Nos. 10-15616, 10-15638

IN THE 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.

BARACK H. OBAMA, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California

PUBLIC UNCLASSIFIED BRIEF FOR THE GOVERNMENT APPELLEES

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TABLE OF CONTENTS

Page

JURISDICTIONAL STATEMENT. 1

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW. 2

STATEMENT OF THE CASE..... 2

STATEMENT OF FACTS. 4

STANDARD OF REVIEW. 13

SUMMARY OF ARGUMENT. 13

ARGUMENT. 16

I. PLAINTIFFS LACK STANDING TO SUE. 16

II. THE INVOCATION OF THE STATE SECRETS PRIVILEGE PRECLUDES LITIGATION OF PLAINTIFFS' STANDING, AS WELL AS THE MERITS OF THEIR CLAIMS. 25

CONCLUSION. 40

TABLE OF AUTHORITIES

Cases: **Page**

ACLU v. NSA, 493 F.3d 644 (6th Cir. 2007), cert. denied, 552 U.S. 1179 (2008). 34

Al-Haramain Islamic Foundation, Inc. v. Bush, 507 F.3d 1190 (9th Cir. 2007) (Al-Haramain I). ..... passim

Allen v. Wright, 468 U.S. 737 (1984)..... 18

Alfred A. Knopf v. Colby, 509 F.2d 1362 (4th Cir.), cert. denied, 421 U.S. 992 (1975). 37

Anderson v. Creighton, 483 U.S. 635 (1987). 35

Bennett v. Spear, 520 U.S. 154 (1997). 17

Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948). 20

City of Los Angeles v. County of Kern, 581 F.3d 841 (9th Cir. 2009). 18

Davis v. Scherer, 468 U.S. 183 (1984). 35

El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007), cert. denied, 552 U.S. 947 (2007)..... passim

Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1 (2004)..... 17, 18, 22, 24

FEC v. Akins, 524 U.S. 11 (1998)..... 11

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167 (2000). 17

Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979)..... 18

Haig v. Agee, 453 U.S. 280 (1981)..... 19

Halkin v. Helms, 598 F.2d 1 (D.C. Cir. 1978)..... 27, 37

Halkin v. Helms, 690 F.2d 977 (D.C. Cir. 1982)..... 26

Hepting v. AT & T Corp., 539 F.3d 1157 (9th Cir. 2008)..... passim

Kasza v. Browner, 133 F.3d 1159 (9th Cir.), cert. denied,
525 U.S. 967 (1998). 27

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). 17

Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070 (9th Cir. 2010). ..... passim

NRDC v. EPA, 542 F.3d 1235 (9th Cir. 2008)..... 17

Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395
(D.C. Cir. 1984)..... 27, 33

In re NSA Telecomm. Records Lit., , 564 F. Supp. 2d 1109
(N.D. Cal. 2008) (Al-Haramain II)..... 38

Schlesinger v. Reservists Committee to Stop the War, 418 US 208 (1974)..... 12

Sims v. CIA, 471 U.S. 159 (1985)..... 20, 27

Snepp v. United States, 444 U.S. 507 (1980). 19

Sterling v. Tenet, 416 F.3d 338 (4th Cir. 2005), cert. denied,
546 U.S. 1093 (2006). 37

Tenet v. Doe, 544 U.S. 1 (2005)..... 20

Totten v. United States, 92 U.S. 105 (1876)..... 20

United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). 20

United States v. Lazarenko, 476 F.3d 642 (9th Cir. 2007). 18

United States v. Nixon, 418 U.S. 683 (1974). 26

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

United States v. W.R. Grace, 526 F.3d 49 (9th Cir. 2008). 29

Warth v. Seldin, 422 U.S. 490 (1975)..... 18, 22

Constitution:

United States Constitution:

Article III. 13, 15, 17

Statutes:

Foreign Intelligence Surveillance Act of 1978 ("FISA"):

50 U.S.C. § 1801. 5
50 U.S.C. § 1801(e). 21
50 U.S.C. § 1802(a)(3). 22
50 U.S.C. § 1803. 23
50 U.S.C. §1885a..... 5

5 U.S.C. § 702..... 1

18 U.S.C. § 2712..... 1

28 U.S.C. § 1291..... 2
28 U.S.C. § 1292(b). 5
28 U.S.C. § 1331..... 1, 2
28 U.S.C. § 1343(a)(4)..... 2

FISA Amendments Act of 2008, Pub L No 110-261..... 5, 22

Protect America Act of 2007, Pub. L. No. 110-55. 22

Pub. L. No. 111-186, Title III, Subtitle D, §§ 331..... 21

Legislative Materials:

H.R. Rep. No. 95-1283, at 22 (1978), reprinted in 1978 U.S.C.C.A.N. 3904, 3923-24. 21

S. Rep. No. 110-209, at 9 (2007). 22

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PUBLIC UNCLASSIFIED BRIEF
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JURISDICTIONAL STATEMENT

Plaintiffs in Jewel (No. 10-15616) invoked the jurisdiction of the district court under 28 U.S.C. § 1331, 18 U.S.C. § 2712, and 5 U.S.C. § 702. Jewel ER 24.[1] Plaintiffs in Shubert (No. 10-15638) invoked the jurisdiction of the district court

[1] Citations to the Excerpts of Record in No. 10-15616 (including materials common to both cases) are in the form "Jewel ER __." Where necessary, citations to the Excerpts of Record in No. 10-15638 are in the form "Shubert ER __." Citations to the government appellees' public Supplemental Excerpts of Record are in the form "SER __"; the government's Classified Excerpts of Record, made available to this Court in camera and ex parte, are cited "CER __." Citations to docket entries in the record below are in the form "Jewel [or Shubert] Dkt# __." See Jewel ER 80-85 (docket list); Shubert ER 71-134 (same).

under 28 U.S.C. §§ 1331, 1343(a)(4). The district court dismissed plaintiffs' complaints in both cases in an order dated January 21, 2010; judgment was entered on the docket on January 25, 2010. See Jewel ER 1-20. Plaintiffs filed notices of appeal on March 19, 2010. See Jewel ER 76; Shubert ER 32. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether plaintiffs have standing to pursue claims alleging that the National Security Agency (NSA) engaged in warrantless surveillance of telecommunication information.

2. Whether the invocation of the state secrets privilege precludes litigation of plaintiffs' standing and the merits of their claims.

STATEMENT OF THE CASE

Plaintiffs in both Jewel and Shubert have sued federal government agencies and officials, alleging that NSA's actions violate various statutes and the Constitution.[2] Both cases involve allegations that NSA undertook what the complaints describe as "dragnet" surveillance of the content of the communications of millions of Americans; Jewel also alleges surveillance of communications records.

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[2] This brief is submitted on behalf of the government agencies and officials named in the two complaints: the United States of America, the National Security Agency, the Department of Justice, and President Barack H. Obama, Director of NSA Keith B. Alexander, Attorney General Eric H. Holder, Jr., and Director of National Intelligence James R. Clapper, Jr. (who has succeeded Dennis C. Blair, pursuant to FRAP 43(c)(2)), in their official capacities.

