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18 UNITED STATES DISTRICT COURT
 19 NORTHERN DISTRICT OF CALIFORNIA
 20 SAN FRANCISCO DIVISION

21 TASH HEPTING, GREGORY HICKS,
 22 CAROLYN JEWEL and ERIK KNUTZEN
 23 on Behalf of Themselves and All Others
 24 Similarly Situated,,
 25

26 Plaintiff,

27 v.

28 AT&T CORP., AT&T INC. and DOES 1-
 29 20, inclusive,
 30

31 Defendant.

Case No. C-06-00672-VRW

**BRIEF OF AMICUS CURIAE
MARK KLEIN**

Hearing Date: N/A
 Time: N/A
 Courtroom: 6 (17th floor)
 Judge: Hon. Vaughn Walker

1 **I. INTRODUCTION**

2 This amicus brief addresses a limited issue before the Court: Whether Mark Klein's
3 declaration, now temporarily lodged under seal, should be unsealed and filed in the public
4 record. Because the substance of Mr. Klein's declaration is based on his observations
5 which corroborate publicly-available information and Mr. Klein's voice is an important,
6 informed addition to the public debate about the legality of the government's wiretapping
7 program, Mr. Klein urges this Court to unseal his declaration.

8 **II. MARK KLEIN'S INTEREST IN THE CASE.**

9 Mr. Klein is not a party to these proceedings. He has no economic stake in the
10 outcome of this case. For 22 years, Mr. Klein worked for AT&T. A member of the
11 Communications Workers of America, every personnel review in Mr. Klein's file rated his
12 performance as "outstanding" or "more than satisfactory" during that time. Mr. Klein is
13 now a retiree.

14 Mr. Klein is also a witness. During the last year he worked for AT&T, Mr. Klein
15 observed governmental activity that he believes violates the Constitution and laws of the
16 United States. What he learned about the government's wiretapping program Mr. Klein
17 learned in the course of performing his duties for AT&T. At no time did anyone tell
18 Mr. Klein — neither the government nor anyone else — that the things he observed while
19 doing his job were "top secret," "classified," or otherwise regarded as a "state secret." In
20 fact, when materials attached in support of Mr. Klein's declaration were forwarded by the
21 plaintiffs to the Department of Justice for review, the government responded that it did not
22 object to the documents being filed under seal.

23 There is presently an important public debate on the legality of NSA's wiretapping
24 program. That debate started before any participation by Mr. Klein. More important this
25 court must decide certain issues relating to that program. Some materials that Mr. Klein
26 gave to the plaintiffs in this case the plaintiff then voluntarily sent to the Department of
27 Justice to the attention of an appropriate person. The government representative had the
28 materials for no fewer than four days, plenty of time to consult with all necessary persons

1 within the government. That person then advised the plaintiffs that they could be filed in
2 court. After the government was asked about the materials being filed and after the
3 government approved them for filing the government did not claim they were classified or
4 a state secret. In summery the government has never treated Mr. Klein's knowledge or
5 materials as classified or as government secrets. The government has at no time attempted
6 to put Mr. Klein's materials, or treat his information as classified or as a government secret
7 by insisting that it be put, in a sensitive compartmented information facility ("SCIF").

8 Sensitive national security information is classified and safeguarded according to

9 established procedures. *See* 60 Fed. Reg. 19825 (1995). The government never did that.

10 On the contrary, after conducting a thorough review, the Department of Justice chose not to
11 classify the documents at issue and expressly authorized the plaintiffs to file the material in
12 this Court (albeit it was to be under seal). For all these years the government has treated
13 what Mr. Klein knows and his materials as not worthy of classification or state secret
14 designation. The other party now attempting to keep the public from knowing what they
15 have done, AT&T, never advised Mr. Klein that his knowledge or materials should be
16 treated as classified or as state secrets.

17 **III. THE TECHNOLOGY MARK KLEIN OBSERVED IS PUBLIC INFORMATION.**

18 Mark Klein's declaration is based on his personal observations and is relevant to a
19 robust, national debate currently taking place around the country. As an AT&T technician,
20 Mr. Klein's job included repairing and maintaining the fiber optic cables that carry Internet
21 data from all over the world through AT&T's San Francisco central switch. What he
22 observed — that the signal carrying the Internet data over fiber optic cables was "split"
23 such that an exact copy of the data was redirected to the National Security Agency
24 ("NSA") — had been the topic of public discussion months before he went public with his
25 observations.

26 For example, on December 22, 2005, CNET News.com posed the question, "Just
27 how extensive is NSA's spy program?" Declan McCullagh, "Just How Extensive is NSA's
28 Spy Program," December 22, 2005, available at (<http://news.com.com/Just+how+>

1 [extensive+is+NSAs+spy+program/2100-1028_3-6006326.html](http://www.cnet.com/News/03-6006326.html)). CNET reported that
2 despite the Administration's forceful defense of the program,

3 some technologists and civil libertarians, using clues that dribbled
4 out in press briefings and news articles, are concluding that the
5 operation involves widespread monitoring of millions of e-mail
6 messages and telephone conversations that cross any U.S. border.

6 *Id.* In fact, reported CNET, "[t]he clues are piling up that *vacuum-cleaner style dragnets are*
7 *what's at issue,*" John Gilmore, co-founder of the Electronic Frontier Foundation, said in a
8 mailing list message on Thursday." *Id.* (emphasis added).

