity hews closely to its historical common-law origins, *Mitchell v. Forsyth*, 472 U.S.
 22 511, 521 (1985), qualified immunity has undergone significant evolution and did not assume its
 23

24
 25 ¹⁹ Moreover, even assuming Section 2511(2)(a)(ii) could immunize AT&T against
 26 plaintiffs’ statutory claims, it still would not warrant dismissal of their constitutional claims. *See*
 27 *Webster v. Doe*, 486 U.S. 592, 603 (1988) (“[W]here Congress intends to preclude judicial review
 28 of constitutional claims its intent to do so must be clear.”); *cf. LaGuerre v. Reno*, 164 F.3d 1035,
 1038-40 (7th Cir. 1998) (holding, despite statutory language directing that deportation orders “shall
 not be subject to review by any court,” that “[t]he presumption that executive resolutions of
 constitutional issues are judicially reviewable . . . urges us to read into [that language] an exception
 that will allow the review of such issues.”).

1 present form until *Harlow. Wyatt v. Cole*, 504 U.S. 158, 166 (1992) (“*Harlow* ‘completely
2 reformulated qualified immunity along principles not at all embodied in the common law’”). For
3 the multiple independent reasons explained below, neither doctrine is a basis for dismissing
4 plaintiffs’ claims.

5 **1. Neither Absolute Nor Qualified Immunity Bars the Injunctive and**
6 **Other Equitable Relief Plaintiffs Seek on Each of Their Claims.**

7 All of plaintiffs’ claims seek injunctive and other equitable relief against defendants. *See*
8 Complaint, Prayer for Relief. For their constitutional claims, Claim I, plaintiffs seek only
9 declaratory and injunctive relief, not damages. Claims II through VI seek statutory damages as well
10 as equitable relief, and Claim VII seeks only equitable relief.

11 Both absolute and qualified immunity are immunities to *damages* liability; neither affords
12 immunity to claims for injunctive or other equitable relief. *Pulliam v. Allen*, 466 U.S. 522, 541-543
13 (1984) (“[Absolute] judicial immunity is not a bar to prospective injunctive relief against a judicial
14 officer acting in her judicial capacity.”); *Presbyterian Church v. U.S.*, 870 F.2d at 527 (“Qualified
15 immunity is an affirmative defense to damage liability; it does not bar actions for declaratory or
16 injunctive relief.”); *American Fire, Theft & Collision Managers, Inc. v. Gillespie*, 932 F.2d 816,
17 818 (9th Cir. 1991) (same). It has long been the rule that illegal acts are enjoinable even when
18 ultimately directed by government officers. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S.
19 579, 584 (1952) (enjoining Secretary of Commerce from obeying unconstitutional presidential
20 order). “[I]n case of an injury threatened by his illegal action, the officer cannot claim immunity
21 from injunction process. . . . [¶] The complainant did not ask the court to interfere with the official
22 discretion of the Secretary of War, but challenged his authority to do the things of which complaint
23 was made. The suit rests upon the charge of abuse of power, and its merits must be determined
24 accordingly” *Philadelphia Co. v. Stimson*, 223 U.S. 605, 619-620 (1912) (citations omitted).

25 Because each of plaintiffs’ claims seek injunctive relief and some seek other equitable relief
26 as well, none of plaintiffs’ claims can be dismissed on grounds of absolute or qualified immunity.
27 At most, these immunities, if applicable to AT&T, would provide a defense only to damages
28 liability; for the reasons we explain next, however, AT&T is entitled to neither absolute nor

1 qualified immunity and is subject to damages liability as well as equitable relief.