See Jewel ER 22-23; Shubert ER 48. The complaints offer no specific basis to believe that plaintiffs themselves were subject to any surveillance. Instead, they assert that plaintiffs were likely to have been subject to surveillance under those alleged programs, based on plaintiffs' understanding of the scope of the alleged programs, which plaintiffs contend target nearly every American.

These are two of many cases alleging similar or related conduct by the government or telecommunications carriers. See, e.g., Hepting v. AT & T Corp., 539 F.3d 1157 (9th Cir. 2008), appeal after remand pending, 9th Cir. Nos. 09-16676, et al.; Al-Haramain Islamic Foundation, Inc. v. Bush, 507 F.3d 1190 (9th Cir. 2007) (Al-Haramain I); see also Jewel ER 3-8. Although those cases involve different parties, all seek to challenge alleged warrantless surveillance by NSA. As in those other cases, the United States here asserted the state secrets privilege (and other statutory privileges) over extremely sensitive national security information, noting that disclosure of the privileged information – including information about intelligence activities, sources, and methods – would cause exceptionally grave harm to national security. As the Director of National Intelligence (DNI) explained in his declaration asserting the state secrets privilege, the privilege extends to key evidence implicated by plaintiffs' claims, such as whether plaintiffs themselves had been subjected to any surveillance of the type alleged in their complaints. Confirmation or denial of such claims would cause exceptionally grave harm to national security.

The district court dismissed both complaints on the ground that plaintiffs lack standing to sue.

STATEMENT OF FACTS

1. Following the attacks on the United States on September 11, 2001, President Bush established the Terrorist Surveillance Program (TSP), authorizing NSA to intercept the content of international communications into and out of the United States of persons linked to al Qaeda or related terrorist organizations. To intercept a communication under the TSP, one party to the communication had to be located outside the United States, and there must have been a reasonable basis to conclude that at least one party to the communication was a member or agent of al Qaeda or an affiliated terrorist organization. The TSP was designed to detect and prevent further terrorist attacks within the United States. SER 42.

President Bush publicly acknowledged the TSP's existence in December 2005. On January 17, 2007, Attorney General Gonzales announced that any electronic surveillance that had been occurring under the TSP would henceforth be conducted subject to the approval of the Foreign Intelligence Surveillance Court (FISA Court), and that the President's authorization of the TSP had lapsed. The TSP is thus no longer operative, and has been defunct for over three years. SER 42 & n.3.

2. In January 2006, all but one of the plaintiffs in Jewel filed a different, earlier suit in the Northern District of California, captioned Hepting v. AT&T Corp., alleging that AT&T had provided unlawful assistance in connection with alleged NSA intelligence activities, in violation of the Constitution and specified provisions of federal and state law. In that case, as in these cases, plaintiffs alleged a communications "dragnet" far broader in scope than the publicly acknowledged TSP.

Plaintiffs in Hepting alleged that their status as customers of AT&T made it likely they had been subject to the surveillance they alleged was taking place with the cooperation of that company. Jewel ER 3-4.

Following Hepting, numerous other suits were filed in venues across the country concerning surveillance allegedly undertaken by NSA and telecommunications companies. In August 2006, the Judicial Panel on Multidistrict Litigation ordered all such cases transferred to and consolidated in the Northern District of California. Jewel ER 4-5.

In the cases against telecommunication carriers in district court, the United States intervened and moved for dismissal, formally asserting the state secrets privilege on the ground that litigation of plaintiffs' claims would risk the disclosure of sensitive and highly classified intelligence information, including intelligence sources and methods. In Hepting, the district court denied the government's motion to dismiss in July 2006, and certified its ruling for interlocutory appeal under 28 U.S.C. § 1292(b). This Court granted petitions for interlocutory appeal filed by the government and AT&T. Jewel ER 4-5.

While Hepting was pending on appeal, Congress enacted the FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436. In relevant part, that statute amended the Foreign Intelligence Surveillance Act of 1978 (FISA), 50 U.S.C. §§ 1801, et seq., by adding a general immunity provision for telecommunications companies and other persons alleged to have furnished assistance to elements of the intelligence community. See 50 U.S.C. § 1885a. In light of that new statute, this

Court in August 2008 remanded Hepting to the district court. Hepting v. AT&T Corp., 539 F.3d 1157 (2008).[3] Less than a month after this Court's remand, plaintiffs in Hepting (with the addition of one new plaintiff) filed the complaint in Jewel, naming as defendants federal government agencies and officials but otherwise challenging the same alleged surveillance programs at issue in Hepting.

3. Both cases now on appeal concern essentially identical allegations. Plaintiffs in Jewel allege that NSA conducted and continues to conduct "dragnet" surveillance of both the content and the records of the telephone and internet communications of large numbers of Americans. Jewel ER 22; see id. at 22-24, 27-35. Similarly, the Shubert plaintiffs allege NSA "dragnet" surveillance of the content (but not the records) of "virtually every" telephone and internet communication sent or received in the United States. Shubert ER 48; see generally id. at 60-67.

Plaintiffs' complaints include unsupported assertions about the nature and mechanics of the alleged surveillance they seek to challenge. See Jewel ER 29-32, 33-34; Shubert ER 63-65. Both cases refer to the Terrorist Surveillance Program (TSP), but also allege additional activities that go far beyond the acknowledged TSP and that have never been confirmed or denied by the government. See Jewel ER 22-23; Shubert ER 60-66. Both complaints include allegations that telecommunications

[3] On remand, the Attorney General provided the requisite certifications pursuant to the statute, and the district court accordingly dismissed the action. The Hepting plaintiffs' appeal of that decision is pending (9th Cir. No. 09-16676 and consolidated cases).

companies – in particular, AT&T Corp. – worked in concert with NSA to conduct the alleged surveillance. See Jewel ER 23-24, 29-35; Shubert ER 49-50, 63-64. Notably, plaintiffs do not challenge surveillance authorized by the FISA Court. Nor do plaintiffs challenge surveillance authorized by legislation, such as the FISA Amendments Act of 2008.

4. In both Jewel and Shubert, the Director of National Intelligence (DNI) asserted the state secrets privilege – as well as additional statutory privileges – over information essential to the litigation of plaintiffs' claims. The privilege assertion was supported by public declarations, as well as by classified materials, which were submitted in camera and ex parte to prevent disclosure of the very information sought to be protected.[4]

In particular, the DNI explained that the privilege covers information that would confirm or deny whether these plaintiffs have been subject to the alleged NSA intelligence activities. Disclosure of such information would inherently reveal NSA intelligence sources and methods and reasonably could be expected to harm the national security of the United States. Identifying whether specific individuals were targets of alleged NSA activities would reveal either who is subject to investigative interest (helping that person to evade surveillance) or who is not (potentially

[4] The classified submissions in both cases are included in the government's Classified Excerpts of Record (CER), which are submitted ex parte and in camera, as in the district court, and are available to this Court for review under appropriate security measures.

revealing the scope of intelligence activities as well as the existence of what may be secure channels for enemies of the United States to shield their communications). See SER 7-8, 19-20, 30-31, 44-45.

