10-15616, 10-15638

United States Court of Appeals
for the
Ninth Circuit

CAROLYN JEWEL, *et al.*,

Plaintiffs-Appellants,

– v. –

NATIONAL SECURITY AGENCY, *et al.*,

Defendants-Appellees.

VIRGINIA SHUBERT, *et al.*,

Plaintiffs-Appellants,

– v. –

GEORGE W. BUSH, *et al.*,

Defendants-Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
THE HONORABLE VAUGHN R. WALKER, CHIEF DISTRICT JUDGE
NO. C 08-CV-4373-VRW (JEWEL)
MDL NO. 06-1791-VRW (SHUBERT)

REPLY BRIEF OF SHUBERT APPELLANTS

MATTHEW D. BRINCKERHOFF
ILANN MARGALIT MAAZEL
ADAM R. PULVER
EMERY CELLI BRINCKERHOFF & ABADY LLP
Counsel for Shubert *Appellants*
75 Rockefeller Plaza, 20th Floor
New York, New York 10019
(212) 763-5000

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INTRODUCTION

The Government instituted a massive spying program that monitors telephone and Internet communications of millions of ordinary Americans. As an NSA operative admitted on national television: "The National Security Agency had access to *all* Americans' communications: faxes, phone calls, and their computer communications . . . It didn't matter whether you were in Kansas, you know, in the middle of the country and you never made foreign communications at all. *They monitored all communications*."[1]

Having completely abandoned the rationale for dismissal set forth in the opinion below, the Defendants advance as their main appellate defense the state secrets privilege, an issue the lower court did not even reach. And they do so in sweeping fashion, seeking to transform a limited, common law evidentiary privilege into broad immunity for unlawful conduct. In Defendants' view, *any* illegal conduct–no matter how many people it affects, no matter how violative it is of constitutional rights–cannot be stopped, or even revealed, so long as revelation of the conduct might harm national security. Even a secret program by the President to put a camera in every American's bedroom could not be revealed, if to

[1] Interview of Russell Tice, *Countdown with Keith Olbermann*, January 21, 2009, http://www.youtube.com/watch?v=osFprWnCjPA at 2:15 (statement by NSA operative Russell Tice). Tice later referred to the program as a "low-tech dragnet." *Id.* at 4:20.

reveal it might harm national security. That is not, and cannot be, the law.

The state secrets privilege has limits. As set forth in the narrow holding of *Reynolds v. United States* and its progeny, it is a privilege, not an immunity; it only applies to purely "military," not civilian, matters; it does not permit or sanction military intrusion into civilian affairs; and it does not apply to constitutional claims. In any event, the Court need not reach these issues here, as FISA Section 1806(f) preempts the common-law state secrets privilege; this spying program is "hardly a secret," much less a state secret, *see Hepting v. AT&T Corp.*, 439 F. Supp.2d 974, 994 (N.D. Cal. 2006); and even if the privilege applied as to some evidence, the case should not be dismissed.

"Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government." *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting). So too the uncontrolled ability of the Executive to insulate itself from Article III scrutiny is a powerful weapon "in the arsenal of . . . arbitrary government." The district court's opinion concerning standing should be reversed. And the Defendants' state secrets argument on appeal should be rejected.

ARGUMENT

I. PLAINTIFFS HAVE STANDING TO BRING THEIR CLAIMS

Defendants do not defend the district court's opinion at all. The district court held that Plaintiffs lack standing because their individualized injuries were sustained by a large number of Americans. That ruling, now abandoned by the Defendants, is plainly indefensible. *See, e.g.*, *Newdow v. Lefevre*, 598 F.3d 638, 642 (9th Cir. 2010).

Instead, Defendants make three other arguments attacking Plaintiffs' standing to bring this case. First, they claim the Plaintiffs assert a "generalized grievance better suited to resolution by the political branches," Appellees' Public Br. at 19, and that the federal courts "are not the appropriate forum for addressing the unique concerns of our nation's foreign intelligence needs," *id.* at 23. Second, they suggest Plaintiffs' "allegations that they have been targeted for surveillance" are insufficient to constitute a cognizable injury under constitutional standing requirements. *Id.* at 23. Finally, they contend Plaintiffs lack standing to bring claims under FISA. *Id.* at 38-39. None of these arguments is of any merit.

A. The Federal Courts are an Appropriate Venue for Plaintiffs' Constitutional and Statutory Claims

Although couched by Defendants as an issue of "generalized grievance," the notion that a dispute is "better suited to resolution by the political branches" actually implicates the "political question" doctrine. *See, e.g., Vieth v. Jubelirer*,

541 U.S. 267, 277 (2004) (political question arises when "the question is entrusted to one of the political branches or involves no judicially enforceable rights"). It is this Court's "responsibility to determine whether a political question is present, rather than to dismiss on that ground simply because the Executive Branch expresses some hesitancy about a case proceeding." *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 978 n.3 (9th Cir. 2007) (internal quotations omitted).