2 **2. AT&T Is Not One of the Select Few Essential Government Actors**
3 **Entitled to Absolute Immunity.**

4 AT&T has no absolute immunity to damages liability for its participation in constitutional
5 and federal statutory violations. “Our decisions have recognized immunity defenses of two kinds.
6 For officials whose special functions or constitutional status requires complete protection from suit,
7 we have recognized the defense of ‘absolute immunity.’ . . . [¶] For executive officers in general,
8 however, our cases make plain that qualified immunity represents the norm.” *Harlow*, 457 U.S. at
9 807. Accordingly, the Supreme Court has recognized absolute immunity only for a select few
10 categories of government actors whose function in our system of government inescapably demands
11 that they be accorded it: Presidents, legislators, judges, prosecutors, and witnesses. *Harlow*, 457
12 U.S. at 807; *Nixon*, 457 U.S. at 749 (President’s absolute immunity is “a functionally mandated
13 incident of the President’s unique office”). “But this protection has extended no further than its
14 justification would warrant.” *Harlow*, 457 U.S. at 813. Cabinet officers, for example, do not
15 possess absolute immunity; indeed, the Supreme Court has expressly held that “the Attorney
16 General is not absolutely immune from suit for damages arising out of his allegedly
17 unconstitutional conduct in performing his national security functions” in authorizing warrantless
18 electronic surveillance. *Mitchell*, 472 U.S. at 520-21. Nor has absolute immunity ever been
19 extended to private corporations.

20 AT&T is not entitled to absolute immunity because it is not an essential actor in our
21 constitutional system of government like the President, a judge, or a legislator. It is a private, for-
22 profit corporation selling services to consumers for the benefit of its shareholders. The functioning
23 of the Republic does not demand that AT&T receive absolute immunity from liability for
24 committing constitutional and statutory violations in the face of clearly established law to the
25 contrary.

26 Moreover, AT&T cannot rely on the absolute immunity of others because government
27 officers or private parties who participate in a constitutional or statutory violation with the
28 President or another government actor possessing absolute immunity do not thereby derivatively

1 acquire absolute immunity themselves. *Harlow*, 457 U.S. at 810-11 (President’s aides do not have
2 derivative absolute immunity); *Dennis v. Sparks*, 449 U.S. 24 (1980) (private corporation and
3 individuals who jointly participated with a judge in unconstitutional acts had no immunity even
4 though judge had absolute immunity).

5 3. AT&T Has No “Absolute Common-Law Immunity.”

6 “[I]n deciding whether officials performing a particular function are entitled to absolute
7 immunity, we have generally looked for a historical or common-law basis for the immunity in
8 question.” *Mitchell*, 472 U.S. at 521. AT&T’s hypothesized “absolute common-law immunity”
9 (MTD at 13-15) for telecommunications providers relying on government authority is a chimera,
10 for it has no historical or common-law basis. At common law, damages liability for illegal search
11 and seizures was clearly established, even for wartime seizures made on authority of the President.
12 More recently, the Ninth Circuit has rejected the notion that a telecommunications provider’s
13 cooperation with the government excuses liability for illegal surveillance.

14 a. The Common Law Imposes Damages Liability for 15 Unlawful Searches and Seizures.

16 Historically, “[t]he Anglo-American tradition did not include a general theory of immunity
17 from suit or from liability on the part of public officers.” 2 HARPER & JAMES, *The Law of Torts*,
18 § 29.8, at 1632 (1st ed., 1956). Thus, the common-law rule was that those who executed unlawful
19 searches and seizures were liable in trespass. *The Apollon*, 22 U.S. (9 Wheat.) 362, 372-74 (1824)
20 (Story, J.); *Gelston v. Hoyt*, 16 U.S. (3 Wheat.) 246, 310, 313-14, 320, 325 (1818) (Story, J.);
21 *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 116, 123-24 (1804) (Marshall, C.J.);
22 *Entick v. Carrington*, 19 How. St. Tr. 1029 (C.P. 1765); *Wilkes v. Woods*, 19 How. St. Tr. 1153
23 (K.B. 1763).

24 The Supreme Court early on specifically rejected any immunity for persons who, at the
25 direction of the executive, conduct searches and seizures during wartime that violate statutory
26 limitations imposed by Congress. During the United States’ first war, the undeclared naval war
27 with France from 1798 to 1801, Congress authorized the President to direct the seizure of
28 American ships that were traveling *to* French ports, but not those traveling *from* French ports.

