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14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16 SAN FRANCISCO DIVISION
17

18 TASH HEPTING, GREGORY HICKS,
19 CAROLYN JEWEL and ERIK KNUTZEN
on Behalf of Themselves and All Others
20 Similarly Situated,

21 Plaintiffs,

22 vs.

23 AT&T CORP., AT&T INC. and DOES 1-20,
24 inclusive,

25 Defendants.

No. C-06-0672-VRW

**REPLY MEMORANDUM OF
DEFENDANT AT&T CORP. IN
SUPPORT OF MOTION TO
DISMISS PLAINTIFFS' AMENDED
COMPLAINT**

Date: June 23, 2006
Time: 9:30 a.m.
Courtroom: 6, 17th Floor
Judge: Hon. Vaughn R. Walker

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12
13
14
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17
18
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23
24
25
26
27
28

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

II. ARGUMENT 1

 A. Plaintiffs’ Claims Should Be Dismissed On Grounds Of Statutory Immunity. 1

 B. The FAC Fails To Plead The Absence Of Absolute Common-Law Immunity. 7

 C. The FAC Establishes AT&T’s Qualified Immunity As A Matter Of Law. 11

 1. Qualified immunity is available to private corporations. 11

 2. Qualified immunity is available against plaintiffs’ statutory claims. 12

 3. Qualified immunity applies as a matter of law in this case. 13

 D. Plaintiffs Lack Standing. 14

 1. Plaintiffs have not alleged facts sufficient to establish “injury in fact.” 14

 2. The state secrets privilege bars plaintiffs from establishing standing. 16

III. CONCLUSION 18

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

TABLE OF AUTHORITIES

CASES

Bartell v. Lohiser,
12 F. Supp. 2d 640 (E.D. Mich. 1998), *aff'd* 215 F.3d 550 (6th Cir. 2000)..... 11

Benford v. America Broad. Co.,
554 F. Supp. 145 (D. Md. 1982) 13

Berry v. Funk,
146 F.3d 1003 (D.C. Cir. 1998) 13

Bibeau v. Pacific Nw. Research Found. Inc.,
188 F.3d 1105 (9th Cir. 1999)..... 11

Blake v. Wright,
179 F.3d 1003 (6th Cir. 1999)..... 13

Collins v. Jordan,
110 F.3d 1363 (9th Cir. 1996)..... 13

Craska v. New York Tel. Co.,
239 F. Supp. 932 (N.D.N.Y. 1965) 10

Crawford-El v. Britton,
523 U.S. 574 (1998) 5

DeVargas v. Mason & Hanger-Silas Mason Co.,
844 F.2d 714 (10th Cir. 1988).....11, 12

Eastland v. United States Servicemen’s Fund,
421 U.S. 491 (1975) 10

Ellis v. City of San Diego,
176 F.3d 1183 (9th Cir. 1999)..... 11

Ellsberg v. Mitchell,
709 F.2d 51 (D.C. Cir. 1983)..... 17

FDIC v. Meyer,
510 U.S. 471 (1994) 11

Fowler v. Southern Bell Tel. & Tel. Co.,
343 F.2d 150 (5th Cir. 1965) 10

Halkin v. Helms,
598 F.2d 1 (D.C. Cir. 1978)..... 17

Halkin v. Helms,
690 F.2d 977 (D.C. Cir. 1982)17, 18

1 *Halperin v. Kissinger*,
 424 F. Supp. 838 (D.D.C. 1976), *rev'd on other grounds*,
 2 606 F.2d 1192 (D.C. Cir. 1979)7, 10

3 *Harlow v. Fitzgerald*,
 457 U.S. 800 (1982) 11

4
 5 *Jacobson v. Rose*,
 592 F.2d 515 (9th Cir. 1978) 8

6 *Kasza v. Browner*,
 133 F.3d 1159 (9th Cir. 1998)..... 8

7
 8 *Laird v. Tatum*,
 408 U.S. 1 (1972) 15

9 *Little v. Barreme*,
 6 U.S. (2 Cranch) 170 (1804)..... 7

10
 11 *Lujan v. Defenders of Wildlife*,
 504 U.S. 555 (1992) 14

12 *Mejia v. City of New York*,
 119 F. Supp. 2d 232 (E.D.N.Y. 2000).....11, 12

13
 14 *Mullis v. United States Bankr. Ct. Dist. of Nev.*,
 828 F.2d 1385 (9th Cir. 1987)..... 10

15 *O'Shea v. Littleton*,
 414 U.S. 488 (1974) 15

16
 17 *Olagues v. Rusbinello*,
 797 F.2d 1511 (9th Cir. 1986), *vacated as moot*, 484 U.S. 806 (1987) 15

18 *Owen v. City of Independence*,
 445 U.S. 622 (1980)12, 13

19
 20 *Peavy v. Dallas Independent Sch. Dist.*,
 57 F. Supp. 2d 382 (N.D. Tex. 1999)..... 13

21 *Presbyterian Church v. United States*,
 870 F.2d 518 (9th Cir. 1989)14, 15

22
 23 *Pulliam v. Allen*,
 466 U.S. 522 (1984) 10

24 *Richardson v. McKnight*,
 521 U.S. 399 (1997) 12

25
 26 *Rosewood Servs., Inc. v. Sunflower Diversified Servs., Inc.*,
 413 F.3d 1163 (10th Cir. 2005)..... 11

27 *In re Sealed Case*,
 310 F.3d 717 (Foreign Intel. Surv. Ct. of Rev. 2002) 6

28

1 *Sherman v. Four County Counseling Ctr.*,
 987 F.2d 397 (7th Cir. 1993) 11

2

3 *Smith v. Nixon*,
 606 F.2d 1183 (D.C. Cir. 1979) 7, 9

4 *In re State Police Litig.*,
 888 F. Supp. 1235 (D. Conn. 1995) 13

5

6 *Supreme Court v. Consumers Union*,
 446 U.S. 719 (1980) 10

7 *Tapley v. Collins*,
 211 F.3d 1210 (11th Cir. 2000).....9, 13

8

9 *United Presbyterian Church v. Reagan*,
 738 F.2d 1375 (D.C. Cir. 1984)15, 16

10 *United States v. First City Nat’l Bank of Houston*,
 386 U.S. 361 (1967) 2

11

12 *United States v. King*,
 478 F.2d 494 (9th Cir. 1973) 6

13 *United States v. The Paquete Habana*,
 189 U.S. 453 (1903) 8

14

15 *United States v. Texas*,
 507 U.S. 529 (1993) 8

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

17

18 *Webster v. Doe*,
 486 U.S. 592 (1988) 7

DOCKETED CASES

20 *ACLU v. NSA*,
 Civ. 06-10204 (E.D. Mich. filed Jan. 17, 2006) 3

21

22 *Center for Constitutional Rights v. Bush*,
 Civ. 06-313 (S.D.N.Y. filed Feb. 28, 2006) 3

