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12 **UNITED STATES DISTRICT COURT**
 13 **NORTHERN DISTRICT OF CALIFORNIA**
 14 **SAN FRANCISCO DIVISION**

16 IN RE NATIONAL SECURITY AGENCY)
 TELECOMMUNICATIONS RECORDS)
 17 LITIGATION)
 18 _____)
 19 _____)
 20 _____)
 21 This Document Relates To:)
 22 _____)
Shubert v. Bush)
 (Case No. 07-00693))
 23 _____)

No. M:06-cv-01791-VRW

**REPLY MEMORANDUM OF THE
 UNITED STATES IN SUPPORT OF
 THE STATE SECRETS PRIVILEGE
 AND THE MOTION TO
 DISMISS OR FOR SUMMARY
 JUDGMENT BY THE UNITED
 STATES AND THE OFFICIAL
 CAPACITY DEFENDANTS**

Hon. Vaughn R. Walker
 Date: August 30, 2007
 Time: 2:00 p.m.
 Courtroom: 6

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 AUTHORITIES..... iii

INTRODUCTION..... 1

ARGUMENT..... 3

I. THE STATE SECRETS PRIVILEGE IS FULLY APPLICABLE TO THIS CASE AND PLAINTIFFS’ ARGUMENTS TO THE CONTRARY ARE WITHOUT MERIT.. 3

 A. The United States’ Assertion of the State Secrets Privilege is Fully Consistent with the Law and Not an Attempt to “Immunize” Government Activity from Judicial Review..... 3

 B. Plaintiffs’ Have Adopted an Excessively Narrow Conception of “Military Matters” That is Inconsistent with the Law Governing the State Secrets Privilege..... 5

 C. Plaintiffs’ Reliance on *Webster v. Doe* is Misplaced Because the State Secrets Privilege Was not Invoked in That Case..... 6

II. STATE SECRETS ARE NECESSARY TO THE FULL AND FAIR ADJUDICATION OF PLAINTIFFS’ CLAIMS. 8

 A. Plaintiffs Cannot Establish Standing Without State Secrets..... 8

 B. The Merits of Plaintiffs’ Claims Could Not Be Adjudicated Without State Secrets.. 10

III. THE COURT MUST DETERMINE THE CONSEQUENCES OF THE UNITED STATES’ SUCCESSFUL ASSERTION OF THE STATE SECRETS PRIVILEGE ON THE PARTIES’ ABILITY TO LITIGATE THIS CASE..... 11

IV. FISA DOES NOT PRECLUDE APPLICATION OF THE STATE SECRETS PRIVILEGE IN CASES ALLEGING UNLAWFUL SURVEILLANCE.. 13

V. THE STATUTORY PRIVILEGES INVOKED IN THIS CASE FURTHER PROTECT THE STATE SECRETS AT ISSUE.. 14

CONCLUSION. 15

TABLE OF AUTHORITIES

CASES

1

2

3 *Am. Civil Liberties Union v. Nat’l Security Agency*,

4 ___ F.3d ___, 2007 WL 1952370 (6th Cir., July 6, 2007)... 2, 9

5 *Clift v. United States*, 597 F.2d 826 (2d Cir. 1979)... 13

6 *Clift v. United States*, 808 F. Supp. 101 (D. Conn. 1991)... 13

7 *Dept. of the Navy v. Egan*, 484 U.S. 518 (1988)... 15

8 *Doe v. Tenet*, 329 F.3d 1135 (9th Cir. 2003), *rev’d on other grounds*, 544 U.S. 1 (2005)... 4, 8

9 *Dorfmont v. Brown*, 913 F.2d 1399 (9th Cir. 1990)... 15

10 *Edmonds v. Fed. Bureau of Investigation*, 323 F. Supp. 2d 65 (D.D.C. 2004),

aff’d 161 Fed. Appx. 6 (D.C. Cir.), *cert. denied*, ___ U.S. ___, 126 S. Ct. 734 (2005)... 6

11 *El Masri v. United States*, 479 F.3d 296 (4th Cir. 2007),

petition for cert. filed, 75 U.S.L.W. 3663 (May 30, 2007)... 4, 6, 7, 11

12 *Ellsberg v. Mitchell*, 709 F.2d 51 (D.C. Cir. 1983)... 5, 7

13 *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268 (4th Cir. 1980)... 12

14 *Halkin v. Helms*, 598 F.2d 1 (D.C. Cir. 1978)... 5, 7

15 *Halkin v. Helms*, 690 F.2d 977 (1982)... 5, 7

16 *Halperin v. Kissinger*, 807 F.2d 180 (D.C. Cir. 1986)... 7

17 *Halpern v. United States*, 258 F.2d 36 (2d Cir. 1958)... 13, 14

18 *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006), *appeal pending* (2d Cir.)... 11

19 *Kasza v. Browner*, 133 F.3d 1159 (9th Cir. 1998)... 5, 11

20 *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)... 9

21 *In re Sealed Case*, ___ F.3d ___, 2007 WL 2067029 (D.C. Cir., July 20, 2007)... 6

22 *Sterling v. Tenet*, 416 F.3d 338 (4th Cir. 2005)... 11, 12

23 *Tenenbaum v. Simonini*, 372 F.2d 776 (6th Cir.), *cert. denied*, 543 U.S. 1000 (2004)... 5

24 *Totten v. United States*, 92 U.S. 105 (1876)... 13

25 *United States v. Nixon*, 418 U.S. 683 (1974)... 7, 15

26 *United States v. Reynolds*, 345 U.S. 1 (1953)... passim

27 *Webster v. Doe*, 486 U.S. 592 (1988)... 6, 7, 8

28

1 *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)..... 15

2 *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544 (2d Cir. 1991)..... 12

