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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

IN RE NATIONAL SECURITY AGENCY TELECOMMUNICATIONS RECORDS LITIGATION (M:06-cv-1791)

This Document Relates to:

VIRGINIA SHUBERT, NOHA ARAFA, SARAH DRANOFF and HILARY BOTEIN, individually and on behalf of all others similarly situated,

Plaintiffs,

-against -

BARACK OBAMA, et al.,

Defendants.

Case No. 07-cv-00693-JSW

PLAINTIFFS' OPPOSITION TO DEFENDANTS' THIRD MOTION TO DISMISS AND FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

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

Now, for the third time in this case, the Government seeks to transform a limited, common law, evidentiary privilege[2] into sweeping immunity for its own unlawful conduct. If defendants were to prevail, no court could ever stop the Government from spying upon millions of innocent Americans, even if unlawful, unconstitutional, and criminal. But none of the few, narrow Supreme Court state secret cases of the past 223 years supports defendants' dangerous view. To the contrary, the Government's radical extension of the state secrets privilege defies over two centuries of American jurisprudence: law that established the constitutional right and duty of Article III courts to "say what the law is," *Marbury v. Madison*, 5 U.S. 137, 177 (1803); the right to be free from unreasonable searches and seizures, *see* U.S. Const. amend. IV; constitutional limitations upon Executive power, *see Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), and upon "military intrusion into civilian affairs," *Laird v. Tatum*, 408 U.S. 1, 15 (1972); and the right to a judicial forum to assert constitutional rights, *see Webster v. Doe*, 486 U.S. 592 (1988).

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[1] http://www.youtube.com/watch?v=osFprWnCjPA at 2:15 (statement by NSA operative Russell Tice). Mr. Tice later refers to the program as a "low-tech dragnet." *Id.* at 4:20.

[2] *See, e.g.*, *General Dynamics Corp. v. United States*, ___ U.S. ___, 131 S. Ct. 1900 (2011) (explaining the narrow evidentiary privilege in non-government contract cases).

The Government's state secrets argument is perhaps as frightening as the Dragnet itself. Under this argument, a secret program by the military to put a camera in every American's bedroom could not be revealed, if to reveal it might harm national security. A secret program by the President to abduct and torture Americans could not be revealed, much less enjoined, if to reveal it might harm national security. This is not some parade of horribles; it is the Government's position in this case.

Article III courts exist to prevent such unchecked power. "Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government."[3] So too, the uncontrolled ability of the Executive branch to insulate itself from Article III scrutiny.

Defendants' motion should be denied.

FACTS[4]

On June 9, 2005, then-President Bush assured the public that "Law enforcement officers need a federal judge's permission to wiretap a foreign terrorist's phone, a federal judge's permission to track his calls, or a federal judge's permission to search his property. Officers must meet strict standards to use any of these tools. And these standards are fully consistent with the Constitution of the U.S." Second Amended Complaint ("SAC") ¶ 54. As subsequently revealed in *The New York Times*, however, and later confirmed by, *inter alia*, President Bush, former Attorney General Gonzalez, published press reports, whistleblowers, and insiders within the United States government, in the fall of 2001 the National Security Agency ("NSA") launched a secret electronic surveillance program to intercept, search, and seize, without prior judicial authorization, the

[3] *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).

[4] The factual allegations of the Second Amended Complaint must be accepted as true for purposes of this motion. *See, e.g.*, *Colony Cove Properties, LLC v. City of Carson*, 640 F.3d 948, 955 (9th Cir. 2011) .

telephone and e-mail communications of persons inside the United States. *Id.* at ¶¶ 56-57. President Bush secretly approved and reauthorized the program more than 30 times. *Id.* at ¶ 58.

The President illegally placed the intelligence arm of the United States military "in the bedroom, in the business conference, in the social hour, in the lawyer's office–everywhere and anywhere a 'bug' can be placed."[5] The NSA intercepted (and continues to intercept) millions of phone calls and email of ordinary Americans, including plaintiffs, with no connection to Al Qaeda, terrorism, or any foreign government ("the Spying Program" or the "Dragnet"). *See, e.g.*, SAC ¶¶ 2, 5, 8. The Spying Program monitors millions of calls and emails made to or from the United States and other countries, and millions of calls and emails entirely within the United States, spying upon these private phone conversations and emails without a warrant. *Id.* at ¶¶ 62-78.