1 President Adams, however, gave more expansive orders to the Navy that exceeded the searches and
2 seizures authorized by Congress, and directed the seizure of American ships that were “bound to or
3 from French ports.” *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 178 (1804). Adams did so for what
4 we would call reasons of national security: “It was so obvious, that if only vessels sailing to a
5 French port could be seized on the high seas, that the law would be very often evaded” *Id.*

6 Obeying the President’s orders but acting contrary to the statutory limitations of Congress,
7 the Navy frigate *Boston*, commanded by Captain Little, seized a ship coming *from* a French port it
8 suspected with probable cause of being American and took the ship to Boston where it was libeled.
9 The ship was adjudicated a neutral, and damages for its unlawful seizure and detention were
10 imposed on Captain Little, a naval officer acting in a war zone at the direction of the Commander
11 in Chief.

12 Writing for a unanimous Court, Chief Justice Marshall explained thus the Court’s denial of
13 immunity to Captain Little notwithstanding the Captain’s good-faith obedience to his orders, and in
14 doing so reviewed and rejected the same reliance-on-executive-authority argument that AT&T
15 makes here:

16 Is the officer who obeys [the instructions of the executive] liable for damages
17 sustained by [the executive’s] misconstruction of the act [of Congress], or will his
18 orders excuse him? . . . [¶] I confess the first bias of my mind was . . . that though
19 the instructions of the executive could not give a right, they might yet excuse from
20 damages. . . . That implicit obedience which military men usually pay to the orders
21 of their superiors, which indeed is indispensably necessary to every military system,
22 appeared to me strongly to imply the principle that those orders, if not to perform a
23 prohibited act, ought to justify the person whose general duty it is to obey them, and
24 who is placed by the laws of his country in a situation which in general requires that
he should obey them. I was strongly inclined to think that where, in consequence of
orders from the legitimate authority, a vessel is seized with pure intention, the claim
of the injured party for damages would be against that government from which the
orders proceeded, and would be a proper subject for negotiation. But I have been
convinced that I was mistaken, and . . . that the instructions cannot change the
nature of the transaction, or legalize an act which without those instructions would
have been a plain trespass.

25 *Little v. Barreme*, 6 U.S. at 178-179; cited with approval in *Farid v. Smith*, 850 F.2d 917, 922 (2d
26 Cir. 1988). The parallels are manifest: An Act of Congress imposing limitations on searches and
27 seizures; an undeclared war; and an executive which orders searches and seizures beyond the scope
28 of what Congress has authorized. Chief Justice Marshall’s answer must be our own: a search or

1 seizure that is contrary to statute or Constitution, even when ordered by the President, gives rise to
2 liability. Just as Captain Little was liable for his unlawful seizures, so must AT&T be.

3 **b. The Ninth Circuit Has Held that Telecommunications**
4 **Providers Are Liable for Assisting the Government in**
5 **Illegal Surveillance.**

6 This backdrop of common-law liability for unlawful seizures reveals that the “absolute
7 common-law immunity” for telecommunications providers assisting the government that AT&T
8 invokes is a fiction of its own creation. Moreover, in the context of Title III violations, the Ninth
9 Circuit has examined and rejected the very argument made here by AT&T that a
10 telecommunications provider’s cooperation with the government immunizes it from liability.
11 Instead, it has held that Congress intended the statutory good faith defense of 18 U.S.C. § 2520 to
12 be the exclusive means by which a telecommunications provider may raise its cooperation with the
13 government as a defense to liability:

14 We appreciate [Nevada] Bell’s concern that it may be held liable for cooperating
15 with the police at the request of the Nevada state court. But the proper response to
16 that concern is not to emasculate the statute. Congress appreciated this potential
17 dilemma and established a defense for good faith reliance on a court order. It is
18 upon such a defense that Bell must rely.