The political question doctrine, though, has no relevance here. "A controversy is nonjusticiable– *i.e.*, involves a political question– where there is a 'textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.'" *Nixon v. United States*, 506 U.S. 224, 228 (1993) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). Although Defendants claim grandly that the action raises "questions about how to conduct our nation's intelligence operations," Appellees' Public Br. at 24, Plaintiffs' claims are far narrower. They seek to enforce specific rights under specific statutes and the U.S. Constitution. For federal courts to interpret statutes and the Fourth Amendment and apply them to the facts presented is not an intrusion on the political branches, but rather a commonplace exercise of the judicial function. Our constitutional scheme was specifically designed with a role for the judiciary to police the executive to protect the citizenry from unlawful search and seizure.

Here, Congress has specifically authorized judicial involvement by enacting statutes that grant individuals like Plaintiffs private rights of action which they can bring in federal courts: the Stored Communications Act, the Wiretap Act, and FISA. Such congressional action is conclusive of justiciability. *See Hanson v. Wyatt*, 552 F.3d 1148, 1159 (10th Cir. 2008) ("justiciability is determined simply by examining whether Congress has authorized the cause of action"); *Johnson v. Collins Entertainment Co., Inc.*, 199 F.3d 710, 729 (4th Cir. 1999) (Luttig, J., concurring) ("If Congress sees fit to provide citizens with a particular cause of action, then we as federal courts should entertain that action-and unbegrudgingly.").

That this case (allegedly) involves national security and foreign intelligence does not, as Defendants suggest, make the case nonjusticiable. "[I]t is 'error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.'" *Corrie*, 503 F.3d at 982 (quoting *Baker*, 369 U.S. at 211). *See also Hanson*, 552 F.3d 1148 at 1159 (10th Cir. 2008); *Lane v. Halliburton*, 529 F.3d 548, 558 (5th Cir. 2008) (political question analysis is "not satisfied by 'semantic cataloguing' of a particular matter as one implicating 'foreign policy' or 'national security.'"). Nor will this Court "find a political question 'merely because [a] decision may have significant political overtones.'" *Corrie*, 503 F.3d

at 982 (quoting *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986)).

That the Government has a "compelling interest" in national security, Appellees' Public Br. at 19, has no bearing on whether this case is justiciable. To the contrary, courts regularly find cases involving national security and government surveillance justiciable. *See, e.g.*, *Wilson v. Libby*, 535 F.3d 697 (D.C. Cir. 2008) (no political question in suit over disclosure of identity of covert agent by Vice President); *Stehney v. Perry*, 101 F.3d 925 (3d Cir. 1996) (NSA clearance revocations do not pose nonjusticiable political questions); *In re NSA Telecomm. Records Litig.*, 700 F. Supp.2d 1182 (N.D. Cal. 2010) (finding Plaintiffs had standing and NSA had violated FISA); *Hepting v. AT&T Corp.*, 439 F. Supp.2d 974 (N.D. Cal. 2006), *abrogated by statute and remanded*, 539 F.3d 1157 (9th Cir. 2008). The political question doctrine simply does not apply to this case.

B. Plaintiffs Have Sufficiently Alleged Injury to Survive a Motion to Dismiss

The Amended Complaint more than adequately alleges an injury sufficient to withstand a motion to dismiss. Plaintiffs allege that their statutory and constitutional rights were violated by Defendants when they were spied upon as part of an unlawful program, and that their personal phone conversations and email were "intercept[ed], search[ed], seiz[ed], and subject[ed] to surveillance." ER 2:48-50, 66 (Am. Compl. ¶¶ 2, 5-8, 87). These allegations, which are more than

plausible given the widely reported existence of the surveillance program at issue and Defendants' concessions as to the existence of much of the program, ER 1:21-30, 2:60-67, are sufficiently certain to allow the Court, accepting the allegations as true, to "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1003 (9th Cir. 2010) (quoting *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009)).

Plaintiffs are not required to allege any further "specific harm resulting from the claimed surveillance." The damage to the Plaintiffs' privacy, their statutory rights, and their constitutional rights is far greater than the "identifiable trifle" required to satisfy Article III's standing requirements, particularly at the pleading stage. *See* Shubert Pls.' Opening Br. at 14-18; *Council of Insurance Agents & Brokers v. Molasky-Arman*, 522 F.3d 925, 932 (9th Cir. 2008) (quoting *United States v. Students Challenging Regulatory Agency (SCRAP)*, 412 U.S. 669, 689 n. 14 (1973)); *Oregon v. Legal Services Corp.*, 552 F.3d 965, 969 (9th Cir. 2009). That others may have suffered the same injury from other discrete, but related, surveillance activities is of no moment. *See, e.g.*, *FEC v. Akins*, 524 U.S. 11 (1998); *Newdow v. Lefevre*, 598 F.3d 638 (9th Cir. 2010).