3 **STATUTES**

4 50 U.S.C. 403-1(i). 14

5 Foreign Intelligence Surveillance Act (“FISA”), 50 U.S.C. § 1801 *et seq.*..... 13

6 Fed. R. Civ. P. 56(b). 2, 8, 12

7 Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458,
8 118 Stat. 3638 (Dec. 17, 2004). 14

9 National Security Act, 50 U.S.C. § 403(c)..... 6

10 Protect America Act of 2007, Pub. L. No. 110-55 (August 5, 2007). 3

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INTRODUCTION

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2 Based on the limited public statements made by the United States about the Terrorist
3 Surveillance Program (“TSP”), plaintiffs seek to compel sweeping disclosures of facts concerning
4 National Security Agency (“NSA”) operations that would be necessary to litigate their claims
5 regarding alleged activities markedly different than what the United States has acknowledged.
6 Specifically, plaintiffs challenge alleged foreign intelligence activities that they contend constitute
7 a “dragnet” of content surveillance – “a massive, criminal domestic spying program that monitors
8 millions of telephone and internet communications of ordinary Americans,” and that
9 “indiscriminately targets every call and every email of every person.” Pls’ Opp. (MDL Docket No.
10 335) at 1, 15. As this Court has noted, although the United States has acknowledged that under the
11 TSP it intercepted the content of communications to or from the United States reasonably believed
12 to involve a member or agent of al Qaeda, the United States has *denied* the existence of a broad
13 content “dragnet” of the sort alleged by plaintiffs.

14 As the Director of National Intelligence (“DNI”) and the NSA Director explain in their public
15 and classified declarations, litigating plaintiffs’ content “dragnet” claims, or even such threshold
16 questions as the plaintiffs’ standing to pursue such litigation, would require disclosure of information
17 concerning NSA activities that, if revealed, would cause serious harm to national security. The
18 DNI’s assertion of the state secrets privilege must be upheld if it demonstrates a “reasonable danger”
19 that disclosure of the information at issue will harm national security, and, in assessing that
20 demonstration, the Court must accord the predictive judgment of the Nation’s top intelligence
21 officials the “utmost deference.” Any other result would fail to accord respect to the considered
22 views of the DNI, and it is here evident that the state secrets privilege is properly invoked.

23 In opposing the Government’s submission, plaintiffs rely on various faulty and misguided
24 arguments about the state secrets privilege and its impact on this case. The fundamental flaw in
25 plaintiffs’ brief is their failure to acknowledge that defendants have sought summary judgment and
26 have established that it is apparent now that this case cannot be litigated without the exposure of
27 state secrets. While plaintiffs concede that on a motion for summary judgment, “the plaintiff can
28 no longer rest on allegations,” *see* Pls’ Opp. at 50-51, they nonetheless proceed to do exactly that

1 while claiming that the Court should ignore defendants' motion because "it comes at the pleading
2 stage, before they have even answered." *Id.* Plaintiffs make no effort to demonstrate that their case
3 can be litigated without state secrets but choose instead to rely solely on allegations, a completely
4 insufficient response to defendants' motion for summary judgment.

5 Plaintiffs' papers make it apparent that delaying full resolution of the state secrets issues
6 would be pointless and would defeat the very purpose of the privilege by putting the security of the
7 information at continued risk of disclosure, inadvertent or otherwise. Plaintiffs' only concession to
8 the fact that defendants have filed a summary judgment motion is their submission of an affidavit
9 under Federal Rule of Civil Procedure 56(f) ("Pls' 56(f) Aff.," MDL Docket No. 336). This affidavit
10 describes the evidence that plaintiffs do not have, but that they have identified as essential to the
11 litigation of their claims, including discovery into whether telecommunications carriers were
12 involved in the "interception and disclosure of plaintiffs' communications to the Government," Pls'
13 56(f) Aff. ¶ 5; "the existence and scope of the monitoring program," *id.* ¶ 7; whether plaintiffs'
14 communications were themselves intercepted; *id.* ¶¶ 9-10; the "manner" in which plaintiffs'
15 communications are intercepted, *id.* ¶ 11; and such other discovery as might be necessary "as the
16 case progresses." *Id.* at note 1. All of this information is squarely covered by the DNI's assertion
17 of the state secrets privilege, and plaintiffs' Rule 56(f) statement is an acknowledgment that such
18 basic information critical to the litigation of their claims remains secret from them.

19 Dismissal at the outset is not unusual in a case like this; it is what the state secrets doctrine,
20 as articulated by the Supreme Court and Ninth Circuit, requires. Plaintiffs' arguments about the
21 inapplicability of the state secrets privilege to their case are based on a fundamental misreading of
22 the relevant caselaw, and are discussed below. Dismissal is also the course followed recently by the
23 Sixth Circuit in *Am. Civil Liberties Union v. Nat'l Security Agency* ("ACLU"), ___ F.3d ___, 2007 WL
24 1952370 (6th Cir., July 6, 2007), in which that Court held that the state secrets privilege prevented
25 the plaintiffs from proving their standing. Plaintiffs' speculative claims of a content "dragnet" that
26 monitors the telephone calls of "every American" bears no relationship to the general description of
27 the limited nature of the TSP made by the Government, and such speculation provides an entirely
28 insufficient basis on which to lay bare the details of the United States' intelligence gathering

1 programs simply so that it can be demonstrated that what plaintiffs fear does not exist. In these
 2 circumstances, the Court should not hesitate to preclude the disclosure of intelligence-related
 3 information that could harm the Nation now and for many years to come. We respectfully submit
 4 that, in this case, the only way to avoid such disclosures is through dismissal.