19 *Jacobson v. Rose*, 592 F.2d 515, 522 (9th Cir. 1978). In reaching this conclusion, the Ninth Circuit
20 necessarily, and properly, rejected AT&T’s argument that courts are free to ignore the statutory
21 good faith defense and fashion their own unsupported, *ad hoc* defenses. Instead, it deferred to
22 Congress, which has carefully crafted both the scope of liability and the statutory defenses
23 available to telecommunications providers, and in doing so foreclosed any argument that courts can
24 superimpose some form of “absolute common-law immunity” on top of Congress’s statutory
25 scheme.

26 The decision on which AT&T principally relies for its “absolute common-law immunity”
27 argument, *Smith v. Nixon*, 606 F.2d 1183 (D.C. Cir. 1979), conflicts with the Ninth Circuit’s
28 decision in *Jacobson* and is not an immunity case. *Smith*, which addressed claims under the
Constitution and 18 U.S.C. § 2511, does not purport to apply any rule of immunity from suit, much
less an established “absolute common-law immunity.” After reciting a sentence from the district
court’s opinion – “C&P’s limited technical role in the surveillance as well as its reasonable

1 expectation of legality cannot give rise to liability for any statutory or constitutional violation,”
 2 *Smith*, 606 F.2d at 1191 – the D.C. Circuit gave its two-sentence analysis: “We think this was the
 3 proper disposition. The telephone company did not initiate the surveillance, and it was assured by
 4 the highest Executive officials in this nation that the action was legal.” *Id.*

5 The *Smith* court’s conclusion that the telephone company was not liable is *ipse dixit*, devoid
 6 of any reasoned analysis or citation of supporting authority at all. At most, it suggests the court of
 7 appeals had in mind not immunity from suit, but some variety of good faith defense that had to be
 8 plead and proven. (The district court similarly described its holding as a conclusion that the
 9 telephone company had not acted wrongfully, not a conclusion that it was immune even if it had
 10 acted wrongfully: “There was no wrongdoing in this case by C&P.” *Smith v. Nixon*, 449 F. Supp.
 11 324, 326-27 (D.D.C. 1978).)

12 Moreover, unlike the Ninth Circuit in *Jacobson*, the *Smith* court failed to make any
 13 examination of the statutory language of Section 2520 that both creates civil liability for violations
 14 of Section 2511 and creates a good faith defense to civil liability, much less attempted to reconcile
 15 its conclusion of non-liability with this statutory language. The *Smith* court’s conclusion is thus
 16 contrary to the Ninth Circuit’s holding in *Jacobson* that the statutory good faith defense is
 17 exclusive.²⁰

18 _____
 19 ²⁰ There are plenty of other reasons why *Smith* does not control here. *Smith* predated, and
 20 thus does not address, the enactment of the civil liability provisions of 18 U.S.C. § 2707, 47 U.S.C.
 21 § 605, and 50 U.S.C. § 1810 on which plaintiffs rely. *Smith* also predated the Supreme Court’s
 22 revolution in immunity law in *Harlow* (before that decision, qualified immunity was thought to
 23 involve the defendant’s subjective good faith). In addition, the statutory good faith defense of 18
 24 U.S.C. § 2520 has been amended significantly since the version applicable to *Smith*. *Smith* also
 25 stands in considerable tension with the D.C. Circuit’s later conclusion in *Berry v. Funk*, discussed
 26 in the text, that there is no qualified immunity to Title III claims even for government officers.

27 The two other decisions AT&T relies on for its “absolute common-law immunity” also
 28 have no relevance here. *Fowler v. Southern Bell Tel. & Tel. Co.*, 343 F.2d 150 (5th Cir. 1965)
 presented only a *state* tort law claim for invasion of privacy, not any claim of constitutional or
 federal statutory violation. Thus, it does not involve absolute or qualified immunity for
 constitutional and federal statutory violations – the issue presented here – but an entirely different
 immunity doctrine, the official immunity of individual federal employees to *state* tort liability. 28
 U.S.C. § 2679; *Westfall v. Erwin*, 484 U.S. 292, 295 (1988). This official immunity has never
 extended to claims like plaintiffs’ for federal constitutional and statutory violations. 28 U.S.C.
 § 2679(b)(2); *Philadelphia Co.*, 223 U.S. at 619-620. Nor does it extend to claims for injunctive or
 other equitable relief, for it is limited to state law tort suits “for money damages.” 28 U.S.C. §
 2679(1); *Philadelphia Co.*, 223 U.S. at 619-620. Nor does it extend to private corporations like