C. Plaintiffs Have Standing Under FISA

In two cursory paragraphs, ignoring the precedent and statutory text cited by Plaintiffs in their opening brief, the Defendants contend that Plaintiffs "cannot

demonstrate that they are aggrieved persons within the meaning of FISA." Appellees' Public Br. at 38. But the facts alleged by Plaintiffs, which must be taken as true,[2] plainly establish that Plaintiffs fall within the class of "aggrieved persons" entitled to bring actions under FISA. FISA defines "an aggrieved person" as one who has been "subjected to an electronic surveillance or about whom information obtained by electronic surveillance of such person has been disclosed or used in violation of [50 U.S.C. § 1809]. 50 U.S.C. § 1810. Plaintiffs have alleged they were unlawfully subjected to such electronic surveillance, and thus have standing under FISA. *See* ER 2:48-50, 66-67 (Am. Compl. ¶¶ 2, 5-8, 87, 98).

D. Any Dismissal on the Basis of a Standing Deficiency Should Have Been Accompanied by Leave to Amend

If, as the Government suggests, the Complaint were somehow insufficiently specific or detailed in its allegations, Plaintiffs should be given the opportunity to amend the complaint to plead such additional details. *See, e.g.*, *Harris v. Amgen, Inc.*, 573 F.3d 728, 737 (9th Cir. 2009); *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1034 (9th Cir. 2008). The District Court's dismissal of the Complaint without leave to amend was thus in error.

[2] There is no heightened pleading standard; the Supreme Court has held that the term "aggrieved person" in the analogous provision of the Wiretap Act "should be construed in accordance with existent standing rules." *Alderman v. United States*, 394 U.S. 165, 176 n. 9 (1969).

II. THE STATE SECRETS PRIVILEGE DOES NOT PROVIDE VALID ALTERNATIVE GROUNDS FOR DISMISSAL

"With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 655 (1952) (Jackson, J., concurring). The Government's radical attempt to avoid an inquiry into the lawfulness of executive action by extending the state secrets privilege to the ordinary conversations of millions of Americans flies in the face of over two centuries of American jurisprudence: law that has established the constitutional right and duty of Article III courts to "say what the law is," *Marbury v. Madison*, 5 U.S. 137, 177 (1803); the right to be free from unreasonable searches and seizures, *see* U.S. Const. amend. IV; the right to a judicial forum to assert constitutional rights, *see Webster v. Doe*, 486 U.S. 592 (1988); and constitutional limitations upon Executive power, *see Youngstown*, 343 U.S. 579.

Appellees would sweep away these vital constitutional principles with the stroke of a declaration, arrogating to themselves the right to immunize *any* criminal or unconstitutional conduct in the name of national security via the cloak of the state secrets privilege.[3] The Government cannot so easily puncture a hole in the Constitution.

[3] The privilege encompasses two distinct applications: "One completely bars adjudication of claims premised on state secrets (the '*Totten [v. United States*, 92

The District Court did not address state secrets at all in its opinion. Yet Appellees seek, primarily via an unauthorized, secret brief, for this Court to rule upon the issue for the first time. This unfair invitation should be rejected.

Even if the Court were to address the issue in the first instance, the Court should conclude the state secrets privilege does not warrant dismissal of the entire case because (1) the privilege is preempted by FISA; (2) *Reynolds* does not govern constitutional claims; (3) the *Reynolds* privilege does not apply to a civilian case, such as this one; (4) the Government has not met its burden in showing the necessity of the application of the privilege here; and (5) any evidence that may be privileged does not require wholesale dismissal of this case.

A. The Court Should Not Determine the Applicability of the State Secrets Privilege as a Matter of First Instance

The District Court did not reach the issue of whether the state secrets privilege applies here, or whether it bars Plaintiffs' claims. The proper course would be for the Court to decline to "consider the issue for the first time on appeal," and remand for such consideration. *Al-Haramain Islamic Fdn. v. Bush*

U.S. 105 (1875)] bar'); the other is an evidentiary privilege ('the [*United States v.*] *Reynolds* [345 U.S.1 (1953)] privilege') that excludes privileged evidence from the case and *may* result in dismissal of the claims. (emphasis in original). The Government does not argue that the very subject matter of the litigation is a state secret, or otherwise invoke the so-called *Totten* bar. Given the extensive information already made public about the Government's unlawful wiretapping program, such an argument would be meritless. *See Al-Haramain*, 507 F.3d at 1199-1201.

("*Al-Haramain I*"), 507 F.3d 1190, 1206 (9th Cir. 2007) (citing *Singleton v. Wulff*, 428 U.S. 106, 120 (1976) and *Barsten v. Dep't of Interior*, 896 F.2d 422, 424 (9th Cir. 1990)). The Court of Appeals should only decide an issue not decided by the District Court if "no additional fact-finding is necessary," and "where the proper resolution is beyond any doubt, or where injustice might otherwise result." *Dodd v. Hood River Country*, 136 F.3d 1219, 1229 (9th Cir. 1998). *See also Cardenas v. Anzai*, 311 F.3d 929, 938-39 (9th Cir. 2002).

The application of the state secrets privilege is an inherently factbound inquiry, and, as set forth below, is not resolved beyond any doubt in the Government's favor. Nor would remand result in injustice. To the contrary, dismissal of a case involving one of the greatest violations of Fourth Amendment rights in the Nation's history, prior even to a thorough review of the evidence by the District Court, would constitute manifest injustice. The Court should thus decline to consider this issue.