There is nothing speculative about the Spying Program. The existence of, and purported justifications for, the Dragnet are public. The Department of Justice Office of Legal Counsel authored no fewer than *nine* legal opinions in support of the program. SAC ¶ 60. For example, then-Deputy Assistant Attorney General John Yoo explained:

> [U]nder existing laws like FISA, you have to have the name of somebody, have to already suspect that someone's a terrorist before you can get a warrant. You have to have a name to put in the warrant to tap their phone calls, and so it doesn't allow you as a government to use judgment based on probability to say: "Well, 1 percent probability of the calls from or maybe 50 percent of the calls are coming out of this one city in Afghanistan, and there's a high probability that some of those calls are terrorist communications. But we don't know the names of the people making those calls." You want to get at those phone calls, those e-mails, but under FISA you can't do that.

Id.

Based solely on public, non-classified information, the mechanics of how the Spying Program operates are laid out in detail in the SAC, ¶¶ 62-78. In summary, the NSA relies on

[5] *Berger v. New York*, 388 U.S. 41, 64-65 (1967) (Douglas, J., concurring).

electronic communication companies, including AT&T and Verizon (used by the named plaintiffs) to intercept, search and seize, and subject to electronic surveillance, communications, including voice calls and e-mails, that pass through switches controlled by these companies. SAC ¶ 64. A former AT&T employee, Mark Klein, provided detailed testimony and documentary evidence as to how government agencies use these switches, in combination with "splitters" installed by the NSA, to acquire communications. *Id.* at ¶¶ 66-68. According to William Binney, former chief of the NSA's Signals Intelligence Automation Research Center, there are 10 to 20 such splitters located throughout the country. *Id.* at ¶ 67.

According to Klein and as confirmed by other knowledgeable witnesses, every single communication that passes through each splitter is directed to the NSA. SAC ¶ 68. Former NSA official Binney stated that, at the outset of this program, the NSA recorded 320 million telephone calls alone via this program, a number that has since increased. *Id.* at ¶ 69.

As government officials have acknowledged, "Most telephone calls in the United States" are reviewed; "[Y]ou have to have all the calls or most of them. But you wouldn't be interested in the vast majority of them." SAC ¶ 71. Once the NSA acquires the communications, they are stored in a vast government database, before being subjected to computerized content analysis, described by former Secretary of Homeland Security Michael Chertoff as "data-mining." *Id.* at ¶¶ 70, 77. If the communications include any of a number of keywords or phrases, they are "flagged," as are all other communications to or from that individual. *Id.* at ¶¶ 70, 72. Communications can also be flagged based on a related phone number or web address. *Id.* at ¶ 73.

NSA employees then listen to any flagged phone calls. SAC ¶¶ 74-76. Some have admitted to listening to calls simply for entertainment purposes, and sharing these calls with their colleagues. *Id.* at ¶ 75. As one employee explained, "It's almost like going through and finding someone's diary." *Id.* at ¶ 76. *After* an NSA employee reviews the communication, if he or she further flags the communication, then, and only then, does the government seek a warrant under the

appropriate statutory mechanisms. *Id.* at ¶ 78.

Defendants protest to this Court that the state secrets privilege *prevents* them from denying the existence of the Dragnet program. But, in fact, defendants have already done so in this very case. *See* Public Declaration of Keith Alexander, May 25, 2007 ¶ 16 (MDL Docket # 295-3[6]) ("Plaintiffs' allegations of a content surveillance dragnet are false.").

PROCEDURAL HISTORY

On May 17, 2006, plaintiffs filed a putative class action in the United States District Court for the Eastern District of New York, alleging claims for violations of FISA, 50 U.S.C. § 1810; the Wiretap Act, 18 U.S.C. §§ 2510, *et seq.*; the SCA, 18 U.S.C. §§ 2701, *et seq.*; and the Fourth Amendment. On August 31, 2006, the Judicial Panel on Multidistrict Litigation conditionally transferred the action to this Court as a "tag-along" to an MDL assigned to then-Chief Judge Walker. An Amended Complaint was filed on May 11, 2007.