5 ARGUMENT

6 **I. THE STATE SECRETS PRIVILEGE IS FULLY APPLICABLE TO THIS CASE 7 AND PLAINTIFFS' ARGUMENTS TO THE CONTRARY ARE WITHOUT MERIT.**

8 The DNI and NSA Director, in their unclassified and classified submissions, have explained
 9 in detail the information that must be protected from disclosure in this case and the grave harms that
 10 confirmation, denial, or disclosure could cause to the national security. In unclassified terms, the
 11 information covered by the United States' assertion of the state secrets privilege includes information
 12 that may be needed to demonstrate that the TSP was a limited program and that the NSA does not
 13 otherwise engage in the content surveillance "dragnet" alleged by plaintiffs, as well as information
 14 that may tend to confirm or deny whether the individual plaintiffs have been subject to any alleged
 15 intelligence activities. *See* U.S. Mem. (MDL Docket No. 295) at 7-10. The explanations of these
 16 experienced officials concerning the national security harms risked by this litigation are specific and
 17 thorough, are based on their unique perspective and expertise, and are eminently reasonable.¹

18 Plaintiffs' only response to the United States' comprehensive showing is to argue that the
 19 state secrets privilege is inapplicable for three reasons. Each of these arguments is without merit.

20 **A. The United States' Assertion of the State Secrets Privilege is Fully 21 Consistent with the Law and Not an Attempt to "Immunize" 22 Government Activity from Judicial Review.**

23 Plaintiffs contend that the United States has attempted to "transform . . . a narrow, evidentiary
 24 privilege into a sweeping immunity for violations of criminal law and the Constitution," *see* Pls'
 25 Opp. at 17, and they offer a variety of extreme hypothetical situations that have no relationship to
 26 plaintiffs' allegations or the TSP, and that would be allegedly "immunized" through the application
 27 of the state secrets privilege here. *See id.* at 38. For example, plaintiffs complain that "there is

28 ¹ Further support for the invocation of the privilege may be derived from the enactment of
 the Protect America Act of 2007, Pub. L. No. 110-55 (August 5, 2007). *See* Defts' Notice of
 Statutory Amendments to the Foreign Intelligence Surveillance Act, MDL Docket No. 345.

1 *nothing* the military could not do within the wide landscape of this country that could not be cloaked
2 by the state secrets privilege,” *id.*, including “taking over the broadcast networks in order to control
3 the airwaves,” *id.*, or “put[ting] a camera in every American’s bedroom.” *Id.* at 2. But the United
4 States has never argued, and does not now argue, that the state secrets privilege allows it to
5 unilaterally insulate its activities entirely from judicial review. To the contrary, the United States
6 recognizes and appreciates the Court’s important role in assessing availability of the state secrets
7 privilege under the standards established by the Supreme Court. *See El Masri v. United States*, 479
8 F.3d 296, 312 (4th Cir. 2007) (“the state secrets doctrine does not represent a surrender of judicial
9 control over access to the courts”), *petition for cert. filed*, 75 U.S.L.W. 3663 (May 30, 2007). It is
10 out of respect for that role that the United States has submitted detailed classified presentations (in
11 this case and others), setting forth for the Court the specific information that needs to be protected
12 and the harms that could result from disclosure.

13 We have made such detailed presentations, although the law does not require them, so that
14 the Court may see for itself the serious dangers that litigating this case poses to the effectiveness of
15 the United States’ foreign intelligence efforts. *See United States v. Reynolds*, 345 U.S. 1, 10 (1953)
16 (“[W]e will not go so far as to say that the court may automatically require a complete disclosure to
17 the judge before the claim of privilege will be accepted. . . . [T]he court should not jeopardize the
18 security which the privilege is meant to protect by insisting upon an examination of the evidence,
19 even by the judge alone, in chambers.”). We have also adhered strictly to the principle that the state
20 secrets privilege “is not to be lightly invoked,” *id.* at 7, and have relied for its assertion upon the
21 personal consideration and experienced assessment of the DNI, the Nation’s senior intelligence
22 officer. “It is invocation at that level of the executive hierarchy, and with that degree of personal
23 assurance, that lessens the possibility of reflexive invocation of the doctrine as a routine way to avoid
24 adverse judicial decisions.” *Doe v. Tenet*, 329 F.3d 1135, 1151 (9th Cir. 2003), *rev’d on other*
25 *grounds*, 544 U.S. 1 (2005). We ask only that the Court carefully consider all of the information
26 provided and defer appropriately to the judgments of national security experts as to the risk of harms.
27 Defendants’ adherence to well-established law hardly amounts to a demand for “sweeping
28 immunity,” and plaintiffs’ overheated rhetoric on this point is entirely misplaced. *See El-Masri*, 479

1 F.3d at 312-13 (rejecting plaintiffs’ “invitation to rule that the state secrets privilege can be brushed
2 aside on the ground that the President’s foreign policy has gotten out of line”).