Moreover, plaintiffs' complaints allege far broader surveillance activities than the TSP. The key element of both complaints is the allegation of "dragnet" surveillance operations directed at domestic and international telephone and internet communications. See Jewel ER 22-23; Shubert ER 48. The TSP was not such a dragnet: it was directed at the content of specific, targeted international communications in which at least one participant was reasonably believed to be associated with al-Qaeda or an affiliated terrorist organization. See SER 9, 21, 31-32, 46. And the government has not confirmed or denied the existence of "dragnet" surveillance such as plaintiffs allege. As the DNI explained, attempting to demonstrate that the TSP was not the content dragnet plaintiffs allege, or that NSA has not otherwise engaged in such an alleged content dragnet, would require the disclosure of highly classified NSA intelligence sources and methods concerning the TSP and other NSA intelligence activities. Ibid. Such disclosures, the DNI concluded, would cause exceptionally grave harm to national security. SER 9, 31-32.

Plaintiffs also assert that the alleged surveillance activities of NSA were conducted in conjunction with private telecommunications companies. See, e.g., Jewel ER 23-24, 29-35; Shubert ER 49-50, 63. In explaining the scope of the state secrets privilege asserted in these cases, as well as the harm to national security that could result from disclosure of privileged information, the DNI demonstrated that

confirmation or denial of whether NSA has had an intelligence relationship with private companies would cause exceptional harm to national security by, among other things, revealing to foreign adversaries the channels of communication that may or may not be secure. See SER 9-10, 22, 32-33, 47.

5. The federal government defendants moved to dismiss both cases and, alternatively, for summary judgment, relying on a variety of grounds, including the absence of a waiver of sovereign immunity authorizing suit under any of the statutory provisions relied on by plaintiffs, as well as the inability to litigate plaintiffs' claims – including plaintiffs' inability to establish their standing – in light of the assertion of the state secrets privilege.

On January 21, 2010, the district court issued a single opinion and order in Jewel and Shubert, dismissing the complaints in both cases based on plaintiffs' absence of standing to litigate the claims at issue. The court recounted the procedural history of these and other cases challenging alleged NSA surveillance, noting the progression from Hepting to the two cases at issue here. See Jewel ER 3-8. The opinion then reviewed the complaints, procedural history, and pending motions in each of these two cases. Id. at 8-13.

In Jewel, the district court undertook a detailed analysis of plaintiffs' complaint, observing that it "contains allegations about AT&T's involvement in the surveillance activities that are quite similar to those set forth in the complaint in Hepting." Id. at 10. Plaintiffs identify themselves as customers of AT&T and assert that AT&T's records include records of telephone and internet use by plaintiffs. See

ibid. The opinion notes that "[t]he complaint contains no other allegations specifically linking any of the plaintiffs to the alleged surveillance activities." Ibid. The court observed that "[t]he complaint purports to set forth seventeen causes of action against the United States and defendant government officials in their official and individual capacities." Id. at 11. The court also explained that those original defendants remain in the suit in their individual capacities only, while their successors in office have been substituted automatically in their official capacity. Finally, the opinion notes plaintiffs' requests for expansive "declaratory, injunctive, and other equitable relief," and for "actual and punitive damages * * * and attorney fees." Ibid.

In Shubert, the court reviewed the procedural history and the terms of the complaint. Jewel ER 12-13. Plaintiffs in that case are alleged to live and work in Brooklyn, New York, and to communicate with others outside the United States by telephone and by email. Id. at 12. Defendants in Shubert are government officials sued in their official capacities (no individual-capacity defendants have been named), and names of the current office-holders have been substituted. Id. at 12-13. The opinion observed that the Shubert complaint relied for its factual allegations on a 2005 news story, as well as on statements by President Bush and on other publicly available information. But "[t]he complaint contains no factual allegations specifically linking any of the plaintiffs to the alleged surveillance activities," and the court noted that, unlike some other cases, including Hepting and Jewel, the complaint alleges only surveillance of the content of communications, not of communications records. Id. at 13. Finally, the court noted the purported statutory and constitutional

causes of action, as well as plaintiffs' putative role as class representatives and the relief sought. Ibid.[5]

The district court "concluded that neither the Jewel plaintiffs nor the Shubert plaintiffs have alleged facts sufficient to establish their standing to proceed with their lawsuit against the President, the NSA and the other high-level government officials named as defendants in these lawsuits." Jewel ER 13-14. The district court looked to the Supreme Court's holding that "where large numbers of Americans suffer alike, the political process, rather than the judicial process, may provide the more appropriate remedy for a widely shared grievance." Id. at 15 (quoting FEC v. Akins, 524 U.S. 11, 23 (1998)). The court emphasized the importance of that principle, "[w]hether styled as a constitutional or prudential limit on standing." Ibid. (quoting Akins, 524 U.S. at 23). The district court also quoted a treatise explaining that some claims are better suited to resolution in a political forum. Ibid.

After explaining similar concerns underlying taxpayer standing decisions, as well as the principle that "[a] citizen may not gain standing by claiming a right to have the government follow the law," id. at 16, the district court observed that "[t]he two cases at bar are, in essence, citizen suits seeking to employ judicial remedies to

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[5] The district court mistakenly asserted that the original complaint in Shubert had not been amended. See Jewel ER 12. Although an amended complaint was filed in that case (see Shubert ER 47-70), the court's description of the operative sections of the complaint were essentially unchanged. One change in the amended complaint was to allege, as in Jewel, that plaintiffs were customers of AT&T, and that AT&T participated in the alleged surveillance at issue. See Shubert ER 49-50.

punish and bring to heel high-level government officials for the allegedly illegal and unconstitutional warrantless electronic surveillance program or programs." Id. at 16-17.

The district court noted that plaintiffs in these two cases "neither allege facts nor proffer evidence sufficient to establish a prima facie case that would differentiate them from the mass of telephone and internet users in the United States and thus make their injury concrete and particularized." Id. at 18 (internal quotation marks omitted). The court pointed in particular to plaintiffs' constitutional claims, in light of the Supreme Court's emphasis on the need for stringent application of standing principles in such cases. Ibid. ("the requirement of concrete injury further serves the function of insuring that such adjudication does not take place unnecessarily") (quoting Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 221 (1974)). Those concerns have particular force where, "as here, the constitutional issues at stake in the litigation seek judicial involvement in the affairs of the executive branch and national security concerns appear to undergird the challenged actions." Ibid.

6. On that basis, the district court granted the government's motions to dismiss the two cases, concluding that it was not necessary to rule on the other outstanding issues. Id. at 18-19. The court entered judgment in both cases on January 25, 2010, and plaintiffs appealed to this Court.

STANDARD OF REVIEW

This Court reviews de novo the legal questions of standing to sue and the interpretation and application of the state secrets doctrine.

SUMMARY OF ARGUMENT

A. This Court should hold that plaintiffs lack standing to sue, whether as a constitutional or prudential matter. Plaintiffs offer only bare speculation in an effort to link themselves with any alleged surveillance activities. There is no specific basis to conclude that plaintiffs have suffered any injury as a consequence of the conduct they allege. Moreover, a core principle of prudential standing recognizes that some claims should be resolved by the elected branches of government – Congress and the President – rather than by litigation in federal courts. One category of claims barred by prudential standing includes generalized grievances alleging abstract and widespread injuries, where other governmental institutions, notably the representative branches of government, are better suited to addressing those policy questions and where judicial intervention is unnecessary to protect individual rights. Thus, even if plaintiffs could satisfy Article III injury requirements, prudential standing warrants dismissal of these particular claims.