CONSTITUTION AND STATUTES

23 U.S. Cont. art. 1 § 6 cl. 1 10

24

25 Pub. L. No. 107-40, 115 Stat. 224 (2001)..... 6

26 18 U.S.C. § 25111, 5, 7

27 18 U.S.C. § 2520 1

28 18 U.S.C. § 2703(e)..... 7

42 U.S.C. § 1983 10

1 47 U.S.C. § 605 10
2 50 U.S.C. § 1809(a)..... 6

3 **LEGISLATIVE HISTORY**

4 H.R. Rep. No. 99-647 (1986)..... 2
5 S. Rep. No. 99-541 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555 1, 4

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8
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1 **I. INTRODUCTION.**

2 Plaintiffs' opposition to AT&T Corp.'s motion to dismiss is largely an exercise in
3 misdirection. It relies on a combination of mischaracterization of AT&T's arguments,
4 inapposite authority, and a blending of concepts that are legally distinct to try to muddy the
5 waters sufficiently to persuade this Court to allow the case to proceed. The First Amended
6 Complaint ("FAC") utterly fails to allege facts that could overcome AT&T's statutory and
7 common law immunities from suit for its alleged cooperation with authorized government
8 surveillance activities, and it nowhere alleges that plaintiffs themselves have been harmed
9 in a sufficiently concrete and direct manner to satisfy Article III of the Constitution.

10 **II. ARGUMENT.**

11 **A. Plaintiffs' Claims Should Be Dismissed On Grounds of Statutory**
12 **Immunity.**

13 Plaintiffs' opposition never cites, much less comes to grip with, the key statutory
14 language that is the basis for AT&T's motion to dismiss on statutory immunity grounds.
15 As set forth in AT&T's motion, in defining the cause of action for a violation of 18 U.S.C.
16 § 2511, Congress stated that "[e]xcept as provided in section 2511(2)(a)(ii)," any person
17 whose communication is intercepted may receive relief in a civil action, 18 U.S.C. §
18 2520(a) (emphasis added). By using this language in creating the cause of action, Congress
19 made clear that to state a claim, a plaintiff must allege facts demonstrating that §
20 2511(2)(a)(ii) immunity does not exist. The legislative history confirms this. S. Rep. No.
21 99-541 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555 expressly recognizes that "the
22 defendant can move to dismiss the complaint for failure to state a claim upon which relief
23 can be granted" if the complaint fails to allege, among other things, that the
24 communications service provider "acted without a facially valid court order or
25 certification." *Id.* at 26, *reprinted in* 1986 U.S.C.C.A.N. at 3580. And because § 2511
26 immunity applies to all potential causes of action arising from activities undertaken
27 pursuant to appropriate governmental authorizations, 18 U.S.C. § 2511(2)(a)(ii)(B),
28 plaintiffs' failure to make the required allegations is fatal to all of their claims. Unable to

1 refute this central legal proposition, plaintiffs are left only to try to confuse the issue by
2 mischaracterizing AT&T's argument and by conflating various merits defenses with the
3 entirely different threshold immunity provided by § 2511.

4 Plaintiffs' argument that ECPA does not impose a "heightened pleading" standard
5 (Opp. at 9-11) is directed at a straw man. AT&T makes no such claim. AT&T's assertion
6 is that the inclusion of the phrase "[e]xcept as provided in section 2511(2)(a)(ii)" in the
7 definition of the cause of action in § 2520(a), the structure of the statute, and its legislative
8 history all demonstrate that a plaintiff must allege that § 2511(2)(a)(ii) immunity does not
9 exist in order to state a claim. *See* AT&T Motion to Dismiss ("AT&T Mot.") at 7-8.

10 AT&T, accordingly, does not rely on a heightened pleading standard; we simply argue that
11 a plaintiff must plead all elements of his or her cause of action. Because plaintiffs have not
12 done so, and cannot do so, the complaint should be dismissed.

13 The only authority on which plaintiffs rely for their assertion that the absence of
14 certification is not an element of their claim – a snippet of legislative history, Opp. at 11 –
15 deals solely with the good faith defense in 18 U.S.C. § 2520(d), which is a defense on the
16 merits that is wholly separate from § 2511(2)(a)(ii)'s threshold immunity. *See* H.R. Rep.
17 No. 99-647, at 50 (1986). Indeed, the designation of "good faith reliance" as a "defense"
18 indicates that § 2511(2)(a)(ii) does not describe an affirmative defense but rather delineates
19 a threshold immunity that must be overcome in order to state a § 2520(a) claim.

20 Plaintiffs next argue that § 2511(2)(a)(ii) immunity must be an affirmative defense
21 because *other* exceptions to Title III have been characterized as affirmative defenses. Opp.
22 at 11-12. Plaintiffs' argument is a *non sequitur*. As even plaintiffs recognize, *each* case
23 they cite deals with exceptions *other* than § 2511(2)(a)(ii).¹ None of those other exceptions

24
25 ¹ *See* Opp. at 11-12 (citing *Doe v. Smith*, 429 F.3d 706, 709 (7th Cir. 2005) (§ 2511(2)(d)),
26 *In re Pharmatrak, Inc.*, 329 F.3d 9, 19 (1st Cir. 2003) (§ 2511(2)(d)), *United States v.*
27 *Jones*, 839 F.2d 1041, 1050 (5th Cir. 1988) (§ 2511(2)(c)), *United States v. Harvey*, 540
28 F.2d 1345, 1352 n.9 (8th Cir. 1976) (§ 2511(2)(a)(i))). Plaintiffs' citation to *United*
States v. First City Nat'l Bank of Houston, 386 U.S. 361, 366 (1967) (Opp. 11) is
irrelevant; it addresses who bears a burden of proof, not elements required for pleading.

1 is, like § 2511(2)(a)(ii), carved out of the cause of action defined in § 2520(a). Both the
2 text and the structure of the statute thus confirm that § 2511(2)(a)(ii) immunity is in a
3 different legal category from the merits defenses on which plaintiffs rely. *See* AT&T Mot.
4 at 7. Plaintiffs cite no authority to the contrary.