3 **B. Plaintiffs’ Have Adopted an Excessively Narrow Conception of “Military
4 Matters” That is Inconsistent with the Law Governing the State Secrets
Privilege.**

5 Plaintiffs also argue that the state secrets privilege was not intended to extend its protection
6 to anything other than “military matters,” and that it was not intended to protect evidence concerning
7 Government activities aimed at “civilian affairs” from disclosure in litigation. *See* Pls’ Opp. at 25-
8 28, 31-39. According to plaintiffs, “military matters” consist of only those secrets that specifically
9 implicate the physical maneuvers and materiel of the United States’ armed services. *See* Pl’s Opp.
10 at 37 & n.21. No case has ever limited the state secrets privilege in this way. *Reynolds* itself
11 explicitly refers to “a privilege which is well established in the law of evidence” that “protects
12 military *and* state secrets,” 345 U.S. at 7 (emphasis added), and provides that courts should find the
13 state secrets privilege successfully asserted where they are satisfied that there is a “reasonable
14 danger” that disclosing the evidence will expose information that “in the interests of *national*
15 *security*, should not be divulged.” *Id.* at 10 (emphasis added). Courts applying *Reynolds* have
16 specifically noted the broad range of secrets encompassed by the privilege:

17 Possibly because the state secrets doctrine pertains generally to *national security*
18 concerns, the privilege has been viewed as both expansive and malleable. The
19 various harms, against which protection is sought by invocation of the privilege,
include impairment of the nation’s defense capabilities, disclosure of intelligence-
gathering methods or capabilities, and disruption of diplomatic relations with foreign
governments.

20 *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983) (footnotes omitted; emphasis in original);
21 *accord Tenenbaum v. Simonini*, 372 F.2d 776, 777 (6th Cir.) (upholding state secrets privilege
22 because “a reasonable danger exists that disclosing the information in court proceedings would harm
23 national security interests, or would impair national defense capabilities, [or] disclose intelligence-
24 gathering methods or capabilities. . . .”), *cert. denied*, 543 U.S. 1000 (2004); *see also Kasza v.*
25 *Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998) (“The government may use the state secrets privilege
26 to withhold a broad range of information”) (citing *Ellsberg, supra*, and *Halkin v. Helms* (“*Halkin I*”),
27 598 F.2d 1 (D.C. Cir. 1978), both applying state secrets privilege to claims arising from allegations
28 of unconstitutional warrantless surveillance); *Halkin v. Helms* (“*Halkin IP*”), 690 F.2d 977 (1982)

1 (same). Thus, numerous courts have upheld the state secrets privilege in cases just like this one.

2 **C. Plaintiffs' Reliance on *Webster v. Doe* is Misplaced Because the State**
3 **Secrets Privilege Was not Invoked in That Case.**

4 Relying on *Webster v. Doe*, 486 U.S. 592 (1988), plaintiffs argue that where a plaintiff makes
5 a constitutional claim, the courts must balance the litigant's need for information against the holder
6 of the privilege's need to maintain its confidentiality. See Pls' Opp. at 39-44 (citing *Webster*, 486
7 U.S. at 604). In other words, plaintiffs' argument is that, in cases raising constitutional claims,
8 *Webster* transforms the absolute state secrets privilege into a qualified one.

9 Plaintiffs' reading of *Webster* is an invitation to error. Nothing in *Webster* overrules
10 *Reynolds*, which confirmed the absolute nature of the state secrets privilege: "even the *most*
11 *compelling necessity* cannot overcome the claim of privilege if the court is ultimately satisfied that
12 military secrets are at stake." 345 U.S. at 11 (emphasis added). *Webster*, of course, did not review
13 an Executive Branch assertion of the state secrets privilege at all, but merely held that the National
14 Security Act, 50 U.S.C. § 403(c), did not preclude review of constitutional claims despite the
15 agency's generalized fears of "rummaging around" in agency affairs. *Webster* provides no insight
16 into what the Court might have done where the litigation of constitutional claims required the
17 disclosure of information which the head of a federal agency had properly and specifically
18 determined to be exempt from disclosure under the state secrets privilege as it has done here.

19 Thus, both before and after *Webster*, courts have repeatedly applied the state secrets privilege
20 to bar the disclosure of classified information in cases where constitutional claims are raised. Most
21 recently, in *In re Sealed Case*, ___ F.3d ___, 2007 WL 2067029 (D.C. Cir., July 20, 2007), the
22 United States Court of Appeals for the District of Columbia specifically considered and rejected the
23 argument that "the constitutional nature of [the] underlying claim . . . entitles [a plaintiff] to escape
24 the binds of the federal rules" governing the use of evidence, and found that "so long as the state
25 secrets privilege operates as a rule of evidence . . . and not as a means to modify [a plaintiff's]
26 substantive constitutional rights, we hold that it may be invoked by the United States" in a case
27 raising constitutional claims. *Id.*, 2007 WL 2067029 at *3. See also *El Masri v. Tenet*, 479 F.3d at
28 308-13 (finding that state secrets privilege barred disclosure of classified information in case raising
claims for relief under the Constitution); *Edmonds v. Fed. Bureau of Investigation*, 323 F. Supp. 2d

1 65, 79-80 (D.D.C. 2004) (dismissing constitutional claims arising from allegedly unlawful
2 termination on the grounds that the claims could not be litigated in the absence of information
3 protected by the state secrets privilege), *aff'd* 161 Fed. Appx. 6 (D.C. Cir.), *cert. denied*, __ U.S. ___,
4 126 S. Ct. 734 (2005); *see also Ellsberg, supra, Halkin I, supra, and Halkin II, supra* (all evaluating
5 the applicability of the state secrets privilege in context of constitutional claims); *Halperin v.*
6 *Kissinger*, 807 F.2d 180, 188 (D.C. Cir. 1986) (the state secrets privilege sometimes “make[s] it
7 impossible for plaintiffs to go forward with their claims for damages based on statutory and
8 constitutional violations” because they cannot obtain “access to the facts”).