9 Two days after CNET News.com published its story, on December 24, 2005, Reuters
10 headlined: "NSA spy program broader than Bush admitted." Reuters, "NSA Spy Program
11 Broader than Bush Admitted," December 24, 2005, available at [http://www.msnbc.msn.com/id/](http://www.msnbc.msn.com/id/10592932/)
12 [10592932/](http://www.msnbc.msn.com/id/10592932/) (emphasis added). The Reuters report was based on an earlier *New York Times* article
13 which cited "current and former government officials" who said that "information was collected
14 [without warrants by the NSA] by tapping directly into some of the U.S. telecommunication
15 system's main arteries." *Id.*

16 In addition, on January 10, ABC News reported that, according to NSA whistleblower
17 Russell Tice, the NSA program "may have involved spying on millions of Americans, not just a
18 few highly suspicious characters." Brian Ross, "NSA Insider Speaks Out," January 10, 2006,
19 available at <http://abcnews.go.com/Nightline/story?id=1860899&page=1>. In a televised
20 interview, Tice admitted to being one of the sources the *New York Times* used when it broke the
21 story about the NSA's eavesdropping program in early December 2005. Importantly, when asked
22 whether he had revealed any classified information to the *Times*, Tice responded: "No. No. I've
23 not told them anything classified." *Id.*

24 Joining the major news media's chorus were groups like the American Civil Liberties
25 Union ("ACLU"), who, on January 31, 2006, posted on their website that the "NSA has gained
26 direct access to the telecommunications infrastructure through some of America's largest
27 companies." American Civil Liberties Union, "Eavesdropping 101: What can the NSA Do?"
28 available at <http://www.aclu.org/safefree/nsaspying/23989res20060131.html>. Without any help

1 from Mr. Klein, the ACLU went on to detail a “major new element of the NSA’s spying
2 machinery is its ability to tap directly into the major communications switches, routing stations,
3 or access points of the telecommunications system.” The ACLU noted that by working with
4 leading telecommunications companies, the NSA has obtained a “new level of direct access” to
5 the nation’s telecommunications infrastructure that “apparently includes both some of the
6 gateways through which phone calls are routed, as well as other key nodes through which a large
7 proportion of Internet traffic passes.” And “most significantly,” reported the ACLU, “access to
8 these ‘switches’ and other network hubs give the agency access to a direct feed of all the
9 communications that pass through them, and the ability to filter, sift through, analyze, read, or
10 share those communications as it sees fit.” *Id.*

11 The ACLU also directed users to a map entitled, “Eavesdropping 101: What Can the
12 NSA Do?” which purported to show how the NSA “has extended its tentacles into much of the
13 U.S. civilian communications infrastructure, including, it appears, the ‘switches’ through which
14 international and some domestic communications are routed, Internet exchange points, individual
15 telephone company central facilities, and Internet Service Providers (ISPs).” *Id.* (A true and
16 correct copy of the ACLU’s map is attached hereto as Exhibit A.)

17 Far from releasing any new information or “state secret,” Mr. Klein’s observations
18 corroborate opinions that have been voiced in a public debate that has been raging long before
19 Mr. Klein came forward. Mr. Klein’s participation in this public discussion is important because
20 his is a viewpoint informed by first-hand observations and bolstered by decades of technical
21 expertise. Indeed, by coming forward, Mr. Klein has engaged in the very type of national
22 conversation Senator Arlen Specter (R-PA) encouraged when he said earlier this year that he
23 hoped “public concern and public indignation [would] build up” such that that scrutiny of the
24 Administration’s eavesdropping program does not wane. Declan McCullagh, “NSA Spying
25 Come Under Legal, Political Attack,” April 28, 2006, available at [http://news.com.com/NSA+](http://news.com.com/NSA+spying+comes+under+legal%2C+political+attack/2100-1028_3-6066123.html)
26 [spying+comes+under+legal%2C+political+attack/2100-1028_3-6066123.html](http://news.com.com/NSA+spying+comes+under+legal%2C+political+attack/2100-1028_3-6066123.html).

27 Mr. Klein’s declaration and the information it relates regards information about publicly-
28 known and publicly-discussed technology. His observations corroborate his belief and the

1 opinions of others that the government has obtained access to all e-mails, telephone calls and web
2 browsing that go through the AT&T facility. Mr. Klein believes this government access is an
3 illegal interception of domestic wire communications prohibited by the Electronic
4 Communications Privacy Act, 18 U.S.C. 2511, *et seq.*, Foreign Intelligence Surveillance Act,
5 50 U.S.C. 1801, *et seq.*

6 Mr. Klein also believes that this government access is unconstitutional if no warrant has
7 been obtained to justify the access as required by the Fourth Amendment of the U.S. Constitution,
8 as appears to be the case from recent statements by Members of Congress. *See* U.S. Const.
9 Amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects
10 against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but
11 upon probable cause, supported by Oath or affirmation, and particularly describing the place to be
12 searched, and the persons to be seized.”)

13 **IV. LIMITED REQUEST FROM MR. KLEIN.**

14 Mr. Klein asks that his declaration be unsealed.

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16 Dated: May 4, 2006

Respectfully submitted,

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