The elected branches of our federal government – the President and Congress – are better suited to addressing the sensitive issues raised in these cases concerning intelligence policy, which are inextricably entangled with specific questions concerning sources and methods of foreign intelligence. Congress, through the legislative process and the specific judicial procedures it has established under FISA

to regulate foreign intelligence surveillance, and the President, in the exercise of his constitutional responsibility to protect national security, will continue to ensure the appropriate exercise of any foreign intelligence surveillance activities. Perhaps most important, the President and Congress can ensure that appropriate measures are in place to prevent disclosure of information concerning intelligence activities, sources, and methods, and thus seek to avoid compromising national security.

Federal district courts and courts of appeals, by contrast, are not the appropriate forum to resolve cases such as these, involving fundamental disputes concerning alleged intelligence activities, sources, and methods, the disclosure of which would cause exceptionally grave harm to national security – particularly where, as here, plaintiffs only speculate as to the existence, nature and scope of alleged intelligence programs and cannot point to any identifiable harm to a particular plaintiff. Indeed, those very concerns underscore the need for the state secrets privilege, which, when asserted by the Executive and upheld by the Judiciary, removes from civil cases evidence whose disclosure could be expected to harm national security. In these cases, the government has invoked the state secrets privilege to protect against those very dangers. The need for the privilege to protect national security in these cases parallels the rationale for a prudential standing barrier against litigation of plaintiffs' claims.

Plaintiffs direct their arguments almost entirely at the constitutional requirement of injury in fact, but this Court need not reach the hypothetical question whether plaintiffs could, apart from the effect of the state secrets privilege,

demonstrate Article III standing. Even if plaintiffs' speculative allegations could suffice to show injury, the separate and distinct prohibitions of prudential standing would require dismissal in any event.

B. If standing concerns were not sufficient to demonstrate that plaintiffs' suits were properly dismissed, the state secrets privilege would require dismissal here. Plaintiffs could not litigate their standing or the merits of their claims because doing so would require disclosure of information protected by the state secrets privilege. The government has invoked that privilege (as well as statutory privileges) in these cases to protect essential information concerning national security and foreign intelligence matters at the heart of plaintiffs' claims. In particular, the privilege as asserted here protects information that would confirm or deny whether plaintiffs have been subjected to any alleged NSA surveillance at issue here. Without the ability to demonstrate that they have been subject to surveillance, plaintiffs cannot demonstrate their standing because they cannot show injury in fact. The extensive and detailed classified filings in these cases explain the exceptionally grave harm to national security that would result from disclosure of information that would confirm or deny any alleged surveillance of plaintiffs.

Those materials in the record also confirm that plaintiffs could not possibly litigate the merits of their claims, even if there were no standing barrier. The complaints in these cases urge the district court to hold that the government is prohibited from conducting the alleged surveillance. To prevail on such a claim – indeed, even to make out a prima facie claim – plaintiffs would need to introduce

evidence concerning the nature and scope of the surveillance they allege was conducted and is ongoing. But the state secrets privilege – which protects from disclosure any information concerning NSA intelligence activities, sources, or methods that may relate to or be necessary to adjudicate plaintiffs' allegations – removes all such evidence from the case, and precludes plaintiffs or the courts from relying on it.

The district court did not reach this additional basis for dismissal in the decision below, and this Court need not do so either, in light of the prudential standing barrier to plaintiffs' claims. However, if there is any doubt about standing, this Court can affirm on the alternative ground that the state secrets privilege precludes litigation of plaintiffs' standing, as well as the merits of their claims. The government's invocation of the privilege satisfies both the formal and the substantive requirements set forth in the case law of this Court and the Supreme Court. And the harms to national security that would result from disclosure of the privileged information have been amply explained and supported in the classified material submitted in camera and ex parte, as well as the declarations submitted on the public record. If necessary, the judgment below can be affirmed on this alternative basis.

ARGUMENT

I. PLAINTIFFS LACK STANDING TO SUE.

As the Supreme Court has repeatedly emphasized, not all disputes are appropriate for judicial resolution. Justiciability concerns – including the fundamental requirement that a plaintiff demonstrate standing to sue – reflect

appropriate limitations on judicial authority. In any federal court case, a plaintiff must establish standing as a requirement under Article III of the Constitution. See, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 180-181 (2000). Standing is a "core component" of the Constitution's case-or-controversy requirement. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). And it is well established that speculative allegations of injury do not suffice to demonstrate standing. See, e.g., Al-Haramain Islamic Foundation, Inc. v. Bush, 507 F.3d 1190, 1205 (9th Cir. 2007) (Al-Haramain I) ("It is not sufficient for Al-Haramain to speculate that it might be subject to surveillance under the TSP simply because it has been designated a 'Specially Designated Global Terrorist.'").

But that "irreducible constitutional minimum," Lujan, 504 U.S. at 560, is not the end of the inquiry. Standing doctrine also encompasses prudential limitations. "In addition to these Article III standing requirements, our exercise of jurisdiction is also limited by prudential considerations." NRDC v. EPA, 542 F.3d 1235 (9th Cir. 2008) (citing Bennett v. Spear, 520 U.S. 154, 162 (1997)). Principles of prudential standing have been developed largely as a matter of judicial self-restraint and exist independently of the limitations imposed by Article III. See, e.g., Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 11 (2004) (prudential standing "embodies judicially self-imposed limits on the exercise of federal jurisdiction").[6]

[6] The district court here held that plaintiffs lacked standing because these cases concern generalized grievances. See Jewel ER 13-18. That doctrine has roots in both Article III and prudential standing requirements. As we explain below, the district

Prominent among the prudential limitations on standing is "the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches." Id. at 12 (quoting Allen v. Wright, 468 U.S. 737, 751 (1984)). That rule prohibits suits that call upon courts "to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." Ibid. (quoting Warth v. Seldin, 422 U.S. 490, 500 (1975)). "A generalized harm shared in substantially equal measure by all or a large class of citizens does not by itself warrant exercise of jurisdiction." United States v. Lazarenko, 476 F.3d 642, 651 (9th Cir. 2007). The Supreme Court has explained that "a litigant normally must assert an injury that is peculiar to himself or to a distinct group of which he is a part, rather than one 'shared in substantially equal measure by all or a large class of citizens.'" Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979) (quoting Warth, 422 U.S. at 501).

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court decision should be affirmed, whether on constitutional or prudential grounds. The government defendants did not seek dismissal on standing grounds, but the court's sua sponte decision on that basis presents the issue squarely on appeal. This Court can and should consider the issue here. Cf. City of Los Angeles v. County of Kern, 581 F.3d 841, 845-846 (9th Cir. 2009) (although this Court's prior case law held that prudential standing arguments can be waived, "the choice to reach the question lies within [this Court's] discretion"; a party's failure to invoke prudential standing "does not bar our examination of the matter"). Indeed, the Supreme Court recently held that prudential standing required dismissal in a case where that issue had not been raised in the courts below or in the parties' briefs. See Newdow, 542 U.S. at 12-18.