9 At bottom, plaintiffs’ argument is no more than that constitutional claims pose a more
10 “compelling necessity” than other sorts of claims and that this necessity warrants setting the
11 Government’s claims of privilege aside. But this argument does not withstand scrutiny in the face
12 of the Supreme Court’s plain language in *Reynolds*, and there is nothing in *Webster* that suggests that
13 the Court intended such a sweeping change in well-established common law principles governing
14 absolute privileges, let alone a privilege grounded in the President’s Article II power to protect the
15 nation from attack.² *See El-Masri*, 479 F.3d at 313 n.6 (“Even if we were to conclude . . . that
16 protecting national security is less important than litigating the merits of [plaintiffs’ civil and human
17 rights] claim, we are not at liberty to abrogate the state secrets doctrine on that basis.”).

18 As we have explained, the state secrets privilege operates as an evidentiary privilege in this
19 case. *See* U.S. Mem. at 12-14. Once it is determined to apply, however, it is absolute and requires
20 the exclusion of any evidence over which the privilege is properly asserted. Although the exclusion
21 of privileged evidence may have certain consequences, including dismissal, *see infra*, those
22 consequences do not alter the fundamentally evidentiary nature of the privilege, and nothing in
23 *Webster* decrees that absolute privileges change their stripes simply because they are asserted in
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28 ² Indeed, because the state secrets privilege is grounded in the Constitution, *see United States*
v. Nixon, 418 U.S. 683, 710 (1974), any such holding would itself pose a “serious constitutional
question.” *Webster*, 486 U.S. at 603.

1 cases raising constitutional claims. Plaintiffs' reliance on *Webster*, accordingly, in unavailing.³

2 **II. STATE SECRETS ARE NECESSARY FOR A FULL AND FAIR ADJUDICATION**
 3 **OF PLAINTIFFS' CLAIMS.**

4 Plaintiffs rest their case on the theory that they need only show (and will be able to prove)
 5 three sets of facts to litigate their claims: (1) the existence of a warrantless content collection
 6 "dragnet"; (2) that the alleged "dragnet" is "general and indiscriminate" and not "specific and
 7 particularized," and (3) that the alleged "dragnet" is not reasonable or based upon probable cause.
 8 *See* Pl's Opp. at 10-17.⁴ Plaintiffs, however, can establish neither their standing to pursue their
 9 claims nor any of these facts without information that is protected by the state secrets privilege.

10 **A. Plaintiffs Cannot Establish Standing Without State Secrets.**

11 Plaintiffs' only response to defendants' motion for summary judgment is to assert that they
 12 *allege* facts sufficient to demonstrate standing, *see* Pls' Opp. at 47-50, and to claim that defendants
 13 "concede that plaintiffs have *alleged* standing." *Id.* at 49 (second emphasis added). Plaintiffs
 14 concede that "on a motion for summary judgment, the plaintiff can no longer rest on allegations,"
 15 Pl's Opp. at 50 (internal quotations omitted), but appear to believe that they have no obligation to
 16 properly respond to defendants' motion because it is "premature" and "perplexing." *See* Pls' Opp.
 17 at 5 n. 7 (noting that defendants' motion was not accompanied by any set of undisputed facts). The
 18 Federal Rules of Civil Procedure, however, allow a defendant to seek summary judgment "at any
 19 time," Fed. R. Civ. P. 56(b), and the Local Rules of this Court do not allow the filing of a separate

20
 21 ³ If *Webster* is considered to have any relevance to a case like this one where the United
 22 States has made a properly supported state secrets claim as opposed to a generalized objection to
 23 unspecified discovery, *Webster*, at best, only confirms the unexceptional proposition that a Court
 24 should attempt to make reasonable accommodations at the discovery and trial stages that do not
 25 sacrifice the Government's national security interests. *Webster*, 486 U.S. at 604; *see Doe v. Tenet*,
 26 329 F.3d at 1153 (recognizing that the state secrets privilege is absolute but noting that *Webster*
 "confirms that particularly where constitutional claims are at issue, the *Reynolds* inquiry requires
 courts to make every effort to ascertain whether the claims in question can be adjudicated *while*
protecting the national security interests asserted") (emphasis added).

27 ⁴ As previously described, plaintiffs here challenge only an alleged content collection
 28 "dragnet" program. *See* U.S. Mem. at 6 & n.4. Plaintiffs' brief confirms that their Amended
 Complaint states no claims concerning either the TSP, or any alleged communication records
 program.

1 statement of undisputed facts without court order. *See* Local Rule 56-2(a).

2 In light of our pending summary judgment motion, whether plaintiffs have *alleged* standing,
3 or even whether defendants concede that they have *alleged* standing, is entirely beside the point.⁵
4 The question presently before the Court is whether, in light of the state secrets privilege, plaintiffs
5 can *prove* standing, and plaintiffs make no effort to demonstrate how they can. *See, e.g., ACLU*,
6 2007 WL 1952370, at *37 (Gibbons, J., concurring) (“As this case was decided on the government’s
7 motion for summary judgment, the plaintiffs must set forth by affidavit or other evidence specific
8 facts,” but “plaintiffs have failed to meet this burden because there is no evidence in the record that
9 any of the plaintiffs are personally subject to the TSP.”) (citations and internal quotation marks
10 omitted); *id.* (“On summary judgment, however, the plaintiffs’ mere allegations are insufficient,” and
11 the publicly available information about the TSP “does not satisfy the plaintiffs’ burden”). The Sixth
12 Circuit held that the state secrets privilege prevented the *ACLU* plaintiffs from proving actual
13 interception and dismissed the case for lack of standing. The same result is required here.