5 Ultimately, plaintiffs fall back on an argument that the absence of certification
6 cannot be an element of their claims because they cannot allege it. *Opp.* at 13.
7 Preliminarily, plaintiffs are wrong to suggest that if the absence of certification must be
8 alleged, there can never be a § 2511 claim. Section 2511 broadly prohibits disclosure to
9 “any other person”; thus, in virtually any § 2511 case involving a disclosure to someone
10 other than a governmental official, a plaintiff might reasonably allege the absence of
11 § 2511(a)(2)(ii) immunity. Even in cases involving disclosure to the government, there are
12 circumstances where plaintiffs could, consistent with Rule 11, allege that no certification
13 exists – for example, where the government denies that it has authorized surveillance.
14 Here, all allegations are to the contrary. In this situation, it is true that plaintiffs cannot
15 reasonably assert the absence of certification, but it does not follow that they must be
16 entitled to sue anyway. The ECPA reflects clear congressional intent to immunize carriers
17 from suit when they are merely alleged to have cooperated with government-authorized
18 national security surveillance. Requiring suits making such claims to be dismissed at the
19 threshold due when a plaintiff cannot plead lack of certification is wholly consistent with
20 the scheme Congress enacted. Plaintiffs seeking to challenge such programs may attempt
21 to sue the government directly, as many have done in relation to the NSA program,² but
22 they may not sue allegedly cooperating carriers. Plaintiffs’ complaint is not really with
23 AT&T but with the United States. The statutory scheme providing immunity for
24 telecommunications carriers who are alleged to have cooperated with the government is
25 entirely consistent with Congress’ intent that such claims be brought, if at all, against the

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27 ² *See, e.g., ACLU v. NSA*, Civ. 06-10204 (E.D. Mich. filed Jan. 17, 2006); *Center for*
28 *Constitutional Rights v. Bush*, Civ. 06-313 (S.D.N.Y. filed Jan. 17, 2006).

1 government.

2 Plaintiffs next argue that if they were required to plead the absence of a
3 certification, they have done so. Any fair reading of the complaint reveals that this is
4 incorrect.

5 First, plaintiffs assert that because they pled bad faith, they stated a claim under
6 § 2511. This is an incorrect reading of the statute, which requires an allegation that the
7 defendant lacked the required government authorization – irrespective of mental state. *See*
8 *AT&T Mot.* at 5-13. The issue of bad faith arises under the merits defense in § 2520(d) and
9 is considered only if § 2511 immunity is absent. Moreover, plaintiffs have misread even
10 the legislative history. Plaintiffs quote the Senate Report, S. Rep. No. 99-541, at 26,
11 *reprinted in* 1986 U.S.C.C.A.N. at 3580, and focus on the word “or,” claiming on that basis
12 that Congress intended that a plaintiff can always survive a motion to dismiss in a § 2520
13 case by alleging bad faith. *Opp.* at 14. The Senate Report, however, simply lists factual
14 circumstances in which a pleading in a § 2520 case might be adequate. For example, in a
15 case not involving disclosures to government officials, a complaint alleging bad faith and
16 disclosure might be sufficiently pled, while in cases involving disclosures to government
17 officials, a complaint must allege the absence of certification or court order. The Report
18 cannot be interpreted, as plaintiffs do, to mean that a plaintiff can always state a claim by
19 alleging that the cooperating provider acted in bad faith.

20 Second, plaintiffs argue that they alleged the absence of a certification “by alleging
21 that AT&T acted without ‘lawful authorization.’” *Opp.* at 14 (quoting FAC ¶ 81). This is
22 not a factual allegation, but a legal conclusion that is not deemed true for purposes of
23 deciding a motion to dismiss, *see Warren v. Fox Family Worldwide*, 328 F.3d 1136, 1141
24 n.5 (9th Cir. 2003). In addition, the context of FAC ¶ 81 makes plain that it is not a factual
25 allegation that no certification exists: it references the “above-described acts” and claims
26 that they occurred without “lawful authorization,” FAC ¶ 81, and then is immediately
27 followed by an allegation that “at all relevant times, the government instigated, directed
28 and/or tacitly approved all of the above-described acts of AT&T Corp.,” *id.* ¶ 82.

1 Plaintiffs’ theory in their complaint (and in their briefs) is that any governmental
2 authorization that exists could not be “lawful” and therefore sufficient to immunize AT&T
3 from suit because the Program is, in their view, obviously unlawful. This theory is self-
4 validating and wrong as a matter of law, as the next section explains. But more critically
5 here, in the absence of “specific nonconclusory factual allegations” that AT&T, if it acted,
6 lacked a certification, *see Crawford-El v. Britton*, 523 U.S. 574, 598 (1998), AT&T’s
7 statutory immunity protects it from suit. For identical reasons, plaintiffs’ bare allegation of
8 an “illegal collaboration” with the government, FAC ¶ 8, is insufficient. In sum, there is no
9 factual allegation in the FAC that can be contorted into an allegation that defendants did not
10 receive a § 2511(2)(a)(ii) certification.

11 Finally, plaintiffs argue that “no amount of government authorization can immunize
12 AT&T from liability for the illegal surveillance activities alleged in the complaint.” Opp. at
13 15. This is really the heart of plaintiffs’ submission, but it is an argument based on
14 ideology, not law.

15 As an initial matter, this argument depends on the notion that a facially valid
16 certification cannot be relied upon by a carrier alleged to be assisting the government unless
17 the carrier conducts some independent assessment of the underlying legality of the
18 surveillance being authorized. This interpretation of § 2511(2)(a)(ii) directly contravenes
19 the plain language of the statute and Congress’s purpose in providing carriers with absolute
20 immunity. The statute specifically provides that carriers are immune from suit for assisting
21 with warrantless surveillance if they have “been provided with” a written certification from
22 certain specified persons attesting to the need for and legality of such surveillance. The
23 wording of the statute, which requires no particular mental state or determination by the
24 carrier, is incompatible with the notion that the carrier is obligated to look behind the
25 certification. Indeed, the immunity language itself expressly states that “no cause of
26 action” may be maintained against a carrier for actions taken “in accordance with the terms
27 of a . . . certification,” 18 U.S.C. § 2511(2)(a)(ii), emphasizing that carriers may rely on the
28 “terms” of a certification. There is no requirement of verification; indeed, in most

1 circumstances there would be no way for a carrier to investigate the facts or legal
2 judgments underlying a certification. And on the logic of plaintiffs' argument, providers
3 would similarly be obligated to look behind court orders, which are referenced in the same
4 section. Any such requirement would be absurd, and would chill providers' ability to
5 provide swift cooperation to the United States, which is the obvious purpose of the
6 immunity. *See also* AT&T Mot. at 6-7.