B. Any Invocation of the State Secrets Privilege is Preempted by FISA

In the event the Court reaches the state secrets issue, Plaintiffs attempt to address it within the short confines of this reply brief.

First, the state secrets privilege is preempted by FISA where electronic surveillance is concerned. "The state secrets privilege is a common law evidentiary privilege." *Al-Haramain*, 507 F.3d at 1196; *see also Doe v. C.I.A.*, 576

F.3d 95, 101 (2d Cir. 2009); *In re Sealed Case*, 494 F.3d 139, 142 (D.C. Cir. 2007); *Kasza v. Browner*, 133 F.3d 1159, 1165 (9th Cir. 1998). Like all federal common law, it is "subject to the paramount authority of Congress" and Congress may "displace it even without affirmatively proscribing its use," *County of Santa Clara v. Astra USA, Inc.*, 588 F.3d 1237, 1249 (9th Cir. 2009); *see also Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1092 n.15 (9th Cir. 2010) (*en banc*) ("Congress presumably possesses the power to restrict application of the state secrets privilege"). The privilege will be preempted by a statute if "the statute speaks directly to the question otherwise answered by federal common law." *Kasza*, 133 F.3d at 1167.

As the District Court found in a related case, FISA, 50 U.S.C. § 1806(f), does exactly this, and preempts the common-law state secrets privilege as to materials related to electronic surveillance. *Al-Haramain Islamic Fdn., Inc. v. Bush* ("*Al-Haramain II*"), 564 F. Supp. 2d 1109, 1118-19 (N.D. Cal. 2008).

1. The Specific Protocol Prescribed by FISA Section 1806(f) Displaces the State Secrets Privilege

Section 1806(f) provides an explicit protocol for the use of potentially confidential evidence in proceedings surrounding electronic surveillance. It states:

> . . . whenever any motion or request is made by an aggrieved person pursuant to any other statute or rule of the United States or any State before any court or other authority of the United States or any State *to discover or obtain applications or orders or other materials relating*

> *to electronic surveillance or to discover, obtain, or suppress evidence or information obtained or derived from electronic surveillance* under this chapter, the United States district court or, where the motion is made before another authority, the United States district court in the same district as the authority, shall, notwithstanding any other law, if the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States, *review in camera and ex parte the application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted. . . .*

50 U.S.C. § 1806(f) (emphasis added). The plain text of this statute states that "materials relating to electronic surveillance," the disclosure of which, in the opinion of the Attorney General, would harm national security, are *not* to be excluded from proceedings, but rather to be reviewed *in camera* and *ex parte* in accordance with the specified protocol.

As the *Al-Haramain II* court explained, Section 1806(f) is part of a comprehensive regulatory scheme that "leaves no room in a case to which section 1806(f) applies" for the common-law state secrets privilege. 564 F. Supp.2d at 1118-19. The same material cannot be both excluded under the state secrets privilege, and included via *in camera, ex parte* review as per the statute. The provision "is Congress's specific and detailed prescription for how courts should handle claims by the government that the disclosure of material relating to or derived from electronic surveillance would harm national security." *Id.* at 1119.

Indeed, it "is in effect a codification" of the common law privilege for cases where section 1806(f) applies, "as modified to reflect Congress's precise directive to the federal courts for the handling of materials and information with purported national security implications." *Id.* Accordingly, section 1806(f)'s protocol is mandatory: the courts "shall" conduct the review section 1806(f) prescribes in cases within its scope. *Id.* at 1119.

Section 1806(f) governs this case, as it applies to evidence presented by the Government or requests for "applications or orders or other materials relating to electronic surveillance or to discover, obtain, or suppress evidence or information obtained or derived from electronic surveillance under this chapter" by "an aggrieved person pursuant to any other statute or rule of the United States or any State before any court or other authority of the United States." Plaintiffs are aggrieved persons with claims in a United States court, and the evidence the Government claims privilege over is "material[] relating to electronic surveillance." Section 1806(f), which may be invoked by the Government at any time, governs materials relating to electronic surveillance on all of Plaintiffs' claims, not just their FISA claim. *See ACLU Fdn. of S. Cal. v. Barr*, 952 F.2d 457, 465 (D.C. Cir. 1991) (Section 1806(f) covers claims of whether surveillance complied with all applicable law, including Constitution).

The Government makes no argument that section 1806(f) does not apply,

only stating that it "disagrees" with the *Al-Haramain II* court's decision. Appellees' Public Br. at 38 n. 11. But the statutory text of section 1806(f) is plain: the district court is to determine whether the Government subjected Plaintiffs to unlawful surveillance, and national security concerns are to be resolved by *in camera, ex parte* review.[4]

2. The Existence of a FISA Cause of Action is Inconsistent with the Government's Invocation of the State Secrets Privilege Here

Section 1806(f) speaks directly to how courts should handle "materials relating to electronic surveillance" in, *inter alia*, FISA cases. But even aside from section 1806(f), the mere existence of an independent cause of action (section 1810) for violations of FISA is powerful evidence that Congress sought to preclude the outright dismissal of otherwise viable FISA claims on the basis of the state secrets privilege. If not, section 1810 would be meaningless, as the Government could evade any private FISA action merely by invoking the state secrets