14 Plaintiffs concede that in order to *establish* standing, as opposed to merely *allege* it, they
15 must show that “plaintiffs . . . were illegally spied upon and are being spied upon . . . by defendants.”
16 *See* Pls’ Opp. at 48. Yet, plaintiffs cannot establish any such fact as to any individual plaintiff
17 because information tending to confirm or deny whether they have been subject to alleged NSA
18 activities falls squarely within the DNI’s privilege assertion. *See* U.S. Mem. at 23-20; *ACLU*, 2007
19 WL 1952370, at *3 (“But the plaintiffs do not – and because of the State Secrets Doctrine cannot –
20 produce any evidence that any of their own communications have ever been intercepted by the NSA
21 under the TSP, or without warrants.”); *id.* at *5 (“Moreover, due to the State Secrets Doctrine, the
22 proof needed either to make or negate such a showing [of actual wiretapping] is privileged, and
23 therefore withheld from discovery or disclosure.”); *id.* at *38 (Gibbons, J., concurring) (“Under any
24

25 ⁵ Defendants do not concede that plaintiffs’ speculative allegations are sufficient even to
26 *allege* standing. The “irreducible constitutional minimum of standing” demanded by the Supreme
27 Court requires that a plaintiff allege an “injury in fact,” *i.e.*, an “invasion of a legally protected
28 interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or
hypothetical.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotes and
citations omitted). Even at the pleading stage, entirely speculative allegations like plaintiffs would
be insufficient to meet this minimum.

1 understanding of constitutional standing, the plaintiffs are ultimately prevented from establishing
2 standing because of the state secrets privilege.”).

3 Plaintiffs argue that the Sixth Circuit’s decision in *ACLU* is inapplicable here, but plaintiffs’
4 arguments are obviously flawed. Plaintiffs argue that *ACLU* is inapposite because in that case
5 plaintiffs had moved for partial summary judgment, *see* Pls’ Opp. at 50, but the existence of a
6 plaintiff’s motion has no bearing whatsoever on a plaintiff’s obligation to properly respond to a
7 defendant’s motion. That plaintiffs have chosen not to move for summary judgment does not relieve
8 them of the obligation to show, in response to defendants’ summary judgment motion, how they can
9 prove their standing in light of the state secrets privilege. Plaintiffs also argue that *ACLU* is
10 inapplicable because in that case the plaintiffs did not challenge the Government’s invocation of the
11 state secrets privilege, Pls’ Opp. at 51, but as we have explained, *these* plaintiffs have failed to raise
12 any colorable argument that the privilege has not been properly invoked. Plaintiffs also attempt to
13 distinguish *ACLU* on the ground it involved only injunctive relief, whereas these plaintiffs seek
14 damages for allegedly unlawful past surveillance, but again, reliance on allegations is entirely
15 insufficient in response to defendants’ summary judgment motion; plaintiffs cannot *establish* either
16 that they have been or that they are being subjected to any of the NSA activities in light of the state
17 secrets privilege. *See* U.S. Mem. at 23-30. Finally, plaintiffs make the remarkable argument that
18 because an injunction stopping the alleged “dragnet” program would remedy their alleged harm, they
19 are entitled to relief. Pls’ Opp. at 53. This argument, of course, is entirely inconsistent with Article
20 III; no court has the power to issue an injunction stopping alleged Government activity that is neither
21 proven to exist nor proven to operate against any plaintiff in the case

22 **B. The Merits of Plaintiffs’ Claims Could Not Be Adjudicated Without**
23 **State Secrets.**

24 Plaintiffs barely respond to the Government’s argument that privileged information is
25 necessary to litigate the merits of their claims. As described in the United States’s opening brief,
26 which we do not repeat here, information relating to the merits of plaintiffs’ claims is squarely
27 covered by the privilege assertion. *See* U.S. Mem. at 30-35.

28 Plaintiffs make no attempt to grapple with either the sensitive nature of these facts or the fact
that they cannot establish a *prima facie* case without them. Instead, plaintiffs respond simply that

1 the program they purport to challenge is “not a secret” and that the limited public disclosures made
2 by the United States about the TSP have “opened the door” to further inquiry about alleged other
3 activities of the NSA. Pl. Opp. at 45-46. But plaintiffs do not challenge the TSP and, in any event,
4 only the most general facts about the TSP have been disclosed, such as its existence and the fact that
5 it targeted international communications involving members or agents of al Qaeda or affiliated
6 terrorist organizations. Numerous other facts about the TSP and any other NSA operations remain
7 highly classified, and forcing their disclosure based on the extremely limited public description of
8 the TSP would, as the DNI explains, cause irreparable harm to the national security by compromising
9 sensitive intelligence sources and methods. Plaintiffs essentially argue that the acknowledged
10 existence of one limited intelligence activity allows them, simply by making speculative allegations,
11 to force the disclosure of additional intelligence information or activities. The law simply does not
12 countenance such a “fishing expedition.” *Sterling v. Tenet*, 416 F.3d 338, 344 (4th Cir. 2005).