7 Moreover, plaintiffs' argument that any certification in this case would necessarily
8 be unlawful because permissible warrantless surveillance is "strictly cabined to four
9 situations" specified in ECPA and FISA, Opp. at 15, is wrong as a legal matter.³ Most
10 obviously, FISA itself recognizes that Congress may authorize electronic surveillance by
11 statutes other than FISA. *See* 50 U.S.C. § 1809(a) (prohibiting any person from
12 intentionally "engag[ing] in electronic surveillance under color of law except as authorized
13 by statute"). The United States has indeed argued that the post-9/11 Authorization for Use
14 of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001), is one such statute.
15 Moreover, plaintiffs ignore the President's inherent constitutional authority to gather
16 intelligence to assist in the conduct of the nation's foreign and military affairs. *See, e.g., In*
17 *re Sealed Case*, 310 F.3d 717, 742 (Foreign Intel. Surv. Ct. of Rev. 2002) (collecting
18 cases). This constitutional power, too, could serve as a lawful basis upon which the
19 Attorney General could render a certification outside the four narrow statutory
20 circumstances acknowledged by plaintiffs.⁴

21 In sum, plaintiffs' claim that any certification received by defendants would
22 _____

23 ³ Plaintiffs also cite the portion of the statute authorizing carriers to provide information "to
24 persons authorized by law to . . . conduct electronic surveillance," 18 U.S.C. §
25 2511(2)(a)(ii), perhaps implying that a carrier violates the statute where the persons to
whom it provides the information are not acting lawfully. This phrase, however, merely
defines the category of persons who are entitled to receive surveillance information.

26 ⁴ *United States v. King*, 478 F.2d 494 (9th Cir. 1973), relied on by plaintiffs, Opp. at 16 &
27 n.18, is irrelevant, because *King* involved only an issue of statutorily-required suppression
28 of the fruits of an improper Title III wiretap in a criminal context. That case had nothing
to do with carrier liability, foreign intelligence surveillance, or certifications for
warrantless interception.

1 necessarily be unlawful is irrelevant to the critical point – that plaintiffs must plead the
2 absence of certification as an element of their claim and did not. But in any event,
3 plaintiffs’ irrelevant claim has the additional problem of being wrong. Plaintiffs’ failure to
4 plead that AT&T did not receive a statutory authorization is fatal to their claims.⁵

5 **B. The FAC Fails To Plead The Absence Of Absolute Common-Law**
6 **Immunity.**

7 In its opening memorandum (at 13-15), AT&T showed that it has absolute common-
8 law immunity from this suit under court decisions that recognized the importance of
9 insulating telecommunications carriers that cooperate with foreign intelligence or law
10 enforcement investigations. *See Smith v. Nixon*, 606 F.2d 1183, 1191 (D.C. Cir. 1979);
11 *Halperin v. Kissinger*, 424 F. Supp. 838, 846 (D.D.C. 1976), *rev’d on other grounds*, 606
12 F.2d 1192 (D.C. Cir. 1979). Plaintiffs’ contrary arguments are unavailing.

13 Plaintiffs’ initial argument against absolute common-law immunity, like their initial
14 argument against statutory immunity, is directed at a straw man. Defendants are not
15 claiming official immunity as “essential actor[s] in our constitutional system of
16 government.” Plaintiffs’ arguments based on official immunity cases are therefore wholly
17 beside the point. *Opp.* at 19-21. Rather, defendants are asserting the specific immunity for
18 telecommunications carriers assisting the government in conducting foreign intelligence or
19 law enforcement investigations recognized in *Smith* and *Halperin*.⁶

20 _____
21 ⁵ Plaintiffs assert that, assuming § 2511(2)(a)(ii) immunizes defendants from statutory
22 claims, it cannot preclude plaintiffs’ constitutional claims. Plaintiffs’ argument is that
23 Congress must clearly evince its intent for constitutional claims to be precluded, *Opp.* at
24 17 n.19, but there could hardly be a stronger statement of intent to preclude than that
25 contained in the statutes protecting telecommunications providers at issue “[n]o cause of
action shall lie in any court” 18 U.S.C. § 2511(2)(a)(ii); *id.* § 2703(e). The statutory
text in *Webster v. Doe*, 486 U.S. 592 (1988), which merely committed certain
employment decisions to the discretion of the CIA Director and did not expressly
preclude judicial review at all, is utterly dissimilar.

26 ⁶ Plaintiffs claim without further explanation that the “parallels are manifest” between the
27 immunity that defendants assert here and the immunity that the Supreme Court rejected in
28 *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804). Putting aside the two hundred years of
intervening law on qualified and official immunity and the analysis in *Smith* and
Halperin, the Supreme Court’s denial of immunity to “a naval officer acting in a war zone
(continued...)”) (continued...)

1 With respect to the immunity that defendants *are* asserting, plaintiffs dispute its
2 existence on two grounds. First, plaintiffs erroneously contend that the Ninth Circuit
3 “necessarily, and properly, rejected” the common-law immunity in *Jacobson v. Rose*, 592
4 F.2d 515 (9th Cir. 1978). Opp. at 22. But *Jacobson* did not involve a claim of common-
5 law immunity, and the court did not address, much less reject, the immunity.
6 In *Jacobson*, the Ninth Circuit rejected the telephone company’s argument that it did not
7 violate Title III as a statutory matter simply because “none of its employees actually
8 listened to tapped conversations,” 592 F.2d at 522, but then reversed a verdict against the
9 company, holding that it was entitled based on the facts of the case to an instruction on the
10 statutory good faith defense. See *id.* at 522-24. Plaintiffs claim that the Ninth Circuit held
11 “that Congress intended the statutory good faith defense of 18 U.S.C. § 2520 to be the
12 exclusive means by which a telecommunications provider may raise its cooperation with
13 the government as a defense to liability.” Opp. at 22. But the case says no such thing;
14 *Jacobson* did not even address, let alone decide, the exclusivity of the statutory good faith
15 defense or the availability of common law immunity. The court merely cited the § 2520
16 defense to refute the carrier’s concern that the court’s interpretation of the statute could
17 result in liability for a carrier’s compliance with a court order.