1 Nor is AT&T correct that plaintiffs allege only that AT&T “merely allow[s] government
2 surveillance to be conducted through the carrier’s facilities.” MTD at 15. To the contrary, plaintiffs
3 allege that AT&T actively transmits the communications and call records of its customers to the
4 government. Complaint ¶¶ 43-46, 52, 61, 81, 95, 103-105, 113, 121, 128. AT&T’s minimalist
5 version of its conduct is both inaccurate and no basis for a motion to dismiss.

6 **4. No Qualified Immunity Defense Is Even Potentially Available to AT&T.**

7 **a. Qualified Immunity Is Available Only to Individuals, Not**
8 **Corporations.**

9 Independently, qualified immunity is not a potentially available defense here because
10 qualified immunity is a defense to individual, not entity, liability. The Supreme Court has never
11 extended qualified immunity to an entity, and for good reason. The purpose of qualified immunity
12 is to shield *individual* officers from the disincentives and obstacles to effectively performing their
13 duties that the potential for *personal* liability for damages might cause. These include “the
14 distraction of officials from their governmental duties [by the demands of defending ongoing
15 litigation], the inhibition of discretionary action [by the fear of damages liability], and deterrence of
16 able people from public service.” *Mitchell*, 472 U.S. at 526. The “most important” purpose of
17 qualified immunity is to insure “vigorous,” “principled and fearless decision-making” by
18 *individuals*. *Richardson v. McKnight*, 521 U.S. 399, 408, 409 (1997).

19 None of these reasons supports extending qualified immunity to private corporations like
20 AT&T. As the Supreme Court explained in *Owen v. Independence*, 445 U.S. 622, 653 n.37 (1980),
21 when it denied qualified immunity to municipal corporations, “the justifications for immunizing
22

23
24 AT&T. *Adams v. United States*, 420 F.3d 1049, 1051, 1055 (9th Cir. 2005).

25 *Craska v. New York Tel. Co.*, 239 F. Supp. 932 (N.D.N.Y. 1965) also does not avail AT&T.
26 That case, which addressed only a claim under 47 U.S.C. § 605, was decided nearly 20 years
27 before Congress in 1984 first created the express civil liability provision of section 605(e)(3). It has
28 no bearing on the civil liability Congress created or whether Congress intended that
telecommunications providers have absolute immunity to that liability. Nor does *Craska* conduct
an immunity analysis or claim that it is recognizing an absolute immunity. Moreover, unlike here,
in *Craska* it was the government, not the telephone company, which physically placed the wiretap
on the plaintiff’s phone line, intercepted the communications, and performed the acts that Section
605 prohibits of “divulg[ing]” and “publish[ing]” the communications.

1 officials from personal liability have little force when suit is brought against the governmental
2 entity itself.” To the contrary, making the entity fully liable creates strong institutional incentives
3 for lawful conduct without dampening individual ardor:

4 The knowledge that a municipality will be liable for all of its injurious conduct,
5 whether committed in good faith or not, should create an incentive for officials who
6 may harbor doubts about the lawfulness of their intended actions to err on the side
7 of protecting citizens’ constitutional rights. Furthermore, the threat that damages
might be levied against the city may encourage those in a policymaking position to
institute internal rules and programs designed to minimize the likelihood of
unintentional infringements on constitutional rights.

8 *Id.* at 651-652.

9 These same considerations apply equally to private corporations. *See Owen*, 445 U.S. at
10 639 (“municipalities – like private corporations – were treated as natural persons for virtually all
11 purposes of constitutional and statutory analysis”), 640 (“a municipality’s tort liability in damages
12 was identical to that of private corporations”). Because of the enormous power that governmental
13 and corporate entities marshal and concentrate, bold and decisive action by individual
14 decisionmakers who exercise control over an entity can cause the entity to wreak grave harm on
15 others and on society at large if not channeled to lawful ends by adequate internal and external
16 controls. The proper balance is struck when the individual receives qualified immunity or
17 indemnity while the entity remains fully liable for the harms it causes, and is thereby encouraged to
18 create an internal system of checks and balances that keeps the actions of its agents within the law.