Defendants filed their first Motion to Dismiss or for Summary Judgment on May 25, 2007, MDL Doc. #295, citing, *inter alia*, the state secrets privilege, which was administratively closed. On October 30, 2009, defendants filed a Second Motion to Dismiss and for Summary Judgment, raising, *inter alia*, the state secrets privilege and sovereign immunity. *Shubert* Doc. # 38. On January 21, 2010, Judge Walker issued an order dismissing this action and the *Jewel* action, on standing grounds not raised by the Government.

On December 29, 2011, the Ninth Circuit reversed Judge Walker's decision, declined to reach the state secrets issue, and remanded the action with instruction to grant the *Shubert* plaintiffs leave to amend their complaint. *Jewel v. National Security Agency*, 673 F.3d 902 (9th Cir. 2011). On May 8, 2012, the *Shubert* Plaintiffs filed the operative SAC. In light of Judge

[6] Earlier in this case, some documents were only filed on the master MDL docket, and not in this specific action. Where a document was only filed in the MDL docket, we refer to it as MDL Doc. # __. Cites to the docket in the specific *Shubert* action are marked Doc. # __.

Walker's retirement, the action was initially reassigned to Judge Gonzales Rogers, before being reassigned to this Court on September 17, 2012. Defendants filed their Third Motion to Dismiss and for Summary Judgment on September 28, 2012.

ARGUMENT

I. Section 1806(f) of FISA Preempts the State Secrets Privilege

Rather than repeat arguments made in *Jewel*, plaintiffs hereby adopt and incorporate Sections IV-V of the *Jewel* Plaintiffs' Motion for Partial Summary Judgment, No. 08-cv-04373-JSW, *Jewel* Doc. # 83 at 9-22, and Section I of the *Jewel* Plaintiffs' Combined Reply in Support of Their Motion for Partial Summary Judgment and Opposition to the Government Defendants' Cross-Motion, *Jewel* Doc. # 112 ("*Jewel* Reply and Opposition") at 2-11. For the reasons set forth there, FISA, including Section 1806(f), preempts the state secrets privilege as to all of plaintiffs' claims.

II. Even if Congress Had Not Displaced the State Secrets Privilege, the Privilege Does Not Apply Here

The SAC alleges a wholesale military intelligence takeover of the phones and email. The Government's alleged conduct is far more sweeping and intrusive than that involved in any of the six Supreme Court state secrets privilege cases in the history of the country: *General Dynamics Corp. v. United States*, ___ U.S. ___, 131 S. Ct. 1900 (2011); *Tenet v. Doe*, 544 U.S. 1 (2005); *Webster v. Doe*, 486 U.S. 592 (1988); *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139 (1981); *United States v. Reynolds*, 345 U.S. 1 (1953); *Totten v. United States*, 92 U.S. 105 (1875). Five of these cases involved plaintiffs who volunteered to work or contract with United States military or intelligence. The sixth, *Weinberger*, concerned potential nuclear weapons on a Navy facility. 454 U.S. at 146. *No* case involved the United States military reaching into the heartland of the country, much less as part of a dragnet representing one of the most sweeping constitutional violations in American history.

In short, this case is unprecedented, and the assertion of the state secrets privilege in this case is unprecedented. It creates fundamental constitutional conflicts no court has ever wrestled with, among them: whether the privilege overrides (i) constitutional limitations upon the President to exert power unauthorized by Congress within the domestic sphere, *see Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952); (ii) "the deeply rooted and ancient opposition in this country to the extension of military control over civilians," *Reid v. Covert*, 354 U.S. 1, 33 (1957); and (iii) the constitutional right and duty of Article III courts to "say what the law is," *Marbury v. Madison*, 5 U.S. 137, 177 (1803), especially in a case involving ongoing, widespread violations of constitutional rights, *see Webster*, 486 U.S. at 603.

A. The Two Strands of the State Secrets Privilege

A review of the limited history of the state secrets privilege shows both its narrow scope, and why it would be inappropriate to apply it here.