Plaintiffs' claims here fail to satisfy the requirements of prudential standing because they assert a generalized grievance concerning intelligence policy that is better suited to resolution by the political branches, in light of the extremely sensitive national security concerns at stake and the paramount need for secrecy. As the government explained in its assertion of the state secrets privilege, the claims presented by plaintiffs in these cases cannot be litigated because disclosure of the sensitive intelligence information necessary to do so would cause exceptionally grave harm to national security.

By the terms of the complaints' allegations, these cases concern matters of general government policy with respect to alleged intelligence activities, sources, and methods, and the appropriate response to the threat of terrorist organizations against our nation. Plaintiffs' sweeping claims purport to identify and seek to prohibit specific intelligence methods allegedly used by NSA to conduct surveillance and identify threats from foreign terrorists. The federal courts are not the appropriate forum to resolve these questions.

The Constitution gives the President authority and responsibility to protect the security of the United States. An essential element of that responsibility is the President's supervision and control over the intelligence community, whose core activities by definition and necessity must remain clandestine. It is both "'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation," and that "[m]easures to protect the secrecy of our Government's foreign intelligence operations plainly serve th[is] interest[]." Haig v. Agee, 453 U.S.

280, 307 (1981); see also, e.g., Snepp v. United States, 444 U.S. 507, 509 n.3 (1980) ("The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service."), quoted in Sims v. CIA, 471 U.S. 159, 175 (1985). Sources and methods remain "the heart of all intelligence operations" in the modern era. Sims, 471 U.S. at 167. The need for secrecy concerning intelligence matters has long been recognized by the Supreme Court. "The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world." Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948); see also Tenet v. Doe, 544 U.S. 1, 8 (2005) ("No matter the clothing in which alleged spies dress their claims, Totten precludes judicial review in cases * * * where success depends upon the existence of their secret espionage relationship with the Government.") (citing Totten v. United States, 92 U.S. 105 (1876)); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936) ("[The President] has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results."). Plaintiffs' claims in these cases represent a direct effort to litigate the existence and validity of alleged intelligence activities, sources, and methods, thereby disclosing highly sensitive national security information. That effort is contrary to the repeated teachings of the Supreme Court,

which respects the role of the Executive in protecting national security and prohibits disclosure of such information.

Congress plays an essential role as well, as a coordinate branch also accountable to the electorate and responsible for establishing the laws and providing authorizations and appropriations of funds for the government. Congress also conducts oversight of the operations of the Executive Branch, and both the House and the Senate have established committees that both understand the need for secrecy in intelligence operations and are equipped and accustomed to following the stringent security measures necessary to protect national security information from disclosure. Those intelligence oversight committees ensure involvement by the Legislative Branch at the appropriate levels in sensitive matters of intelligence policy, while protecting against disclosure that could threaten national security. See, e.g., Pub. L. No. 111-186, Title III, Subtitle D, §§ 331, et seq. ("Congressional Oversight, Plans, and Reports").

Congress has not been reluctant to address questions of policy and legal standards in the area of foreign intelligence surveillance. In FISA, enacted in1978, Congress expressly regulated "the use of electronic surveillance in the United States for foreign intelligence purposes." H.R. Rep. No. 95-1283, at 22 (1978), reprinted in 1978 U.S.C.C.A.N. 3904, 3923-24; see 50 U.S.C. § 1801(e) (defining "Electronic surveillance"). Congress carefully balanced the national security needs of the government against the privacy and other protections it sought to afford to individuals in the United States who might be subject to such surveillance. And FISA expressly

recognizes the need for secrecy in such matters, for example by ensuring that information concerning foreign intelligence surveillance is protected from disclosure when transmitted to the FISA Court. See, e.g., 50 U.S.C. § 1802(a)(3).

Indeed, against the backdrop of the similar claims in Hepting, Congress has recently addressed these questions again, in the FISA Amendments Act of 2008, Pub. L. No. 110-261, and in the earlier Protect America Act of 2007, Pub. L. No. 110-55. Again, the need for secrecy was a paramount consideration. In the legislative history of the FISA Amendments Act of 2008, the Senate Select Committee on Intelligence explained that "[i]t would be inappropriate to disclose the names of the electronic communication service providers from which assistance was sought, the activities in which the Government was engaged or in which providers assisted, or the details regarding any such assistance." S. Rep. No. 110-209, at 9 (2007)

Legislative action in this area during the pendency of claims such as those raised here confirms the responsiveness of the political branches, and demonstrates that "judicial intervention may be unnecessary to protect individual rights" in these cases. Newdow, 542 U.S. at 12 (quoting Warth, 422 U.S. at 500). Notably, plaintiffs do not challenge any surveillance conducted pursuant to statutory authority or any surveillance authorized by the FISA Court. And plaintiffs offer nothing other than bare speculation for their assertion that any surveillance is ongoing outside of those authorizations. Nor is there any indication that the elected branches of government are unable to address any such questions.

Moreover, Congress has also established a system of specialized courts that are uniquely equipped to deal with the sensitive national security information involved in foreign intelligence surveillance in this country. See 50 U.S.C. § 1803. By establishing the FISA Court and the FISA Court of Review, Congress sought to ensure an appropriate level of judicial review over such surveillance operations while maintaining the necessary secrecy. Congress notably has not authorized the federal district courts to undertake the kind of review of alleged intelligence activities, sources, and methods that plaintiffs seek in these cases.

Thus, in cases such as this, the federal district courts and courts of appeals are not the appropriate forum for addressing the unique concerns of our nation's foreign intelligence needs. As the government's assertion of the state secrets privilege demonstrates, litigation of plaintiffs' claims would require disclosure of detailed matters of intelligence policy, activities, sources, methods, and capabilities. And such disclosure would demonstrably cause exceptionally grave harm to national security.

Plaintiffs rely on speculative allegations that they have been targeted for surveillance, and they argue that such surveillance constitutes cognizable injury sufficient to satisfy the constitutional minimum requirements of standing. That argument does not withstand scrutiny where these plaintiffs offer only bare speculation that such surveillance even exists, where they offer no support for their conclusory allegations that they have been subject to such surveillance, and where they have identified no specific harm resulting from the claimed surveillance. Whether viewed through a constitutional or prudential lens, plaintiffs' claims in these

cases warrant dismissal. In the context of such claims, specific questions about how to conduct our nation's intelligence operations on a large scale are, for the reasons discussed above, "more appropriately addressed in the representative branches," as the Supreme Court has held in a different context. Newdow, 542 U.S. at 12.