18 Second, plaintiffs’ contention that any common-law immunity was displaced by
19 subsequent statutory provisions is equally meritless. Plaintiffs ignore the fundamental
20 principle that courts presume that Congress intended to preserve and supplement the
21 common law, absent an express legislative statement to the contrary. AT&T Mot. at 13; see
22 *United States v. Texas*, 507 U.S. 529, 534 (1993); *Kasza v. Browner*, 133 F.3d 1159, 1167
23 (9th Cir. 1998). Plaintiffs do not even attempt to demonstrate that any statute contains an

24 (…continued)

25 at the direction of the Commander in Chief,” Opp. at 21, does not control the question
26 whether a civilian telecommunications carrier that provides technical assistance to a
27 government-run investigation is entitled to immunity. Moreover, in *United States v. The*
28 *Paquete Habana*, 189 U.S. 453 (1903), Justice Holmes expressly limited *Little*, holding
that, precisely as is alleged to be the case here, “when the act of a public officer is
authorized or has been adopted by the sovereign power, whatever the immunities of the
sovereign, the agent thereafter cannot be pursued.” *Id.* at 465.

1 express legislative statement that satisfies this exacting standard; and no such statement
2 exists. *Cf. Tapley v. Collins*, 211 F.3d 1210, 1216 (11th Cir. 2000) (“[t]he Federal Wiretap
3 Act lacks the specific, unequivocal language necessary to abrogate the qualified immunity
4 defense”). Accordingly, the common-law immunity asserted by defendants survived the
5 enactment of the statutory civil liability provisions and supplements the statutory
6 immunities that Congress created.

7 Plaintiffs are left to impugn the immunity recognized in *Smith* and *Halperin* as “a
8 fiction,” an “*ad hoc*” defense, and “*ipse dixit*,” *Opp.* at 22-23 – transparent attempts to
9 avoid the courts’ clear holdings. *Smith* and *Halperin* remain good law, never having been
10 overruled, narrowed, or questioned by any court. While the immunity has only infrequently
11 been invoked, this reflects the fact that few plaintiffs have sued carriers for allegedly
12 cooperating with authorized government surveillance. Plaintiffs’ related assertion that
13 *Smith* and *Halperin* established “some variety of good faith defense that had to be pled and
14 proven,” rather than an immunity, is clearly wrong. *Opp.* at 23. *Smith* affirmed the district
15 court’s *dismissal* of an action against the telephone company on the ground that the
16 allegations against the company could not ““give rise to liability for any statutory or
17 constitutional violation.”” 606 F.2d at 1191 (quoting *Halperin*, 424 F. Supp. at 846). This
18 is immunity from suit, not a defense on the merits that the carrier had to prove.

19 Notably, plaintiffs have virtually no response to AT&T’s showing that the FAC
20 pleads a classic situation for applying the common-law immunity. AT&T *Mot.* at 14-15.
21 The FAC pleads facts alleging that AT&T had only a limited technical role in facilitating
22 *the government’s* surveillance and that AT&T believed that its actions were authorized. *Id.*
23 If these prerequisites exist – as they are alleged to do – the carrier is entitled to immunity.
24 Plaintiffs’ observation that the FAC alleges that AT&T “actively” transmits the call records
25 and communications of its customers to the government is an irrelevant word game
26 unsupported by the cases they cite, *Opp.* at 24, because the availability of the common-law

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28

1 immunity does not turn on the illusory distinction between whether the carrier's assistance
2 to the government is "passive" or "active" – however those terms might be defined.⁷

3 Finally, contrary to plaintiffs' suggestion, Opp. at 18, there is no rule that all forms
4 of absolute immunity bar damages actions only. Many forms of absolute immunity bar
5 claims for declaratory and injunctive relief, including the absolute immunity afforded by
6 the Constitution's Speech or Debate Clause, art. I, § 6, cl. 1, *see Eastland v. United States*
7 *Servicemen's Fund*, 421 U.S. 491, 503 (1975); the common law immunity of state officials
8 for legislative acts, *see Supreme Court v. Consumers Union*, 446 U.S. 719, 732-33 (1980);
9 and (contrary to plaintiffs, *see* Opp. at 18) absolute judicial immunity in § 1983 suits, *see*
10 42 U.S.C. § 1983 (overruling in substantial part, *Pulliam v. Allen*, 466 U.S. 522 (1984),
11 plaintiffs' principal authority).⁸

12 The absolute common-law immunity recognized in *Smith* and *Halperin* is in this
13 category. *Smith* and *Halperin* contain no indication that the immunity is limited to damages
14 claims. Indeed, *Halperin* involved claims for declaratory and injunctive relief, as well as
15 damages, *see* 424 F. Supp. at 840, and the court recognized the telephone company's
16 immunity against all such claims. Moreover, the purposes of the common-law immunity
17 would be undermined if carriers faced lawsuits for equitable relief based on cooperation
18 with the government. Such lawsuits impose significant monetary and public relations costs
19 on carriers, and would therefore make carriers reluctant to comply with requests for

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21 ⁷ Plaintiffs' attempts to distinguish *Fowler v. Southern Bell Tel. & Tel. Co.*, 343 F.2d 150
22 (5th Cir. 1965), and *Craska v. New York Tel. Co.*, 239 F. Supp. 932 (N.D.N.Y. 1965), are
23 equally unpersuasive. *See* Opp. at 23 n.20. Their argument about *Fowler* is a straw man.
24 Defendants are not relying on the *official immunity* for federal officers under the Federal
25 Tort Claims Act, but on *Fowler's* recognition of a defense to civil liability for carriers that
26 cooperate with government officials. 343 F.2d at 156-57. With respect to *Craska*,
27 plaintiffs assert that the common-law immunity may not have survived the enactment of
28 the civil liability provision of 47 U.S.C. § 605. But as demonstrated *supra*, courts
presume that statutes preserve the common law absent express Congressional statement to
the contrary; plaintiffs do not even attempt to make the necessary showing.

⁸ *Pulliam* also does not apply to *federal* officials sued in *Bivens* actions. *See Mullis v.*
United States Bankruptcy Court, 828 F.2d 1385, 1394 (9th Cir. 1987) ("The judicial or
quasi-judicial immunity available to federal officers is not limited to immunity from
damages, but extends to actions for declaratory, injunctive and other equitable relief").