19 **b. Qualified Immunity Is Unavailable Because**
20 **Telecommunications Providers Have No Common Law**
21 **Immunity from Tort Actions and The Purposes of**
22 **Qualified Immunity Do Not Extend to Them.**

22 Even if AT&T were an individual rather than an entity, it still would not be entitled to
23 qualified immunity. To determine whether qualified immunity is potentially available to a person,
24 the first question is whether that person “was accorded immunity from tort actions at common
25 law.” *Tower v. Glover*, 467 U.S. 914, 920 (1984); *accord*, *Wyatt*, 504 U.S. at 164 (asking whether
26 the “parties seeking immunity were shielded from tort liability”). Any such tort immunity must be
27 “firmly rooted in the common law.” *Wyatt*, 504 U.S. at 164; *accord*, *Richardson*, 521 U.S. at 404.

28 AT&T is unable to satisfy this prerequisite for qualified immunity because

1 telecommunications providers do not possess any firmly rooted immunity at common law from tort
 2 actions. To the contrary, there was a firmly rooted common-law tradition imposing liability on
 3 them for their torts, including for their malfeasance in handling communications entrusted to
 4 them.²¹ See, e.g., *Gonzales v. Southwestern Bell Tel. Co.*, 555 S.W.2d 219, 221 (Tex. App. 1977);
 5 *Le Crone v. Ohio Bell Tel. Co.*, 201 N.E.2d 533 (Ohio Ct. App. 1963) (wiretapping); *Critz v.*
 6 *Southern Bell Tel. & Tel. Co.*, 172 So. 510, 512 (Miss. 1937); *Western Union Tel. Co. v. Ramsey*,
 7 88 S.W.2d 675, 677 (Ky. Ct. App. 1935); *Vinson v. Southern Bell Tel. & Tel. Co.*, 66 So. 100 (Ala.
 8 1914); *Joshua L. Bailey & Co. v. Western Union Tel. Co.*, 76 A. 736, 741 (Pa. 1910); *McLeod v.*
 9 *Pacific States Tel. & Tel. Co.*, 94 P. 568, *on reh.*, 95 P. 1009 (Or. 1908), *Southern Bell Tel. & Tel.*
 10 *Co. v. Earle*, 45 S.E. 319, 321 (Ga. 1903).

11 Nor do the purposes of qualified immunity support extending it to telecommunications
 12 providers. As explained previously, the most important purpose of qualified immunity – ensuring
 13 that fear of personal damages liability does not stop individual government officers from acting
 14 decisively – has no application to a multibillion-dollar private for-profit corporation like AT&T.

15 As the Supreme Court has noted:

16 [T]he rationales mandating qualified immunity for public officials are not applicable
 17 to private parties. [¶] . . . [¶] . . . Although principles of equality and fairness may
 18 suggest, as respondents argue, that private citizens who rely unsuspectingly on state
 19 laws they did not create and may have no reason to believe are invalid should have
 20 some protection from liability, as do their government counterparts, such interests
 21 are not sufficiently similar to the traditional purposes of qualified immunity to
 justify such an expansion. Unlike school board members, or police officers, or
 Presidential aides, private parties hold no office requiring them to exercise
 discretion; nor are they principally concerned with enhancing the public good.
 Accordingly, extending *Harlow* qualified immunity to private parties would have no