* * * *

Standing concerns, whether constitutional or prudential, reflect the courts' proper reluctance to accept a plaintiff's invitation to rely on non-specific legal authorities as a basis for exploration of generalized grievances affecting widespread segments (indeed, in this case, according to plaintiffs' allegations, virtually all) of the nation's population. The courts should defer to the political branches by recognizing the absence of a clear basis to intrude on the sensitive policy questions that would be required to adjudicate these extraordinary suits.[7]

[7] The district court here properly recognized that the Jewel plaintiffs' lack of standing required the dismissal of the claims against all of the defendants in Jewel, including the government officials sued in their individual capacity. See Jewel ER 19 ("Inasmuch as plaintiffs lack the particularized injury to afford them standing to sue defendants in their official capacities, so also plaintiffs lack standing to pursue claims against defendants as individuals."). That is true whether dismissal is on constitutional or prudential grounds. Plaintiffs seek to litigate alleged policies and conduct they say were undertaken by the government; they do not contend that these cases involve uniquely individual conduct by one or a few government employees acting on their own. The claims in this case – whether against defendants in their official or individual capacities – allege abstract and widespread injuries based on generalized grievances concerning the scope and validity of alleged foreign intelligence surveillance that are best left for the political branches to address.

II. THE INVOCATION OF THE STATE SECRETS PRIVILEGE PRECLUDES LITIGATION OF PLAINTIFFS' STANDING, AS WELL AS THE MERITS OF THEIR CLAIMS.

The government invoked the state secrets privilege in both Jewel and Shubert, protecting from disclosure highly sensitive classified information concerning the nation's intelligence activities, sources, and methods, disclosure of which would cause exceptionally grave harm to national security.[8] Information protected by the state secrets privilege would be removed from the litigation altogether. And without the privileged information, these cases cannot proceed, as plaintiffs can neither demonstrate their standing nor litigate the merits of their claims. If this Court determines that plaintiffs are not barred by principles of standing, it should review the claim of privilege and uphold the district court's judgment of dismissal on this alternative ground.

1. This Court, sitting en banc, has recently reaffirmed that "in exceptional circumstances courts must act in the interest of the country's national security to prevent disclosure of state secrets, even to the point of dismissing a case entirely." Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1077 (9th Cir. 2010) (en banc). The Court recognized that assertion of the privilege "excludes privileged evidence from the case and may result in dismissal of the claims." Ibid. Dismissal is required in these cases, due to the scope of the privilege assertion and the nature of plaintiffs'

[8] In addition to the state secrets privilege, the government also asserted statutory privileges over such information. See SER 6, 29.

claims, which together preclude litigation of both plaintiffs' standing and the merits of the claims.

The assertion of the privilege requires a "formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." United States v. Reynolds, 345 U.S. 1, 7-8 (1953) (footnotes omitted). The state secrets privilege belongs to the United States government, and can only be invoked on its behalf. See id. at 7. Assertion of the privilege requires a judgment at the highest level of the department involved, determining that disclosure of the information at issue would be harmful to national security. See, e.g., Halkin v. Helms, 690 F.2d 977, 996 (D.C. Cir. 1982) (Halkin II). The claim of privilege must be based on the personal judgment of the certifying official, and must include "sufficient detail for the court to make an independent determination of the validity of the claim of privilege and the scope of the evidence subject to the privilege." Mohamed, 614 F.3d at 1080.

This Court recently reiterated that the state secrets doctrine has the effect of excluding privileged information from use as evidence in the litigation. Id. at 1077. The privilege "performs a function of constitutional significance." El-Masri v. United States, 479 F.3d 296, 303 (4th Cir.), cert. denied, 552 U.S. 947 (2007) (because the President's "constitutional authority is at its broadest in the realm of military and foreign affairs," the state secrets privilege "has a firm foundation in the Constitution, in addition to its basis in the common law of evidence") (citing United States v. Nixon, 418 U.S. 683, 710 (1974)). Accordingly, "[c]ourts should accord the

utmost deference to executive assertions of privilege upon grounds of military or diplomatic secrets." Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395, 402 (D.C. Cir. 1984) (quoting Halkin v. Helms, 598 F.2d 1, 9 (D.C. Cir. 1978) (Halkin I)) (internal quotation marks omitted).

That deference is due not only to the constitutional role of the President, but also because of "practical" concerns: "the Executive and the intelligence agencies under his control occupy a position superior to that of the courts in evaluating the consequences of a release of sensitive information." El-Masri, 479 F.3d at 305; see also, e.g., Sims, 471 U.S. at 178 (information that "may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context"); Halkin I, 598 F.2d at 8 ("the business of foreign intelligence gathering in this age of computer technology is more akin to the construction of a mosaic than it is to the management of a cloak and dagger affair"), quoted in Kasza v. Browner, 133 F.3d 1159, 1166 (9th Cir.), cert. denied, 525 U.S. 967 (1998). This Court has "acknowledge[d] the need to defer to the Executive on matters of foreign policy and national security and surely cannot legitimately find ourselves second guessing the Executive in this arena." Al-Haramain Islamic Foundation, Inc. v. Bush, 507 F.3d 1190, 1203 (9th Cir. 2007) (Al-Haramain I), quoted in Mohamed, 614 F.3d at 1081-1082.

A reviewing court accordingly bears "a special burden to assure itself that an appropriate balance is struck between protecting national security matters and preserving an open court system." Al-Haramain I, 507 F.3d at 1203. Of course, "the

state secrets doctrine does not represent a surrender of judicial control over access to the courts." Mohamed, 614 F.3d at 1082 (quoting El-Masri, 479 F.3d at 312). And this Court has repeatedly emphasized the importance of the judicial role: "We take very seriously our obligation to review the [government's claims] with a very careful, indeed a skeptical, eye, and not to accept at face value the government's claim or justification of privilege." Mohamed, 614 F.3d at 1082 (quoting Al-Haramain I, 507 F.3d at 1203).

2. The assertion of the state secrets privilege in these cases is valid. The government has satisfied the procedural and substantive requirements for asserting the state secrets privilege. As required by Reynolds, the government has submitted a "formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." Reynolds, 345 U.S. at 7-8. The Director of National Intelligence (DNI), Dennis C. Blair, provided a public declaration formally invoking the privilege and explaining – in as much detail as possible on the public record – the reasons why the privilege is necessary here to protect national security. SER 1-11, 24-34. The DNI's assertion of the privilege was supported by a public declaration of the Director (or acting Director) of NSA, which provided additional information concerning the need for the privilege and the exceptionally grave harm to national security that would result from disclosure of privileged information. See SER 12-23, 35-48. The privilege assertion was also supported by classified materials, submitted in camera and ex parte, that explained in considerable detail the reasons why protection of the privileged

information is necessary and the harm to national security that could be expected to result from disclosure.

This Court, like the Supreme Court, has observed the need for gravity and deliberation in asserting the privilege. "[T]he decision to invoke the privilege must 'be a serious, considered judgment, not simply an administrative formality.'" Mohamed, 614 F.3d at 1080 (quoting United States v. W.R. Grace, 526 F.3d 499, 507-508 (9th Cir. 2008) (en banc)). The DNI's declarations in these cases reflect the "personal judgment" of the DNI, and – along with the classified materials – include information "presented in sufficient detail for the court to make an independent determination of the validity of the claim of privilege and the scope of the evidence subject to the privilege." Ibid.