The first known case citing the privilege was the trial of Aaron Burr. Burr moved for a *subpoena duces tecum* ordering President Jefferson to produce a letter by General James Wilkinson; the Government argued the letter contained confidential material. Riding circuit, Chief Justice Marshall found only a qualified evidentiary privilege: if the letter "contain[s] any matter which it would be imprudent to disclose, which it is not the wish of the executive to disclose, such matter, *if it be not immediately and essentially applicable to the point*, will, of course, be suppressed." *United States v. Burr*, 25 F. Cas. 30, 37 (C.C.D.Va. 1807) (emphasis added). Material that *was* "immediately and essentially applicable to the point" would not be suppressed, notwithstanding the "impruden[ce]" of disclosure. *Id.*

As the Supreme Court has explained, since *Burr*, two doctrines have developed, arising out of different judicial powers. *General Dynamics Corp.*, 131 S. Ct. at 1906. One derives from courts' "common-law authority to fashion contractual remedies in Government-contracting disputes." *Id.* When applied in those contracting disputes, the privilege "bars adjudication of

claims premised on state secrets (the '*Totten* bar')." *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1077 (9th Cir. 2010) (*en banc*) (citing *Totten*, 92 U.S. 105); *see also General Dynamics,* 131 S. Ct. at 1906-07. The more commonly applied state secrets doctrine derives from the Court's "power to determine the procedural rules of evidence." This is merely an evidentiary privilege; when properly invoked, "the privileged information is excluded and the trial goes on without it." *General Dynamics*, 131 S. Ct. at 1906. Here, as this case does *not* call upon the Court's "common-law authority to fashion contractual remedies in Government-contracting disputes," the so-called *Totten* bar does not apply. At best, only particular, privileged evidence can be excluded.

Totten, *Tenet*, and *General Dynamics*, as well as the Ninth Circuit case *Kasza v. Browner*, 133 F.3d 1159 (9th Cir. 1998), all involve individuals or corporations who willingly entered into military and/or espionage contracts with the Government. For example, *Totten* was a suit based on a contract a spy allegedly made with President Lincoln to recover compensation for espionage services rendered during the Civil War. *Id.* at 105-06. The Supreme Court noted:

> [b]oth employer and agent must have understood that the lips of the other were to be for ever sealed respecting the relation of either to the matter. This condition of the engagement was implied from the nature of the employment.

Id. at 106. In short, the plaintiff's decision to become a spy operated as a waiver of his ability to enforce the espionage agreement. *See also Tenet v. Doe*, 544 U.S. 1 (2005) (reaffirming *Totten* and holding that two alleged Cold War spies could not sue the CIA to enforce an espionage agreement); *Kasza*, 133 F.3d 1159 (applying *Totten* bar brought by widow of former Air Force employee who had worked at a "classified operating location").

Mohamed centered on a contract between a company and the United States to "provide[] direct and substantial services to the United States for its so-called 'extraordinary rendition' program, thereby enabling the clandestine and forcible transportation of terrorism suspects to secret overseas detention facilities." 614 F.3d at 1070 (internal marks omitted). To the

extent *Mohamed* suggested that that the *Totten* bar is not limited to cases involving military contracts with the Government, *id.* at 1078-79, the Supreme Court's decision in *General Dynamics* overruled *Mohamed*, holding that the *Totten* bar is an expression of the Court's common law authority to fashion the law of government contracts. 131 S. Ct. at 1906. The Court's *General Dynamics* decision, almost entirely devoted to the unique circumstances of espionage and military government contracting and the "rough, very rough" justice acceptable in such circumstances, emphasized the narrowness of the draconian *Totten/Tenet* bar. *Id.* at 1909.

Even the Supreme Court cases applying the limited evidentiary state secrets privilege almost exclusively involved persons who worked with or for the military. The first modern state secrets case, *United States v. Reynolds*, 345 U.S. 1 (1953), arose out of the death of individuals who volunteered to observe a secret test run of a B-29 aircraft. *Id.* at 3. The decedents chose to volunteer for a sensitive military mission, and as in *Totten*, plainly must have known of the secret nature of the mission. After the flight crashed, their widows sued the government under the Federal Tort Claims Act and sought discovery of the Air Force's accident investigation report. *Id.* at 2-3. The Air Force filed a formal "Claim of Privilege" and refused to produce the accident report. *Id.* at 4-5.

Reynolds first formally defined the state secrets privilege. It applies only where a court is satisfied "from all the circumstances of the case," that (1) "there is a reasonable danger that compulsion of the evidence" will (2) "expose *military matters*" which (3) "in the interest of national security, should not be divulged." 345 U.S. at 10 (emphasis added). Only when this three-part test is met, "the occasion for the privilege is appropriate." *Id.*

The *Reynolds* Court explained that "[i]n each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted." *Id.* at 11.