1 cooperation. And like damages claims, suits for equitable relief would, contrary to the
2 intent of Congress, leave carriers caught in the middle of disputes that should be between
3 plaintiffs and the government. Accordingly, common-law immunity bars plaintiffs' claims
4 for injunctive and other equitable relief, as well as their claims for damages.

5 **C. The FAC Establishes AT&T's Qualified Immunity As A Matter Of**
6 **Law.**

7 **1. Qualified immunity is available to private corporations.**

8 In opposing AT&T's claim of qualified immunity, plaintiffs first assert that
9 qualified immunity is available only to private individuals, not corporations. Opp. at 24-25.
10 But Plaintiffs base their proposed rule solely on cases involving individuals and municipal
11 liability. The authority on point, which plaintiffs fail to acknowledge, is to the contrary:
12 numerous decisions hold that qualified immunity is available to private corporations.⁹

13 The vast majority of cases discussing qualified immunity speak in terms of
14 individuals because, historically, the doctrine developed to protect government *officials*
15 from liability. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Government
16 *entities* are generally shielded by sovereign immunity, see *FDIC v. Meyer*, 510 U.S. 471
17 (1994), and have no need for qualified immunity. The general statements in these cases
18 indicate little about whether private corporations may receive qualified immunity.

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20 ⁹ See, e.g., *Rosewood Servs., Inc. v. Sunflower Diversified Servs., Inc.* 413 F.3d 1163, 1166
21 (10th Cir. 2005) (“there is no bar against a private corporation claiming qualified
22 immunity.”); *Sherman v. Four County Counseling Ctr.*, 987 F.2d 397, 403 n.4 (7th Cir.
23 1993) (finding “no persuasive reason to distinguish between a private corporation and a
24 private individual” in analyzing qualified immunity); *DeVargas v. Mason & Hanger-Silas*
25 *Mason Co.*, 844 F.2d 714, 723 (10th Cir. 1988) (the policy reasons for qualified immunity
26 “apply equally to all private defendants...whether individuals or corporations”); *Mejia v.*
27 *City of New York*, 119 F. Supp. 2d 232, 268 (E.D.N.Y. 2000) (qualified immunity is
28 available to courier service enlisted by law enforcement to make an allegedly unlawful
arrest); *Bartell v. Lohiser*, 12 F. Supp. 2d 640, 645-46 (E.D. Mich. 1998) (qualified
immunity is available to private contractor “performing a discrete public service task at
the express direction and close supervision of government officials”). The Ninth Circuit
has not decided the issue, but has both appeared to assume that qualified immunity can
cover corporations, see *Bibeau v. Pacific Nw. Research Found. Inc.*, 188 F.2d 1105 (9th
Cir. 1999) (finding that a research firm was not entitled to qualified immunity under
Richardson without addressing entity immunity), and also stated in dictum that it cannot,
see *Ellis v. City of San Diego*, 176 F.3d 1183, 1191 (9th Cir. 1999).

1 Likewise, the Supreme Court’s analysis in *Owen v. City of Independence*, 445 U.S.
2 622 (1980), is driven by the unique factors relating to municipal liability and has little
3 bearing on the liability of private corporations. The reasoning of that case, which derives
4 from the inhibiting effect fears of financial liability can have on individuals, as opposed to
5 governmental entities, indeed supports the availability of qualified immunity for private
6 corporations, which are subject to similar incentive effects. *See id.* at 652-56.

7 Qualified immunity cases distinguish between governmental defendants and other
8 defendants – not between individuals and entities. *See DeVargas v. Mason & Hanger-Silas*
9 *Mason Co.*, 844 F.2d 714, 723 (10th Cir. 1988). The availability of qualified immunity for
10 a private party depends on the two-factor test articulated in *Richardson v. McKnight*, 521
11 U.S. 399, 407 (1997), which can be satisfied by an entity, and is satisfied by AT&T here.¹⁰
12 The FAC’s allegations essentially claim that AT&T is “serving as an adjunct to government
13 in an essential governmental activity” and “acting under close official supervision.” *Id.* at
14 413. AT&T’s alleged conduct is thus eligible for qualified immunity under the *Richardson*
15 test. Conducting surveillance to prevent hostile foreign attacks is a traditional
16 governmental function of the highest importance that, in an electronic era, may require the
17 facilities of private companies. These companies should be entitled to qualified immunity,
18 lest the threat of corporate monetary liability introduce “unwarranted and unconscionable
19 consideration” into the cooperation process, potentially paralyzing the government’s ability
20 to conduct efficient electronic surveillance. *Owen*, 445 U.S. at 656.

21 **2. Qualified immunity is available against plaintiffs’ statutory claims.**

22 Plaintiffs next contend that qualified immunity does not apply to their statutory

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24 ¹⁰ Plaintiffs’ argument that telecommunications carriers generally have no general common-
25 law immunity from tort actions, *see Opp.* at 25-27, is irrelevant. AT&T claims a specific
26 immunity based on the actions alleged in the FAC – cooperation with government
27 officials who are conducting foreign intelligence surveillance. In *Mejia*, 119 F. Supp. 2d
28 at 261, for example, the court analyzed whether a private courier had common-law
immunity when enlisted by law enforcement to make an allegedly unlawful arrest,
because the suit was precipitated by the courier’s alleged participation in such an arrest.
The court did not analyze whether there is a common-law immunity for being a private
courier; that was not the function at issue in the case.