[4] The Government's argument that Plaintiffs are required to demonstrate *other* evidence of electronic surveillance before Section 1806(f) may be applied, Appellees' Public Br. at 38, is unsupported. Plaintiffs are not required to present evidence in response to a motion to dismiss. *See Kearney v. Foley & Lardner, LLP*, 590 F.3d 638, 647 (9th Cir. 2009) (finding "error" to require "support" of allegations on motion to dismiss); *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004) (rejecting argument for dismissal because plaintiff "failed to provide evidence outside the pleadings in response to their motion to dismiss").

privilege.[5]

The Second Circuit addressed a similar issue in *Halpern v. United States*, 258 F.2d 36 (2d Cir. 1958), a lawsuit under the Invention Secrecy Act, 35 U.S.C. §§ 181, *et seq.* That statute allowed the patent office to withhold patent grants from inventions that would implicate national security, but provided a mechanism by which inventors could obtain compensation if their patent applications were denied. When one such inventor brought an action, the government invoked the state secrets privilege. The Second Circuit rejected the assertion of the privilege because "the trial of cases involving patent applications placed under a secrecy order will always involve matters within the scope of this privilege," and "[u]nless Congress has created rights which are completely illusory, existing only at the mercy of government officials, the Act must be viewed as waiving the privilege." *Id*. at 43.

Private FISA actions by *definition* concern "Foreign Intelligence Surveillance," *i.e.*, matters that "by their very nature concern security information." *Id*. Unless Section 1810 creates "rights which are completely illusory, existing only at the mercy of government officials," *id*., FISA must be viewed as supplanting the state secrets privilege, vesting courts with the power to ensure

[5] In the interest of economy, the *Shubert* Plaintiffs do not detail the history of FISA, but incorporate by reference the *Jewel* Plaintiffs' discussion thereof in their reply brief, Dkt. 39-1 at 16-19.

national security with "appropriate security procedures and protective orders." 50 U.S.C. § 1806(f). Where national security issues arise, the District Court is authorized to consider evidence on an *ex parte* and *in camera* basis in order to determine if unlawful surveillance has occurred.

C. Where, as Here, Constitutional Claims are at Issue, the *Reynolds* Privilege Does Not Apply

The Government's invocation of the state secrets privilege is particularly troubling given Plaintiffs' Fourth Amendment claims. Where constitutional claims are at stake, Supreme Court precedent requires the District Court to exercise its "latitude to control any discovery process which may be instituted so as to balance respondent's need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the [Government] for confidentiality and the protection of its methods, sources, and mission" – not dismissal. *Webster v. Doe*, 486 U.S. 592, 604 (1988). *Reynolds* and the privilege it recognized did *not* involve constitutional claims. *Reynolds* was a tort case brought by three people, involving no issues of constitutional significance. In contrast, this class action on behalf of hundreds of millions of Americans involves arguably the most sweeping violation of constitutional rights by a President in the nation's history. As the *Hepting* court noted, "no case dismissed because its 'very subject matter' was a state secret involved ongoing, widespread violations of individual constitutional rights." *Hepting*, 439 F. Supp.2d at 993.

Here, the Government seeks to use a common law privilege to deny Plaintiffs a judicial forum to assert their Fourth Amendment right to be free from a Dragnet surveillance program. But as the Supreme Court held in *Webster*, a case that post-dates *Reynolds*, a "serious constitutional question . . . would arise" if even "a federal *statute* were construed to deny any judicial forum for a colorable constitutional claim." *Webster*, 486 U.S. at 603 (citation omitted). In *Webster*, the plaintiff (unlike plaintiffs here) affirmatively contracted with and worked for the United States (in the CIA). Notwithstanding the plaintiff's status as a former CIA employee, and notwithstanding the CIA Director's claim that "judicial review even of [plaintiff's] constitutional claims" will be "to the detriment of national security," *id.* at 604, the Supreme Court refused to dismiss the case. Instead, and in contrast to *Reynolds* (which involved no constitutional claim), the Court instructed the district court to "balance [plaintiff's] need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission." *Id.*; *see also Stehney v. Perry*, 101 F.3d 925, 934 (3d Cir. 1996) (constitutional challenge to the NSA revocation of national security clearance in part to avoid the "serious constitutional question that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim").

Appellees ask the Court to deny plaintiffs a judicial forum to vindicate their Fourth Amendment rights. That *Webster* does not permit. The *Webster* court was familiar with (and cited) *Reynolds*. But the *Webster* court struck a different balance where constitutional rights were at stake–permitting the case to proceed, discovery to be held, and a careful balancing of the parties' respective interests.

This case is even stronger than *Webster*, because Congress passed a law (FISA) specifically authorizing discovery here, and the constitutional interests at stake are also far greater. *Webster* involved a single plaintiff, asserting fairly weak constitutional claims.[6] This case is a putative class action on behalf of millions of Americans, asserting serious violations of the Fourth Amendment. The Government's radical attempt to deny Plaintiffs a judicial forum to assert their Fourth Amendment claims must be rejected. *Webster*, 486 U.S. at 603.