13 Plaintiffs’ approach to this case fails to take account of the fundamental principle underlying
14 the state secrets privilege: where the United States has shown a “reasonable danger” that disclosure
15 will harm the national security, the privilege must be upheld. *Reynolds*, 345 U.S. at 10. The DNI
16 and NSA Director have amply demonstrated the harms that would occur if this litigation required
17 the disclosure of classified intelligence information needed to disprove plaintiffs’ content “dragnet”
18 theory. Ignoring their judgment and allowing plaintiffs to probe for proof of any undisclosed
19 operations would essentially put the Nation’s most sensitive foreign intelligence operations at risk
20 any time a narrow public disclosure is made or a litigant chooses to speculate. *See Hepting v. AT&T*
21 *Corp.*, 439 F. Supp. 2d 974, 990 (N.D. Cal. 2006), *appeal pending* (2d Cir.) (declining to “invite
22 attempts to undermine the privilege by mere assertions of knowledge by an interested party”).

23 **III. THE COURT MUST DETERMINE THE CONSEQUENCES OF THE UNITED**
24 **STATES’ SUCCESSFUL ASSERTION OF THE STATE SECRETS PRIVILEGE ON**
25 **THE PARTIES’ ABILITY TO LITIGATE THIS CASE.**

26 Once the state secrets privilege is upheld as an evidentiary matter, the Court must determine
27 the effect of the privilege on the case. In all cases the privilege requires the exclusion of the
28 protected information from disclosure; in certain cases where state secrets are necessary to a full and
fair adjudication of the case, the case cannot proceed and must be dismissed. *See U.S. Mem.* at 14-

1 18; *see, e.g., El-Masri*, 479 F.3d at 306-08; *Kasza*, 133 F.3d at 1166. The Court should not delay
2 dismissing the case when it is evident that the litigation will require state secrets; rather, in order to
3 avoid proceedings that will unnecessarily risk the disclosure of state secrets, the Court must assess
4 the full impact of the privilege at the time of the assertion.

5 As demonstrated by their own affidavit, all of the information that plaintiffs contend is
6 necessary discovery in order for plaintiffs to respond to defendants' pending motion for summary
7 judgment is squarely covered by the privilege assertion made by the DNI and the NSA Director.
8 Thus, plaintiffs' Rule 56(f) Affidavit vividly illustrates the futility of delaying a full assessment of
9 the privilege in this case. It makes no sense to defer a complete decision on the state secrets issues
10 until after discovery; the United States would have to reassert the very same privilege in response
11 to the discovery requests. Not only would such a process "be a waste of time and resources,"
12 *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 548 (2d Cir. 1991), but, more importantly,
13 it would put the disclosure of national security information at continued risk. Plaintiffs would "have
14 every incentive to probe as close to the core secrets" as possible in "attempt[ing] to make out a prima
15 facie case," and such probing "would inevitably be revealing." *Farnsworth Cannon, Inc. v. Grimes*,
16 635 F.2d 268, 281 (4th Cir. 1980) (en banc) (per curiam). And the risk of inadvertent disclosures,
17 which is always present in cases involving the handling of classified information, would persist. *See*
18 *Sterling*, 416 F.3d at 344 ("Courts are not required to play with fire and chance further
19 disclosure – inadvertent, mistaken, or even intentional – that would defeat the very purpose for
20 which the privilege exists."); *id.* at 348 ("Inadvertent disclosure during the course of a trial – or even
21 in camera – is precisely the sort of risk that *Reynolds* attempts to avoid."). That is why courts are
22 called upon to give "utmost deference" to the considered judgment of the Nation's intelligence
23 officials that the continuation of the litigation of a matter such as this is likely to result in disclosures
24 that would be harmful to the national security.

25 This is not a case where state secrets are tangential and can be considered as discrete matters
26 later as individual evidentiary issues arise. The privilege assertion here covers information at the
27 very core of plaintiffs' claims, and the effect of the exclusion of such information on further
28 proceedings is presently apparent. The United States' motion to dismiss or for summary judgment,

1 moreover, has put the issue squarely before the Court and has placed the burden on plaintiffs to
2 respond. They have failed entirely to meet that burden.

3 **IV. FISA DOES NOT PRECLUDE APPLICATION OF THE STATE SECRETS**
4 **PRIVILEGE IN CASES ALLEGING UNLAWFUL SURVEILLANCE.**

5 Plaintiffs advance the clearly erroneous argument that Section 1806(f) of the Foreign
6 Intelligence Surveillance Act (“FISA”), 50 U.S.C. § 1801 *et seq.*, abrogates the state secrets
7 privilege, “displaces” any common law rule of outright dismissal, and establishes the procedure to
8 follow whenever the Government invokes the privilege in a case involving allegations of unlawful
9 electronic surveillance. Pls’ Opp. at 18-23. As we have explained in other cases before this Court,
10 there is no authority that supports either plaintiffs’ argument that FISA was intended to abrogate the
11 state secrets privilege, or the argument that the procedures set forth in FISA were intended to apply
12 in cases where plaintiffs seek disclosure of national security information to support claims for relief
13 in civil litigation. *See, e.g.*, MDL Docket No. 340, at 40-46. We do not repeat those arguments here,
14 but incorporate them by reference.

15 One point is worth noting. Plaintiffs rely heavily on *Halpern v. United States*, 258 F.2d 36
16 (2d Cir. 1958), for the proposition that a statute may waive the state secrets privilege. *See* Pl. Opp.
17 at 17-19, 23, 36. That argument misreads *Halpern*. *Halpern* itself noted that the state secrets
18 privilege was inapplicable in that case only because, unlike in *Reynolds* and *Totten v. United States*,
19 92 U.S. 105 (1876), which involved “attempts to obtain unauthorized disclosures of secret
20 information,” the *Halpern* plaintiff was “not seeking to obtain secret information which he did not
21 possess.” 258 F.2d at 44; *cf. Clift v. United States*, 597 F.2d 826, 829 (2d Cir. 1979) (in later case,
22 under same statute and similar facts, explaining that the state secrets privilege protected facts the
23 *Halpern* plaintiff did not know). Thus, the only question for the Court in *Halpern* was how to
24 structure the proceedings so as to prevent disclosures of classified information to persons other than
25 the parties who already possessed it, and the Court held that “the privilege relating to state secrets
26 is inapplicable when disclosure to court personnel in an in camera proceeding will not make the
27 information public or endanger the national security.” 258 F.2d at 44.