The government does not lightly invoke the state secrets privilege or seek dismissal of litigation on the basis of the privilege. The Attorney General announced a policy in September 2009 that emphasized the role of the Department of Justice in ensuring that the privilege will be invoked only to the extent necessary to protect national security, and not to conceal wrongful conduct or for any other improper reason. See Shubert Dkt# 38, Ex.3 (also available at: http://www.justice.gov/opa/documents/state-secret-privileges.pdf). This Court recently emphasized the significance of that policy. See Mohamed, 614 F.3d at 1080 ("Although Reynolds does not require review and approval by the Attorney General when a different agency head has control of the matter, such additional review by the executive branch's chief lawyer is appropriate and to be encouraged."). The Executive

recognizes that the privilege should be invoked only rarely, and the Attorney General's policy ensures that any claim of privilege will be subject to independent scrutiny by the Department of Justice to ensure an additional level of review, ensuring that the privilege is invoked only where and to the extent necessary to protect national security, and never for an improper purpose.[9]

The invocation of the privilege in these cases was timely. This Court, like other courts of appeals, has unequivocally recognized that "the government may assert a Reynolds privilege claim prospectively, even at the pleading stage, rather than waiting for an evidentiary dispute to arise during discovery or trial." Mohamed, 614 F.3d at 1081. Here, the declarations supporting the privilege assertion explained the harm to national security that could be expected to result from disclosures of privileged information if the litigation were permitted to continue. See SER 1-48.

The formal invocation of the privilege in these cases covers two key categories of information that are central to plaintiffs' claims. First, the assertion of privilege covers "[i]nformation 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." The DNI explained, as much as possible on the public record, why such

[9] The claim of privilege in Shubert, submitted to the district court on October 30, 2009, was reviewed and approved by the Attorney General under the Department of Justice policy. See Shubert Dkt# 38, at 6 n.8; id., Ex.3. The Shubert privilege claim was substantively identical to the privilege asserted in Jewel, which was submitted before the Department of Justice policy took effect, but the ongoing claim of privilege in that case was nevertheless reviewed and approved at the highest levels.

information must be protected from disclosure. The government cannot confirm or deny whether any individual is or has been subject to surveillance activities, as doing so would cause exceptionally grave harm to the national security: Confirming that an individual is a target of surveillance would allow the individual to evade future efforts, thus diminishing the ability to collect intelligence information. And the only way to assure that such information is kept secret is to refrain from identifying those who are not the subjects of surveillance, because the absence of such reassurance in another case would thereby identify actual targets of surveillance. Moreover, even denials could reveal the scope of intelligence activities as well as the existence of what may be secure channels for enemies of the United States to shield their communications. See SER 7-8, 19-20, 30-31, 44-45.

The privilege assertion also covers any information "concerning NSA intelligence activities, sources, or methods that may relate to or be necessary to adjudicate the plaintiffs' claims." SER 8, 31. This category includes any information concerning "allegations that NSA, with the assistance of telecommunications companies, has indiscriminately intercepted the content and obtained large quantities of communications records." Ibid. This includes information "concerning the operation of the now-defunct Terrorist Surveillance Program," as well as information demonstrating "that the NSA does not otherwise conduct a dragnet of content surveillance as the plaintiffs allege." Ibid. It also includes "information concerning whether or not the NSA obtains communications records from telecommunications companies." Ibid. Revealing such information would require disclosure of "highly

classified NSA intelligence sources and methods about the operation of the TSP and other NSA intelligence activities, * * * which would cause exceptionally grave harm to national security." Id. at 9, 32. Similarly, disclosing information that would confirm or deny whether NSA obtained transaction records from telecommunications companies would cause exceptionally grave harm to national security by revealing whether or not NSA "utilizes particular intelligence sources and methods and, thus, the NSA's capabilities or lack thereof." Ibid. Finally, the privilege assertion covers information that would confirm or deny whether any telecommunications provider has assisted NSA with alleged intelligence activities. Disclosure of such information "would reveal to foreign adversaries whether or not the NSA utilizes particular intelligence sources and methods and, thus, would either compromise actual sources and methods or disclose that the NSA does not utilize a particular source or method." Ibid. And confirming or denying whether NSA has had an intelligence relationship with private companies would cause exceptional harm to national security by, among other things, revealing to foreign adversaries the channels of communication that may or may not be secure. See SER 9-10, 22, 32-33, 47.

This Court must also review the claim of privilege to determine that the information at issue is properly subject to the state secrets privilege. See Mohamed, 614 F.3d at 1081. The federal judiciary plays an essential role in conducting an independent review to ensure that the information is privileged. The Court must satisfy itself, "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." Reynolds, 345 U.S. at 10. The Court here can readily make that determination based on the classified materials submitted in support of the privilege, as well as the public declarations.

The Court's review must be undertaken with appropriate deference to the comparative expertise of the Executive Branch's intelligence officials in assessing the significance of threats to our national security. See Al-Haramain I, 507 F.3d at 1203 ("acknowledg[ing] the need to defer to the Executive on matters of foreign policy and national security"; the Court "surely cannot legitimately find ourselves second guessing the Executive in this arena"), quoted in Mohamed, 614 F.3d at 1081-1082; see also, e.g., Northrop, 751 F.2d at 402; El-Masri, 479 F.3d at 305. And the Court's review of the privilege must be undertaken cautiously, "without forcing a disclosure of the very thing the privilege is designed to protect." Mohamed, 614 F.3d at 1082 (quoting Reynolds, 345 U.S. at 8).

Here, the very concerns that this Court has previously recognized as valid reasons for invoking the privilege are presented by plaintiffs' claims. See Al-Haramain I, 507 F.3d at 1203 ("disclosure of information concerning the Sealed Document and the means, sources and methods of intelligence gathering in the context of this case would undermine the government's intelligence capabilities and compromise national security"). Indeed, the concerns are even more apparent in this case, which does not concern the TSP (an acknowledged program, although many details remain unconfirmed, and are subject to the claim of privilege). Instead, plaintiffs in these cases allege that NSA is undertaking surveillance pursuant to a

program that has neither been confirmed nor denied. As the state secrets declarations make clear, disclosure of any information that might confirm or deny whether NSA conducts such surveillance would cause exceptionally grave harm to national security. As in Al-Haramain I and Mohamed, the Court need "not accept at face value the government's claim or justification of privilege." Ibid., quoted in Mohamed, 614 F.3d at 1082. The public and classified record in this case elucidate the specific concerns underlying the DNI's conclusion that disclosure of the privileged information would harm national security. And the Attorney General has reviewed the claim of privilege, ensuring that it complies with the Department of Justice policies. See Mohamed, 614 F.3d at 1090 ("That certification here is consistent with our independent conclusion, having reviewed the government's public and classified declarations, that the government is not invoking the privilege to avoid embarrassment or to escape scrutiny of its * * * policies, rather than to protect legitimate national security concerns.").

3. The final step in reviewing the assertion of the state secrets privilege is for the Court to "assess whether it is feasible for the litigation to proceed without the protected evidence and, if so, how." Mohamed, 614 F.3d at 1082. Here, the cases must be dismissed because litigation of plaintiffs' claims – including the threshold requirement of standing – is impossible without the privileged information.