D. Because This Case Concerns Civilian, not "Military Matters," the State Secrets Privilege Does Not Apply

The state secrets privilege has traditionally been applied in cases involving military affairs, and not in cases brought by civilians for unlawful acts on American soil. As the district court observed in *Hepting*, "most cases in which the very subject matter [of the case] was a state secret involved classified details about either a highly technical invention or a covert espionage relationship." 439 F.

[6] *See Webster*, 486 U.S. at 602 ("We share the confusion of the Court of Appeals as to the precise nature of respondent's constitutional claims.").

Supp.2d at 993. There is good reason for this. The *Reynolds* holding, by its own terms, dealt *only* with "military matter[s]." 345 U.S. at 10 (privilege applies *only* where "there is a reasonable danger that compulsion of the evidence will expose *military matters* which, in the interest of national security, should not be divulged."). The secret test flight of a bomber (*Reynolds*), and covert spy relationships with President Lincoln (*Totten v. United States*, 92 U.S. 105 (1875)) and with the CIA (*Tenet v. Doe*, 544 U.S. 1 (2005)), are all plainly core "military matters."[7] But *Youngstown Sheet* teaches that the encroachment of the military into the purely *civilian* affairs of ordinary Americans, *e.g.*, spying upon hundreds of millions of phone calls and emails that have nothing to do with the military or with foreign intelligence, is a *civilian* matter. *Id.*, 343 U.S. at 587; *id.* at 642 (Jackson, J., concurring) ("[N]o doctrine that the Court could promulgate would

[7] The great majority of state secrets cases similarly concern core military matters and/or persons who worked with or for United States intelligence or the military. *See, e.g.*, *Sterling v. Tenet*, 416 F.3d 338 (4th Cir. 2005) (covert agent's employment lawsuit against CIA); *Edmonds v. United States Dept. of Justice*, 323 F.Supp.2d 65 (D.D.C. 2004) (action by terminated FBI employee); *Tilden v. Tenet*, 140 F.Supp.2d 623 (E.D. Va. 2000) (employment suit against CIA); *Bareford v. General Dynamics Corp.*, 973 F.2d 1138 (5th Cir. 1992) (defective weapon causing death of sailors in Iraqi missile attack); *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544 (2d Cir. 1991) (malfunction of missile defense system aboard U.S. Navy frigate); *In re Under Seal*, 945 F.2d 1285 (4th Cir. 1991) (failure to renew contract involving "highly-classified program"); *Department of Navy v. Egan*, 484 U.S. 518 (1988) (denial of security clearance to Trident Naval Refit Facility); *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236 (4th Cir. 1985) (Navy and CIA "dolphin torpedo" and "open-ocean weapons systems"); *Molerio v. FBI*, 749 F.2d 815 (D.C. Cir. 1984) (refusal to hire plaintiff as FBI special agent).

seem . . . more sinister and alarming than that a President . . . can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture."); *id.* at 644 ("The military powers of the Commander-in-Chief were not to supersede representative government of internal affairs . . . . Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy."); *id.* at 632 (Douglas, J., concurring) ("[O]ur history and tradition rebel at the thought that the grant of military power carries with it authority over civilian affairs.").

Reynolds carefully included only purely "military matters" within its holding. It did not invite the government to extend the state secrets privilege into the civilian arena, and for good reason. We have long enjoyed a "deeply rooted and ancient opposition in this country to the extension of military control over civilians," *Reid v. Covert*, 354 U.S. 1, 33 (1957), and to "any military intrusion into civilian affairs." *Laird*, 408 U.S. at 15. Extension of the state secrets privilege to conceal and essentially sanction such "military intrusion," *id.*, would run head first into this ancient and vital constitutional doctrine. *See id.*; *Youngstown Sheet*, 343 U.S. at 587.

Reynolds dealt with a limited and traditional application of the state secrets privilege, one confined to a purely "military matter": the secret flight of a B-29

bomber.[8] *Reynolds* therefore carefully limited the privilege (and its holding) to "military matters." The state secrets privilege does not apply in this case, *see id.*, nor could it, *see Reid*, 354 U.S. at 33; *Laird*, 408 U.S. at 15; *Youngstown Sheet*, 343 U.S. at 587.

E. Even if the Government May Invoke the State Secrets Privilege in this Proceeding, the Government's Overbroad Claim Does Not Support Dismissal of this Case

Even if the state secrets privilege can be applied to a case such as this one, as this Court has noted, the state secrets privilege is "not to be lightly invoked." *Al-Haramain I*, 507 F.3d at 1196. Before applying the state secrets privilege, the Court must make three determinations:

> First, we must 'ascertain that the procedural requirements for invoking the state secrets privilege have been satisfied.' Second, we must make an independent determination whether the information is privileged. . . . Finally, 'the ultimate question to be resolved is how the matter should proceed in light of the successful privilege claim.'

Mohamed, 614 F.3d at 1080 (quoting *Al-Haramain I*, 507 F.3d at 1202). Defendants fail this test.

[8] Likewise, the *Mohamed* case decided by this Court involved allegations that the Government "apprehend[ed] foreign nationals suspected of involvement in terrorist activity," resulting in interrogation and detention. 614 F.3d at 1073. The case did not involve the ordinary communications of millions of American citizens.