The *Reynolds* holding was perfectly sensible. First, the Court explained that (unlike here) the Government had *not* opposed the depositions of the surviving crew members, and that (unlike here) the secret information at issue was simply irrelevant. 345 U.S. at 5, 11. The Court held:

> it should be possible for respondents to adduce the essential facts as to causation without resort to material touching upon military secrets. Respondents were given a reasonable opportunity to do just that, when petitioner formally offered to make the surviving crew members available for examination. We think that offer should have been accepted.

Id. Second, the case plainly dealt with a "military matter," *i.e.*, a military mission involving persons flying on a military aircraft. *Reynolds* also did not have occasion to consider the privilege in the context of executive encroachment into the domestic sphere, *cf. Youngstown Sheet*, nor in the context of the "military['s] intrusion into civilian affairs," *Laird*, 408 U.S. at 15. Nor did *Reynolds* consider the privilege in the context of a plaintiff asserting constitutional claims.

Like the case before the Court, however, *Webster v. Doe*, 486 U.S. 592 (1988), did involve constitutional claims. There, an employee fired by the CIA brought constitutional claims against the agency over his termination based on his sexual orientation. The Court held that Section 102(C) of the National Security Act of 1947 could not preclude judicial review of the constitutional claims. *Id.* at 603. In reaching that conclusion, the Court noted the "serious constitutional question that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Id.* (citation omitted). Although the CIA Director "complain[ed] that judicial review even of constitutional claims will entail extensive rummaging around in the Agency's affairs to the detriment of national security," *id.* at 604, the Court permitted the case to go forward. At the same time, though, citing *Reynolds*, the Court explained the district court could supervise discovery in a way that "balance[d] respondent's need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for

confidentiality and the protection of its methods, sources, and mission." *Id.*

B. Plaintiffs Adopt the Arguments Set Forth by the *Jewel* Plaintiffs

Plaintiffs adopt and incorporate Section II of the *Jewel* Plaintiffs' Reply and Opposition, *Jewel* Doc. # 112. For the same reasons set forth there, the state secrets privilege provides no basis for dismissing the SAC or granting summary judgment in this case. As in *Jewel*, the *Shubert* Plaintiffs have filed a Rule 56(d) Declaration with this Opposition, laying out the discovery they would conduct in order to obtain "facts essential to justify [their] opposition." *See, e.g.*, *Garret v. City and County of San Francisco*, 818 F.2d 1515, 1518-19 (9th Cir. 1987); *Kremen v. Cohen*, No. 5:11-CV-05411-LHK, 2012 WL 2919332, at *5-*6 (N.D. Cal. Jul. 17, 2012).

C. Additional Limits on the State Secrets Privilege

In addition to the reasons identified by the *Jewel* plaintiffs, the *Shubert* plaintiffs identify several other grounds for denying the Government's motion.

First, as *Reynolds* held, the privilege by definition only applies to purely "military matters." 345 U.S. at 10. On its face, it cannot apply to the indiscriminate interception of phone calls and emails of tens of millions of civilians, 99.999% of which do not concern military matters.[7] As observed in *Hepting v. AT&T*, 439 F. Supp. 2d 974, 993 (N.D. Cal. 2006), *remanded on other grounds by* 539 F.3d 1157 (9th Cir. 2008), "most cases in which the very subject matter [of the case] was a state secret involved classified details about either a highly technical invention or a covert espionage relationship." There is good reason for this. *Reynolds*, by its own terms, only applied the privilege where "there is a reasonable danger that compulsion of the evidence will expose *military matters* which, in the interest of national security, should not be divulged." 345 U.S. at 10. The secret test flight of a B-29 bomber (*Reynolds*), the covert spy relationships with

[7] The Court may take judicial notice that the overwhelming majority of phone calls and emails by people in the United States do not concern "military matters." *See* Fed. R. Evid. 201(b)(1) (court may judicially notice a fact "generally known within the trial court's territorial jurisdiction"), Needless to say, calls/emails about school, health, dinner, traffic, kids, sports, movies, Justin Bieber, and the like do not concern "military matters."