Most significantly, plaintiffs cannot demonstrate any injury in fact because the effect of the privilege is to remove any evidence "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." SER 7-8, 30-31. Thus, plaintiffs cannot satisfy their burden to demonstrate Article III standing. The Sixth Circuit has held that similar claims must be dismissed where the assertion of the state secrets privilege precludes a determination of standing. See ACLU v. NSA, 493 F.3d 644 (6th Cir. 2007), cert. denied, 552 U.S. 1179 (2008). And this Court has recognized that the state secrets privilege precludes a showing of standing where a plaintiff would need to rely on privileged evidence. See Al-Haramain I, 507 F.3d at 1205 ("Al-Haramain cannot establish that it suffered injury in fact, a 'concrete and particularized' injury, because the Sealed Document, which Al-Haramain alleges proves that its members were unlawfully surveilled, is protected by the state secrets privilege.").

Apart from the question of standing, the removal of privileged information from this litigation would also preclude litigation of the merits of plaintiffs' claims. The state secrets privilege protects from disclosure any information "concerning NSA intelligence activities, sources, or methods that may relate to or be necessary to adjudicate the plaintiffs' claims." SER 8, 30. Without that privileged information, plaintiffs cannot make out a prima facie case that the alleged surveillance even exists, let alone that it might violate any constitutional or statutory provision.

Plaintiffs might seek to rely on news reports and other public sources. Those sources would necessarily be inadequate to prove their case because the government has not confirmed or denied the alleged activities plaintiffs seek to challenge, and speculation by others would not suffice to demonstrate the truth of plaintiffs' claims. But even if plaintiffs could make out a prima facie case, the privilege would preclude

defendants from presenting their defenses. Cf. Mohamed, 614 F.3d at 1090 ("we conclude that even assuming plaintiffs could establish their entire case solely through nonprivileged evidence – unlikely as that may be – any effort by [defendant] to defend would unjustifiably risk disclosure of state secrets") (citing El-Masri, 479 F.3d at 309, concluding that "virtually any conceivable response [by defendants] would disclose privileged information").[10]

Plaintiffs' claims expressly seek to challenge the legality of alleged clandestine intelligence activities. This case does not concern the TSP, which has been publicly acknowledged by government officials but is no longer in existence. Rather, plaintiffs expressly intend to use this litigation to force disclosure of other alleged intelligence activities, sources, and methods. As the DNI and the NSA Director explained in detail, those claims cannot be litigated without privileged information, the disclosure of which would cause exceptionally grave harm to national security.

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[10] The inability to present defenses is also a serious concern for the defendants in Jewel who have been sued in their individual capacity. Those defendants would normally be entitled to seek summary judgment on qualified immunity grounds even before discovery. See, e.g., Anderson v. Creighton, 483 U.S. 635, 640 n.2 (1987) (individual capacity claims against government officials should "be resolved prior to discovery and on summary judgment if possible"); Davis v. Scherer, 468 U.S. 183, 194 n.12 (1984) (recognizing right of federal officials sued in individual capacity to raise qualified immunity as defense to claims alleging violation of federal statutory or constitutional rights). In this case, however, the invocation of the state secrets privilege would foreclose the individual-capacity defendants from using any of the privileged information to support any claim they may have to a qualified immunity defense.

Although the district court in this case did not rule on the state secrets privilege assertion or its effect on this litigation, those issues are properly before this Court. The privilege has been invoked, and the public declarations, as well as the classified material, in support of the privilege assertion are in the record before this Court on appeal. And this Court can conduct its own inquiry into the effect of the privilege assertion on this litigation. This Court in Mohamed so held, disagreeing with the dissent's call for a remand to allow the district court to undertake that inquiry. See Mohamed, 614 F.3d at 1087 n.10 ("we find remand unnecessary because our own Reynolds analysis persuades us that the litigation cannot proceed"). The Court should do likewise here.

Indeed, there is "no point, and much risk, in * * * prolonging the process" by remanding to the district court for initial consideration of the effect of the privilege assertion in this case. Unnecessarily prolonging resolution of this dispute risks inadvertent disclosure of privileged information, with the exceptionally grave harm to national security that would result from such disclosure. Remand could require additional in camera and ex parte submission of the highly sensitive information in support of the privilege. And every such instance of disclosure poses additional risks. See Halkin I, 598 F.2d at 7 ("It is not to slight judges, lawyers, or anyone else to suggest that any such disclosure carries with it serious risk that highly sensitive information may be compromised.") (quoting Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362, 1369 (4th Cir.), cert. denied, 421 U.S. 992 (1975)). Indeed, the Supreme Court acknowledged such a risk in Reynolds. See, e.g., Reynolds, 345 U.S. at 10

("the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers"); see also Sterling v. Tenet, 416 F.3d 338, 348 (4th Cir. 2005), cert. denied, 546 U.S. 1093 (2006) ("Inadvertent disclosure during the course of a trial – or even in camera – is precisely the sort of risk that Reynolds attempts to avoid.").

4. Plaintiffs in these cases cannot prevail by seeking to avoid the effect of the state secrets privilege. The district court correctly recognized that plaintiffs here cannot demonstrate that they are aggrieved persons within the meaning of FISA and thus cannot make out standing or a prima facie case on the merits. See Jewel ER 17-18. For that reason, plaintiffs cannot argue that the state secrets privilege is displaced in this case. Cf. In re NSA Telecomm. Records Lit., 564 F. Supp. 2d 1109, 1117-1124 (N.D. Cal. 2008) (Al-Haramain II).[11]

Thus, even if the district court in Al-Haramain II were correct that FISA could implicitly displace the state secrets privilege in some FISA cases, plaintiffs here cannot rely on that rationale because they cannot demonstrate an entitlement to proceed under FISA. Standing – and specifically, "aggrieved person" status under FISA – must be demonstrated at the outset, and plaintiffs cannot rely on privileged

[11] The district court in Al-Haramain II concluded that a provision in FISA displaced (or preempted) the state secrets privilege in that case. The government disagrees with that decision, but has not had an opportunity to challenge it on appeal, as it was set forth in a non-final order, and the case remains pending in district court. Notably, that case also recognized that plaintiffs could not rely on privileged evidence to demonstrate standing. See Al-Haramain II, 564 F. Supp. 2d at 1134.

evidence to carry that burden. Any evidence 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" is privileged and unavailable to plaintiffs. SER 7-8, 30-31. Here, plaintiffs allege that they have been subject to surveillance, but they offer nothing to support such a claim but bare speculation and the unsupported suggestion that virtually all Americans have been subject to such alleged surveillance if they use the telephone or the internet. As the district court concluded, that is not sufficient. Jewel ER 17-18.

5. The concerns expressed in the public declarations are amplified and detailed in the classified materials submitted in camera and ex parte in support of the privilege assertion. As we explain in more detail below, those materials confirm that the privilege was appropriately invoked in this case, and that dismissal is required.

[Classified Material Redacted]

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of dismissal.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Counsel for the United States are aware of the following related cases within the meaning of this Court's Rule 28-2.6: Hepting v. AT & T Corp., 9th Cir. Nos. 09-16676, et al.; McMurray v. Verizon Communications, Inc., 9th Cir. No. 09-17133.

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