1. The Government's Privilege Claims are Overbroad

This Court must first determine "whether and to what extent the matters the government contends must be kept secret are in fact matters of state secret." *Mohamed*, 614 F.3d at 1085. In order to do so, the Government must demonstrate, "from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose . . . matters which, in the interest of national security, should not be divulged." *Id.*, 614 F.3d at 1081 (quoting *Reynolds*, 345 U.S. at 10). The Court is to examine the Government's assertions to this effect "critically" and "with a very careful, indeed a skeptical, eye, and not to accept at face value the government's claim or justification of privilege." *Id.*, 614 F.3d at 1082. This Court has explained that "[t]his skepticism is all the more justified in cases that allege serious government wrongdoing," such as this one. *Mohamed*, 614 F.3d at 1085, n. 8.

This court has declined to define what constitutes a "state secret." It has noted, however, that the mere fact that the information is classified is "insufficient to establish that the information is privileged." *Mohamed*, 614 F.3d at 1082. "Simply saying 'military secret,' 'national security' or 'terrorist threat' or invoking an ethereal fear that disclosure will threaten our nation is insufficient to support the privilege." *Al-Haramain I*, 507 F.3d at 1203.

In this case, the Government asserts that the state secrets privilege covers two "key categories of information" relevant to Plaintiffs' claims. Appellees' Public Br. at 30. The first category is "information that may tend to confirm or deny whether the plaintiffs have been subject to any alleged NSA intelligence activity that may be at issue in this matter." *Id.* The second category is information "concerning NSA intelligence activities, sources, or methods that may relate to or be necessary to adjudicate the plaintiffs' claims." *Id.* While each of these two extremely broad categories could potentially include *some* materials that may be privileged, each also covers a wide range of materials relevant to Plaintiffs' claims which do not constitute state secrets.

The Government's suggestion that any and all information about the NSA's intelligence activities relating to Plaintiffs' claims would "cause exceptionally grave harm to national security" is, given the record and the Government's own conduct, hard to take seriously. Appellees' Public Br. at 30-31. For example, the Government argues that, the mere disclosure *or denial* of the existence of the unlawful surveillance program would pose a danger to national security. *Id.* at 32. But former Attorney General Mukasey has already stated publicly "there was no such alleged content-dragnet" and thus "no provider participated in that alleged activity." Jewel Plaintiffs' Request for Judicial Notice (Master Dkt. No. 40 ("Jewel RJN")), Ex. D at 5, ¶ 6. And former Director of National Intelligence

Mike McConnell has stated "There's no spying on Americans."[9] The Government has already denied the existence of this program; it cannot now credibly state that such a denial would be dangerous to national security, merely because the denial is made in court.

There has also been a significant amount of public information released about the Government's illegal program. As the district court noted in the related case *Hepting v. AT&T Corp.*, 439 F. Supp.2d 974, 992 (N.D. Cal. 2006), government officials have publicly "admitted the existence" of the program, that it "monitor[s] communication content," "tracks calls into the United States or out of the United States," and "operates without warrants." (citations omitted). Because the "very subject matter of this action is hardly a secret," the state secrets privilege cannot bar this suit. *Id.* at 994; *see also Jencks v. United States*, 353 U.S. 657, 675 (1957) (Burton, J., concurring) ("Once the defendant learns the state secret . . . the underlying basis for the privilege disappears, and there usually remains little need to conceal the privileged evidence from the jury. Thus, when the Government is a party, the preservation of these privileges is dependent upon nondisclosure of the privileged evidence to the defendant."). As the *Hepting* court noted, "If the government's public disclosures have been truthful," discovery regarding those disclosures "should not reveal any new information that would assist a terrorist and

[9] Lawrence Wright, "The Spymaster," The New Yorker, Jan. 21, 2008 (available at http://www.newyorker.com/reporting/2008/01/21/080121fa_fact_wright).

adversely affect national security." But "if the government has not been truthful, the state secrets privilege should not serve as a shield for its false public statements." 439 F. Supp.2d at 996.[10]

Moreover, a former NSA operative, Russell Tice, has publicly spoken at length about the challenged surveillance. In a January 2009 television appearance, he explained, "The National Security Agency had access to *all* Americans' communications: faxes, phone calls, and their computer communications . . . . *They monitored all communications*."[11] Mr. Tice's statements about the challenged program have been covered widely by a variety of media.[12]

The argument that *all* evidence relating to the NSA's surveillance activity is a state secret is, given the record and the government's prior conduct, also overbroad. Government officials regularly have publicly commented on the NSA's intelligence gathering methods. For example, the Senate Select Committee

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[10]Were it otherwise, the state secrets privilege would simply be a license for government officials to lie.

[11] Interview of Russell Tice, *supra* note 1.