22
 23 ²¹ AT&T misapplies this test in two respects. First, it misconceives the relevant activity too
 24 narrowly in describing it as “cooperat[ing] with government officials conducting warrantless
 25 surveillance.” MTD at 16. Here, the proper focus is on the activity of providing
 26 telecommunications services to consumers, just as in *Tower* the relevant activity was legal
 27 representation of criminal defendants, 467 U.S. at 921-22, and in *Richardson* the activity was
 28 “prison management activities,” 521 U.S. at 407. Second, AT&T erroneously asserts that a single
 case, *Smith v. Nixon*, amounts to a firmly rooted tradition of common-law immunity to tort
 liability. As explained above, *Smith* is not an immunity case, conflicts with the Ninth Circuit’s
 decision in *Jacobson*, and in any event is not evidence of a firmly rooted tradition of common-law
 tort immunity, as it is not a tort case at all, but a constitutional and statutory liability case. To look
 to a constitutional and statutory liability case like *Smith* to decide whether there is a preexisting
 tradition of common-law immunity to tort liability inverts the proper analysis.

1 bearing on whether public officials are able to act forcefully and decisively in their
 2 jobs or on whether qualified applicants enter public service. Moreover, unlike with
 3 government officials performing discretionary functions, the public interest will not
 4 be unduly impaired if private individuals are required to proceed to trial to resolve
 their legal disputes. In short, the nexus between private parties and the historic
 purposes of qualified immunity is simply too attenuated to justify such an extension
 of our doctrine of immunity.

5 *Wyatt*, 504 U.S. at 168 (citations omitted); *accord*, *Richardson*, 521 U.S. at 412 (refusing qualified
 6 immunity to private prison guards); *Tower*, 467 U.S. at 922-23 (refusing immunity to public
 7 defenders, who are considered to be private persons for purposes of Section 1983; “[w]e do not
 8 have a license to establish immunities . . . in the interests of what we judge to be sound public
 9 policy.”).

10 AT&T’s argument that telecommunications providers will be reluctant to assist in
 11 government surveillance absent qualified immunity (MTD at 17) lacks merit. The government can
 12 compel by court order the assistance of telecommunications providers in electronic surveillance
 13 activities, and good faith reliance on that order provides them with a defense to liability. *See, e.g.*,
 14 18 U.S.C. §§ 2518(4), 2520(d); *U.S. v. New York Tel. Co.*, 434 U.S. 159, 174-78 (1977); *Company*
 15 *v. U.S. (In re U.S.)*, 349 F.3d 1132, 1139 (9th Cir. 2003).

16 **c. Qualified Immunity Does Not Apply to Plaintiffs’**
 17 **Statutory Claims.**

18 Nor is there a qualified immunity defense available to plaintiffs’ federal statutory claims. In
 19 each of those statutes, as explained above, Congress has carefully crafted the scope and limits of
 20 liability and has also created good faith defenses to liability. 18 U.S.C. §§ 2520(d), 2707(e); 47
 21 U.S.C. § 605(e)(3)(C)(iii); 50 U.S.C. § 1809(b). There is no basis in these statutes for a court to
 22 imply qualified immunity on top of the carefully nuanced statutory scheme of liability and good
 23 faith defenses that Congress has created, and to do so would violate congressional intent.

24 As the D.C. Circuit has explained:

25 the qualified immunity doctrine applied to constitutional torts and § 1983 actions
 26 has no application to [these] statutory claims. That is so because Title III itself
 27 provides a complete defense for “[a] good faith reliance on . . . a court warrant or
 28 order, a grand jury subpoena, a legislative authorization, or a statutory
 authorization.” 18 U.S.C. § 2520(d) (1994). . . . When Congress itself provides for a
 defense to its own cause of action, it is hardly open to the federal court to graft
 common-law defenses on top of those Congress creates. *See City of Milwaukee v.*

1 has been clearly established since the Founding that the Fourth Amendment prohibits suspicionless
2 general searches of the type and massive scale occurring here. *See, e.g., Andresen v. Maryland*, 427
3 U.S. 463, 482 (1976); *Stanford v. Texas*, 379 U.S. 476, 481-86 (1965). In particular, “[i]t is now
4 clear that [the warrant] requirement attaches to national security wiretaps that are not directed
5 against foreign powers or suspected agents of foreign powers.” *Halperin v. Kissinger*, 807 F.2d
6 180, 185 (D.C. Cir. 1986) (Scalia, Circuit Justice). The plaintiff class expressly excludes foreign
7 powers and agents of foreign powers. Complaint ¶ 70.