1 claims. Opp. at 27-28. Plaintiffs rely on the sparse reasoning in *Berry v. Funk*, 146 F.3d
2 1003, 1013 (D.C. Cir. 1998). In *Berry*, the D.C. Circuit essentially held that Congress
3 “occupied the field” by creating a good faith defense to ECPA claims, leaving no room for
4 pre-existing common-law qualified immunity. *Id.* There are two flaws in this reasoning.
5 First, it ignores the established principle that Congress must specifically abrogate an
6 immunity that is firmly rooted in the common law and supported by strong policy reasons.
7 *See Owen*, 445 U.S. at 637. Since *Berry*, two courts of appeal have disagreed with its
8 holding, finding that qualified immunity survives in the ECPA context because Congress
9 did not clearly indicate that it wished to abolish the immunity by creating a good faith
10 defense. *Tapley v. Collins*, 211 F.3d at 1216; *Blake v. Wright*, 179 F.3d 1003, 1012 (6th
11 Cir. 1999).¹¹ Second, *Berry*’s holding that the creation of a good faith defense supplants
12 qualified immunity is illogical, because qualified immunity provides more protection than a
13 good faith defense.¹²

14 **3. Qualified immunity applies as a matter of law in this case.**

15 Where, as here, qualified immunity is available, a two-part analysis determines
16 whether a defendant is entitled to it. The court must determine: (1) “whether the plaintiff
17 has alleged a violation of a right that is clearly established”; and (2) “whether, under the
18 facts alleged, a reasonable official could have believed that his conduct was lawful.”
19 *Collins v. Jordan*, 110 F.3d 1363, 1369 (9th Cir. 1996). As demonstrated by the past six
20 months of public, scholarly, and policy debate, the legality of the government’s surveillance
21 program – and correspondingly, whether the government violated any legal norms – are the
22 subjects of reasonable disagreement. And, because there is no clear law establishing that

23 ¹¹ Numerous lower courts have also recognized that qualified immunity can be available in
24 Title III cases. *See, e.g., In re State Police Litig.*, 888 F. Supp. 1235, 1266-67 (D. Conn.
25 1995); *Benford v. American Broad. Co.*, 554 F. Supp. 145, 153-54 (D. Md. 1982); *Peavy*
v. Dallas Indep. Sch. Dist., 57 F. Supp. 2d 382, 390-91 (N.D. Tex. 1999).

26 ¹² *See Blake*, 179 F.3d at 1012 (“police officers and public officials performing
27 governmental functions should not lose their qualified immunity because of an
28 affirmative defense which might or might not protect them but would, in all events,
require they be subject to extended litigation and deprive them of the benefits of qualified
immunity.”).

1 the government acted improperly, *a fortiori*, no established law forbade AT&T's alleged
2 assistance. Moreover, plaintiffs' allegations about the President's approval of the program
3 establish that any company assisting in the alleged program would have had a reasonable
4 belief that its actions were lawful. Accordingly, AT&T is entitled to qualified immunity on
5 the facts as alleged, shielding AT&T from liability for civil damages.¹³

6 **D. Plaintiffs Lack Standing.**

7 Plaintiffs have not and cannot establish standing. They have not alleged facts
8 sufficient to establish "injury in fact." And, in light of the state secrets privilege invoked by
9 the United States, Plaintiffs *cannot* establish standing.

10 **1. Plaintiffs have not alleged facts sufficient to establish "injury in fact."**

11 To establish constitutional standing, plaintiffs must allege specific facts
12 demonstrating (among other things) that they suffered "an injury in fact" that is "concrete
13 and particularized" and "actual or imminent." *Lujan v. Defenders of Wildlife*, 504 U.S. 555,
14 550-61 (1992). Plaintiffs' only claim is that they have met this requirement, arguing that
15 "[at] its core, the Complaint alleges that AT&T is, *as a factual matter*, subjecting plaintiffs
16 and millions of other innocent Americans to illegal surveillance and disclosure of private
17 records." Opp. at 8 (emphasis added).¹⁴ In search of that "factual matter," plaintiffs focus
18 on a single sentence in the FAC, which alleges that: "[o]n information and belief," AT&T
19 has been "intercepting and disclosing to the government the contents of its customers
20 communications as well as detailed communications records about millions of its
21 customers, *including Plaintiffs and class members.*" Opp. at 4 (quoting FAC ¶ 6). But
22 plaintiffs' unsubstantiated "belief" that their communications have been intercepted or that

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24 ¹³ The Ninth Circuit has held that qualified immunity precludes liability for civil damages,
25 but does not foreclose equitable relief. *See Presbyterian Church v. United States*, 870
26 F.2d 518, 527 (9th Cir. 1989). As a result, a determination that AT&T is entitled to
27 qualified immunity would not by itself result in dismissal of the entire case.

28 ¹⁴ Similarly, Plaintiffs do not dispute that they must establish prudential standing by
alleging facts showing that their situation differs from that of the public generally. Yet
Plaintiffs assert nothing more than a generalized, conclusory grievance that they allege is
shared by millions of Americans.

1 their communications records have been disclosed is insufficient to establish “injury in
2 fact.” Plaintiffs may not establish “injury in fact” with “generalized and nonspecific”
3 allegations that they have been subjected to unlawful surveillance. *See United Presbyterian*
4 *Church v. Reagan*, 738 F. 2d 1375, 1380-81 (D.C. Cir. 1984) (rejecting as insufficient
5 allegations that a plaintiff “discerns a long-term pattern of surveillance of its members,”
6 “has reason to believe that for a long time, its officers . . . have been subjected to
7 government surveillance,” or “has been informed on numerous occasions of instances of
8 mail being intercepted”).

9 Plaintiffs allege no specific facts suggesting that their personal communications
10 have been intercepted or their records targeted for acquisition by government agencies, or
11 even any reason based on their conduct why that would be likely. Indeed, statements by the
12 Attorney General, referenced by Plaintiffs (FAC ¶¶ 33-35) and attached as Ex. J to AT&T
13 Corp.’s Request for Judicial Notice (Dkt. 87), indicate that the Terrorist Surveillance
14 Program is limited to monitoring communications involving members of al Qaeda or those
15 affiliated with or assisting al Qaeda. The FAC expressly excludes from the purported class
16 “anyone who knowingly engages in sabotage or international terrorism, or activities that are
17 in preparation thereof.” FAC ¶ 70. By their own allegations, Plaintiffs are not targets of
18 the Terrorist Surveillance Program and have failed to establish “injury in fact.”¹⁵

19 Plaintiffs’ statutory claims add nothing. *See O’Shea v. Littleton*, 414 U.S. 488, 495
20 n.2 (1974) (“[S]tatutes do not purport to bestow the right to sue in the absence of any
21 indication that invasion of the statutory right has occurred or is likely to occur”). True,
22 plaintiffs allege that various statutes have been violated. *See Opp.* at 5-6. But again
23 plaintiffs fail to allege any facts to establish that *their* statutory rights have been violated.