[12] *See, e.g.*, "Whistleblower Tells Olbermann NSA Spied on Journalists," *The Huffington Post*, January 22, 2009, available at http://www.huffingtonpost.com/2009/01/22/whistleblower-tells-olber_n_159986.html; Liz Cox Barrett, "NSA Knows What Olbermann Said To His Little Nephew In Upstate New York?" *Columbia Journalism Review*, Jan. 22, 2009, available at http://www.cjr.org/the_kicker/nsa_knows_what_olbermann_said.php; Kim Zetter, "NSA Whistleblower: Grill the CEOs on Illegal Spying," Wired.Com, Jan. 26, 2009, available at http://www.wired.com/threatlevel/2009/01/nsa-whistlebl-2/.

on Intelligence issued a detailed report on the "Attempted Terrorist Attack on Northwest Airlines Flight 253," which revealed, *inter alia*, that the NSA had a policy of not making nominations to the Terrorist Identities Datamart Environment and had a "backlog of reports that require review for watchlisting." S. Rep. 111-199, May 24, 2010, at 8 available at http://intelligence.senate.gov/pdfs/111199.pdf. NSA officials have, during this litigation, confirmed to the *New York Times* that the agency had been engaged in the "overcollection" of e-mail messages and phone calls of Americans, in a "significant and systemic" manner.[13]

Appellees cannot selectively comment on the underlying facts in this case when it suits them for political or other gain, then take refuge in the state secrets privilege to escape liability for serious misconduct.

2. Dismissal of the Entire Case is Not Warranted

Even if the Government has sufficiently established that *some* evidence might be protected by the privilege, it does not follow that the entire case must be dismissed. "[I]t should be a rare case when the state secrets doctrine leads to dismissal at the outset of a case," as the Government urges here. *Mohamed*, 614 F.3d at 1092. Rather, "every effort should be made to parse claims to salvage" a case. *Id.* *See also Kasza*, 133 F.3d at 1166 ("whenever possible, sensitive

[13] *See* Eric Lichtblau & James Risen, "Officials Say U.S. Wiretaps Exceeded Law," *The New York Times*, April 16, 2009 at A1, available at http://www.nytimes.com/2009/04/16/us/16nsa.html.

information must be disentangled from nonsensitive information to allow for the release of the latter"). "Ordinarily, simply excluding or otherwise walling off the privileged information may suffice to protect the state secrets and 'the case will proceed accordingly, with no consequences save those resulting from the loss of evidence.'" *Mohamed*, 614 F.3d at 1082 (quoting *Al-Haramain I*, 507 F.3d at 1204). The case may proceed "(1) if the plaintiffs can prove 'the essential facts' of their claims 'without resort to material touching upon military secrets,' or (2) in accord with the procedure outlined in FISA." *Id.* (citing *Reynolds*, 345 U.S. at 11).

As discussed above, the procedure outlined in FISA section 1806(f) can and should be used where necessary to determine if unlawful surveillance occurred. In addition, it is premature for this Court to determine whether Plaintiffs can prove the essential facts of their claims without privileged materials. Not only has there been no discovery whatsoever, the Government has not identified any particular claims or elements thereof that Plaintiffs will allegedly be unable to prove. Given this Court's rejoinder that "every effort should be made to parse claims to salvage a case," *Mohamed*, 614 F.3d at 1092, the Government's blanket, unsupported arguments in support of dismissal of all claims are fatally flawed.[14] Should the Court determine that the state secrets privilege was appropriately invoked in this

[14] This is particularly the case given that some undoubtedly unprivileged evidence of the unlawful program has been revealed. *See* Jewel Pls.' RJN Exs. A-B (setting forth technical evidence of program); C (Defendants' counsel conceding materials not privileged).

case, it should remand to the district court to determine what effect the invocation of privilege has on Plaintiffs' claims. *See, e.g., Ellsberg v. Mitchell*, 709 F.2d 51 (D.C. Cir. 1983) ("[O]n remand the defendants might be able to submit on the public record materials sufficient to demonstrate that their behavior violated no clearly established law. As long as that remains a possibility, we are loathe to dispose of the case on the basis of our sua sponte examination of the secret documents."); *see also Reynolds*, 345 U.S. at 12 (remanding for further proceedings); *Crater Corp. v. Lucent Tech., Inc.*, 423 F.3d 1260, 1267 (Fed. Cir. 2005) (dismissal inappropriate before developing non-privileged record); *In re Nat'l Sec. Agency Telecomm. Records Litig.*, 700 F. Supp.2d 1182, 1199-1202 (N.D. Cal. 2010) (on remand, determining Plaintiffs established FISA violation without privileged evidence).

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellants respectfully request the Court reverse the district court and remand the action for further proceedings.

Dated: December 17, 2010
New York, New York

EMERY CELLI BRINCKERHOFF
& ABADY LLP

/s Ilann M. Maazel
Ilann M. Maazel
Matthew D. Brinckerhoff
Adam R. Pulver

75 Rockefeller Plaza, 20th Floor
New York, New York 10019

(212) 763-5000

Attorneys for Shubert Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,973 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point Times New Roman.

Dated: December 17, 2010
New York, New York

s/ Ilann M. Maazel
Ilann M. Maazel

STATUTORY ADDENDUM

50 U.S.C. § 1806(f) In camera and ex parte review by district court

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

9th Circuit Case Number(s) 10-15616, 10-15638

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