28 Various courts have recognized the distinction between *Halpern* and cases, like this one,
where plaintiffs seek disclosure of secret information *not* known to them in order to pursue litigation,

1 and have refused to interpret *Halpern* as requiring a finding that the state secrets privilege has been
2 waived in other cases arising under the statute at issue in that case. *See Clift v. United States*, 808
3 F. Supp. 101, 109-11 (D. Conn. 1991) (holding that Invention Secrecy Act does not waive the state
4 secrets privilege because that would “turn an absolute privilege into a qualified one, which is
5 unsupported by precedent or statute”); *see also Am. Tel. & Telegraph Co. v. United States*, 4 Cl. Ct.
6 157, 160 n.2 (Cl. Ct. 1983) (rejecting assertion that “the Invention Secrecy Act . . . is a waiver of the
7 state secrets privilege” and characterizing contrary language in *Halpern* as dicta in light of the fact
8 that “the *Halpern* court’s holding was much more limited and closely tailored to that case’s facts”).
9 *Halpern* simply does not stand for the proposition that a statutory provision in general, much less
10 FISA in particular (which *Halpern* did not consider), waives the state secrets privilege. As we have
11 explained in our other filings, FISA does no such thing.

12 **V. THE STATUTORY PRIVILEGES INVOKED IN THIS CASE FURTHER PROTECT**
13 **THE STATE SECRETS AT ISSUE.**

14 Plaintiffs’ effort to diminish the statutory privileges invoked by the DNI and the Director of
15 the NSA to protect intelligence sources and methods is also unavailing. *See Pls’ Opp.* at 54-57.
16 These privileges were properly asserted – and properly apply to the information at issue – in this
17 case, and support the Government’s argument that dismissal is required as a result of the state secrets
18 privilege. *See U.S. Mem.* at 35-38. Indeed, Congress spoke clearly, broadly, and sensibly in
19 protecting from disclosure information pertaining to the intelligence activities of the NSA, and
20 plaintiffs have pointed to no valid basis for contravening Congress’ plain intent.

21 Plaintiffs argue that FISA postdates these statutory enactments and that therefore, they should
22 yield to that later-in-time statute. This argument is misguided: the critical protective schemes
23 established by these statutes, which are aimed at protecting specifically identified information
24 determined to be essential to national security, have never been amended or restricted. Indeed, the
25 “intelligence sources and methods” protection provided in 50 U.S.C. 403-1(i)(1) was *reenacted* in
26 2004 to transfer the authority to protect such information from the Director of Central Intelligence
27 to the Director of National Intelligence without the slightest hesitation by Congress. Intelligence
28 Reform and Terrorism Prevention Act of 2004, Sec. 102A(i)(1), Pub. L. No. 108-458, 118 Stat. 3638
(Dec. 17, 2004), codified at 50 U.S.C. § 403-1(i)(1).

1 Plaintiffs' arguments that Section 401-1(i)(l) provides authority only to the DNI and that
2 neither that statute nor Section 6 of the National Security Agency Act precludes discovery from third
3 parties are also wrong. The DNI has exercised his statutory authority to protect information by
4 invoking the privilege granted to him in this case, and in doing so, he has acted within his powers
5 and within the rubric of the state secrets privilege which requires invocation by the head of an
6 agency; moreover, the DNI has specifically determined that information relating to – and that may
7 be in the hands of – third parties is protected by the privilege, and it is well recognized that control
8 of classified information rests with Executive Branch officials. *See Dept. of the Navy v. Egan*, 484
9 U.S. 518, 527 (1988); *Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990).

10 Finally, plaintiffs' cursory argument that the statutory privileges would raise constitutional
11 questions if they were construed to deny a judicial forum for plaintiffs' constitutional claims, *see* Pls.
12 Opp. at 57-58, is not based on their citation to any authority that a statutory privilege, or any other
13 privilege for that matter, may be abrogated simply because the information protected is relevant to
14 a constitutional claim. In any event, the Court can easily avoid any constitutional concern about the
15 scope of the statutory privileges in this case. As is clear from declarations submitted, the statutory
16 privilege assertions cover the same information that is protected by the state secrets privilege in this
17 case. *See* Public DNI Decl. ¶ 10; Public NSA Director Decl. ¶¶ 2, 11-12. Because the state secrets
18 privilege itself is grounded in the Constitution, *see Nixon*, 418 U.S. at 710, there can be no
19 constitutional problem with precluding the litigation of plaintiffs' claims on the ground that such
20 adjudication would require the disclosure of privileged national security information. Indeed, the
21 statutory authorities invoked by the DNI and the NSA Director demonstrate that the assertion of the
22 state secrets privilege in this case is directly supported by statutory law and, thus, would be at the
23 "highest ebb" of Presidential authority, as described in Justice Jackson's concurring opinion in
24 *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-38 (1952) (Jackson, J., concurring).

25 CONCLUSION

26 For the foregoing reasons, and those set forth in the United States' opening brief, the Court
27 should uphold the state secrets and statutory privilege assertions and grant the United States' motion
28 to dismiss or for summary judgment.

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Respectfully submitted,

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