President Lincoln (*Totten*) and with the CIA (*Tenet*), operations on an Air Force base (*Kasza*) and a potential nuclear naval facility (*Weinberger*), are all plainly core "military matters."[8]

But if *Youngstown Sheet* teaches anything, it is that the encroachment of the military into the purely civilian affairs of ordinary Americans, *e.g.*, spying upon hundreds of millions of phone calls and emails that have nothing to do with the military or with foreign intelligence, is a *civilian* matter. *See* 343 U.S. at 642 (Jackson, J., concurring) ("[N]o doctrine that the Court could promulgate would seem . . . more sinister and alarming than that a President . . . can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture."); *id.* at 632 (Douglas, J., concurring) ("[O]ur history and tradition rebel at the thought that the grant of military power carries with it authority over civilian affairs."). *Reynolds* steered well clear of any such constitutional conflict. *Reynolds* therefore carefully limited the privilege (and its holding) to "military matters."

Second, outside the unique context of contracts with military/intelligence agencies, where the parties "assumed the risk" that the privilege might preclude suit, the privilege—like every other privilege—can, at best, exclude only privileged *evidence* in the context of specific evidentiary disputes. *See General Dynamics*, 131 S. Ct. at 1906. It cannot be used to dismiss entire cases at the motion to dismiss stage. *Id.*

Third, defendants' content monitoring program is "hardly a secret," much less a "state secret." *Hepting*, 439 F. Supp. 2d at 994. Defendants publicly "admitted the existence" of the program, that it "monitor[s] communication content," "tracks calls into the United States or out

[8] The great majority of other state secrets cases similarly concern core military matters and/or persons who worked with or for United States intelligence or the military. *See*, *e.g.*, *Dep't of Navy v. Egan*, 484 U.S. 518 (1988) (denial of security clearance to naval facility that serviced nuclear weapons); *Weinberger*, 454 U.S. 139 (suit against Navy to examine nuclear weapons storage); *Sterling v. Tenet*, 416 F.3d 338 (4th Cir. 2005) (covert agent's employment lawsuit against CIA); *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236 (4th Cir. 1985) (Navy and CIA "dolphin torpedo" and "open-ocean" weapons systems); *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268 (4th Cir. 1980) (action by Navy contractor against Navy employee for loss of Navy contract) (cases all cited by defendants).

of the United States," and "operates without warrants." *Id.* at 992 (citations omitted). Because the "very subject matter of this action is hardly a secret," the state secrets privilege cannot bar this suit. *Id.* at 994; *see also Jencks v. United States*, 353 U.S. 657, 675 (1957) (Burton, J., concurring) ("Once the defendant learns the state secret . . . the underlying basis for the privilege disappears, and there usually remains little need to conceal the privileged evidence from the jury. Thus, when the Government is a party, the preservation of these privileges is dependent upon nondisclosure of the privileged evidence to the defendant.").

The record here shows no secrecy exists. The President "opened the door for judicial inquiry by publicly confirming and denying material information about its monitoring of communication content." *Hepting*, 439 F. Supp. 2d at 996. Defendants cannot both deny the existence of a broader Dragnet, *and* claim that the state secrets privilege prevents them from making such a denial. Yet that is what they attempt to do in this case. As noted above, defendants previously submitted a declaration from Keith Alexander, Director of the National Security Agency, swearing that "Plaintiffs' allegations of a content surveillance dragnet are false." *See* Public Alexander Declaration, May 25, 2007, ¶ 16, MDL Doc. # 295-3. As Judge Walker explained, "If the government's public disclosures have been truthful," discovery regarding those disclosures "should not reveal any new information that would assist a terrorist and adversely affect national security." *Hepting*, 439 F. Supp. 2d at 996. But "if the government has not been truthful, the state secrets privilege should not serve as a shield for its false public statements." *Id.* Defendants cannot have it both ways, as made clear in the Ninth Circuit's 2007 *Al-Haramain* decision, where the Court explained that "the government's many attempts to assuage citizens' fears that *they* have not been surveilled now doom the government's assertion that the very subject matter of this litigation, the existence of a warrantless surveillance program, is barred by the state secrets privilege." *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1200 (9th Cir. 2007). The same situation applies here.