8 It would also be clear to a reasonable telecommunications provider that the alleged
9 interceptions and disclosures violate the statutory provisions asserted by plaintiffs. (Because
10 statutes are typically much more explicit and detailed than the Constitution, the question of
11 whether a statutory right is “clearly established” arises with much less frequency than in the case of
12 constitutional rights.) With respect to plaintiffs’ Communications Act claim, the Supreme Court
13 held decades ago: “[T]he plain words of § 605 forbid anyone, unless authorized by the sender, to
14 intercept a telephone message, and direct in equally clear language that ‘no person’ shall divulge or
15 publish the message or its substance to ‘any person.’ ” *Nardone v. U.S.*, 302 U.S. 379, 382 (1937).
16 ECPA’s prohibitions on the unconsented disclosure of stored communications and records are
17 equally plain: electronic communications service providers like AT&T “shall not knowingly
18 divulge” such communications “to any person or entity,” or such records “to any governmental
19 entity,” except as consistent with specific exceptions inapplicable here. *See* 18 U.S.C. §§ 2702
20 (general prohibition and exceptions), 2703 (procedures for disclosure to government). Finally, and
21 as already discussed, Title III and FISA place clear limits on when communications providers may
22 assist the government in conducting interceptions and electronic surveillance, limits that AT&T has
23 far exceeded. *See* Section A.4, *supra*.

24 IV. CONCLUSION

25 For the foregoing reasons, AT&T’s motion to dismiss should be denied. In the alternative,
26 plaintiffs respectfully request leave to amend their complaint to address any deficiencies this Court
27 finds therein.

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DATED: June 6, 2006

ELECTRONIC FRONTIER FOUNDATION

By _____
Cindy A. Cohn, Esq. (SBN.145997)
Lee Tien, Esq. (SBN 148216)
Kurt Opsahl, Esq. (SBN 191303)
Kevin S. Bankston, Esq. (SBN 217026)
Corynne McSherry, Esq. (SBN 221504)
James S. Tyre, Esq. (SBN 083117)
454 Shotwell Street
San Francisco, CA 94110
Telephone: (415) 436-9333 x108
Facsimile: (415) 436-9993

ATTORNEYS FOR PLAINTIFFS

HELLER EHRMAN LLP
ROBERT D. FRAM
MICHAEL M. MARKMAN
ETHAN C. GLASS
SAMUEL F. ERNST
NICOLE ACTON-JONES
NATHANIEL SHAFROTH
ELENA DIMUZIO
333 Bush Street
San Francisco, CA 94104
Telephone: 415/772-6000
415-772-6268 (fax)

LERACH COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
REED R. KATHREIN
JEFF D. FRIEDMAN
SHANA E. SCARLETT
MARIA V. MORRIS
100 Pine Street, Suite 2600
San Francisco, CA 94111
Telephone: 415/288-4545
415/288-4534 (fax)

TRABER & VOORHEES
BERT VOORHEES (137623)
bv@tvlegal.com
THERESA M. TRABER (116305)
tmt@tvlegal.com
128 North Fair Oaks Avenue, Suite 204
Pasadena, CA 91103
Telephone: 626/585-9611
626/ 577-7079 (fax)

LAW OFFICE OF RICHARD R. WIEBE
RICHARD R. WIEBE
425 California Street, Suite 2025
San Francisco, CA 94104
Telephone: 415/433-3200
415/433-6382 (fax)

LERACH COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
ERIC ALAN ISAACSON
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the following non-CM/ECF participants:

David W. Carpenter
Sidley Austin Brown & Wood LLP
Bank One Plaza
10 South Dearborn Street
Chicago, IL 60600

David L. Lawson
Sidley Austin Brown & Wood
172 Eye Street, N.W.
Washington, DC 20006

By _____ /s/
Cindy A. Cohn, Esq. (SBN.145997)
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, CA 94110
Telephone: (415) 436-9333 x108
Facsimile: (415) 436-9993
cindy@eff.org