24 _____
25 ¹⁵ Plaintiffs cannot establish “injury in fact” by claiming that their First Amendment rights
26 have been chilled. *See Opp.* at 7. Subjective allegations of “chill” are no substitute for
27 allegations of specific harm and cannot establish standing. *See Laird v. Tatum*, 408 U.S.
28 1, 13-15 (1972). In both cases cited by plaintiffs on this point, the plaintiffs specifically
alleged that they had been subject to government surveillance. *See Olagues v. Rusbinello*,
797 F.2d 1511, 1518-19 (9th Cir. 1986), *vacated as moot*, 484 U.S. 806 (1987);
Presbyterian Church 870 F.2d at 520-23.

1 Noticeably absent is any quotation of factual allegations in the FAC showing injury to them
2 personally. No such allegations exist.¹⁶

3 This is a case like *United Presbyterian*, 738 F.2d at 1380, where the plaintiffs
4 alleged that “some of them have been or are currently subjected to unlawful surveillance.”
5 In *United Presbyterian*, one of the plaintiffs alleged that it “discerns a long-term pattern of
6 surveillance of its members”; another plaintiff alleged that it “has reason to believe that for
7 a long time its officers. . . have been subjected to government surveillance”; and yet another
8 alleged that it “has been informed on numerous occasions of instances of [its] mail” being
9 intercepted. *Id.* at 1381. But the Court of Appeals affirmed dismissal of the complaint in
10 *United Presbyterian*, because “[m]ost, if not all of the allegations on that score are in any
11 event too generalized and nonspecific to support a complaint.” *Id.* at 1380. Here, even
12 these factual allegations are non-existent.

13 At bottom, plaintiffs suggest it is likely that they “*have already been ensnared*” in
14 the Program, simply because the Program allegedly ““intercepts millions of
15 communications”” and ““collects . . . a vast amount of communications traffic data.”” Opp.
16 at 2. Plaintiffs claim that there has been “indiscriminate[]” surveillance of AT&T
17 customers (*id.* at 4 n.4), but they do not allege facts establishing that they themselves have
18 been the subject of surveillance or that their communications have been intercepted.

19 **2. The state secrets privilege bars plaintiffs from establishing standing.**

20 The United States has invoked the state secrets privilege and demonstrated why
21 plaintiffs will be unable to prove that they have standing without state secrets information.
22 *See* Dkt. 124, at 16-20. The United States invokes the state secrets privilege with respect to
23 “any information tending to confirm or deny (a) the alleged intelligence activities, (b)
24 whether AT&T was involved with any such activity, and (c) whether a particular

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26 ¹⁶ Plaintiffs miss the point in arguing that the statutes confer standing on “anyone whose
27 communications have been intercepted or subjected to electronic surveillance,” regardless
28 of whether the communications have been listened to. Opp. at 7 n.8. Plaintiffs’ own
argument assumes the very “injury in fact” that the FAC itself fails to allege with
specificity: that plaintiffs’ communications have been intercepted.

1 individual's communications were intercepted as a result of any such activity." *Id.* at 17-
2 18. The United States correctly explains that "[w]ithout these facts – which should be
3 removed from the case as a result of the state secrets assertion – Plaintiffs cannot establish
4 any alleged injury that is fairly traceable to AT&T." *Id.* at 18.

5 Plaintiffs' opposition only underscores the validity of the government's point by
6 making a number of assertions that implicate information that is at the core of the state
7 secrets privilege. It asserts, for example, that "AT&T is indiscriminately surveilling the
8 communications of all its customers," that there is an NSA surveillance program which
9 "intercepts millions of communications," and that AT&T is "intercepting and disclosing
10 to NSA" the communications transmitted via its facilities and is "disclosing the contents of
11 its entire database of phone call and Internet records." *Opp.* at 2, 4 n.4. But plaintiffs
12 cannot prove any of these assertions without information covered by the state secrets
13 privilege. They therefore cannot establish standing. *See Halkin v. Helms* ("*Halkin I*"), 598
14 F.2d 1, 11 (D.C. Cir. 1978); *Halkin v. Helms* ("*Halkin II*"), 690 F.2d 977, 997 (D.C. Cir.
15 1982); *Ellsberg v. Mitchell*, 709 F.2d 51, 565 (D.C. Cir. 1983).

16 The *Halkin* decisions are dispositive. Two separate NSA operations were at issue.
17 598 F.2d at 4. One was Operation "MINARET," conducted by the NSA "as a part of its
18 regular signals intelligence activity in which foreign electronic signals were monitored."
19 *Id.* The district court held that the state secrets privilege covered Operation MINARET. *Id.*
20 at 5. It dismissed the plaintiffs' claims because they were predicated upon the acquisition
21 by NSA of plaintiffs' communications: because of the state secrets privilege, "the ultimate
22 issue, the fact of acquisition, could neither be admitted nor denied." *Id.* at 5. In *Halkin I*,
23 the Court of Appeals affirmed.¹⁷ *Id.* at 5, 11. In *Halkin II*, it said:

24 On a prior appeal, this court upheld a claim of the state secrets
25 privilege by the Secretary of Defense and held that NSA was not

26 ¹⁷ In the course of its analysis, the Court of Appeals observed: "In the case before us the
27 acquisition of the plaintiffs' communications is a fact vital to their claim. No amount of
28 ingenuity in putting questions on discovery can outflank the government's objection that
disclosure of this fact is protected by privilege." 598 F.2d at 7.

1 required to disclose in discovery whether it had intercepted any of
2 plaintiffs' communications. As a result of that ruling, plaintiffs'
3 claims against the NSA and several individual officials connected
with that agency's monitoring activities could not be proved, and
the complaint as to those defendants was dismissed.

4 690 F.2d at 984 (internal citation omitted). In *Halkin II*, the Court of Appeals also
5 considered whether the plaintiffs could bring a claim against the CIA for submitting
6 "watchlists" to NSA, which presumably resulted in interception of communications by
7 persons named on the watchlists. *Id.* at 984, 997. The Court of Appeals held that in light of
8 the state secrets privilege, the plaintiffs could not demonstrate standing in this context
9 either: "[T]he absence of proof of actual acquisition of [the plaintiffs'] communications is
10 fatal to their watchlisting claims." *Id.* at 999-1000. These aspects of *Halkin* are directly
11 controlling. Here, plaintiffs cannot succeed without proof that their communications have
12 been intercepted and disclosed by AT&T to the NSA. But the state secrets privilege bars
13 plaintiffs from proving any such interception. The list of the targets of the alleged NSA
14 program would naturally be one of the most sensitive secrets associated with the program.
15 This flaw is fatal to all of their claims.

16 III. CONCLUSION.

17 For the foregoing reasons, the Amended Complaint should be dismissed.

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