Finally, a plethora of constitutional issues would be raised by the application of the state secrets privilege, as set forth in Part III, *infra*. The doctrine of constitutional avoidance compels the court to construe the evidentiary privilege narrowly to avoid reaching these questions in light of the "long-standing policy of avoiding unnecessary constitutional decisions." *Elkins v. Moreno*, 435 U.S. 647, 661 (1978); *see also Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1222 (9th Cir. 2012) (discussing doctrine of constitutional avoidance). Courts "seek to avoid construing common law rules so as to create serious constitutional problems." *Veilleux v. Nat'l Broad. Co.*, 206 F.3d 92, 122 (1st Cir. 2000); *see also Watters v. TSR, Inc.*, 904 F.2d 378, 383 (6th Cir. 1990) (common law would be applied in a way to avoid constitutional problems).

III. The Application of the State Secrets Privilege Would Violate the Constitution

As noted above, the doctrine of constitutional avoidance compels the Court to construe the evidentiary privilege narrowly to avoid confronting constitutional questions. Should the Court determine, however, that the state secrets privilege is applicable, this Court must address the constitutional issues directly and establish a firm, constitutional limit on this judge-made common law doctrine.

First, the state secrets privilege cannot be used as a covert end-run around the holdings of *Reid* and *Youngstown Sheet*. It cannot create a *de facto* immunity for the extension of military control or intrusion into civilian life. It cannot be a *de facto* cover for unchecked Executive power within the domestic sphere. It cannot be a *de facto* license for the President to violate statutes. *See Youngstown Sheet*, 343 U.S. at 635-638 (Jackson, J., concurring op.) (noting three levels of executive authority). The Executive cannot violate *Reid* or *Youngstown Sheet* simply by acting in secret.

Second, courts cannot abdicate their "emphatic[]" constitutional right and duty of Article III courts to "say what the law is" when the privilege is invoked. *Marbury*, 5 U.S. at 177.

In the context of this case, whatever limits the Court places on plaintiffs' access to information, the Court must exercise its right and duty to opine on the legality of the Dragnet itself. This is particularly important in a case involving "ongoing, widespread violations of individual constitutional rights." *Hepting*, 439 F. Supp. 2d at 993. It is also particularly vital where the Government seeks to use an evidentiary privilege to dismiss an entire case at the outset, divorced from any concrete evidentiary dispute.

Third, the court must assure plaintiffs' right to a judicial forum to assert their constitutional rights, even where the privilege is invoked. *See Webster v. Doe*, 486 U.S. 592, 603 (1988). Where constitutional claims are at stake, Supreme Court precedent requires a balancing of the parties' interests, not dismissal.

A. The Dragnet Is Unlawful

We start with a fundamental point. The Dragnet alleged in the SAC violates the law. The Government does not even attempt to claim that the alleged Dragnet is lawful; the Dragnet cannot be defended on the merits.

1. The Dragnet Violates the Fourth Amendment

"The security of one's privacy against arbitrary intrusion by the police–which is at the core of the Fourth Amendment–is basic to a free society." *Berger v. New York*, 388 U.S. 41, 53 (1967) (citation omitted). A Dragnet sweeping hundreds of millions of private phone calls and emails of millions of innocent Americans, without a warrant or probable cause, is the very opposite of what the Fourth Amendment requires.

First, the Dragnet program violates the Fourth Amendment's requirement the government to obtain a warrant before intercepting the content of a telephone call. *See Katz v. United States*, 389 U.S. 347, 352 (1967); *Berger*, 388 U.S. at 51. Wiretapping "[b]y its very nature . . . involves an intrusion on privacy that is broad in scope," *Berger*, 388 U.S. at 56, and thus bears a dangerous "similarity to the general warrants out of which our Revolution sprang," *id.* at 64

(Douglas, J., concurring). Warrantless searches are presumptively unreasonable, absent "a few specifically established and well-delineated exceptions," not present here. *Katz*, 389 U.S. at 357; *see also United States v. Karo*, 468 U.S. 705, 717 (1984).

The Supreme Court has never recognized an exception to the warrant requirement for domestic intelligence surveillance. To the contrary, in *United States v. United States District Court for the Eastern District of Michigan*, 407 U.S. 297 (1972) ("*Keith*"), the Supreme Court rejected such an exception, holding that the Fourth Amendment's promise of privacy "cannot properly be guaranteed if security surveillance may be conducted solely within the discretion of the Executive Branch." 407 U.S. at 316-17. In *Keith*, the Court rejected multiple arguments for a warrantless eavesdropping intelligence program. It rejected the argument that judicial review "would obstruct the President in the discharge of his constitutional duty to protect domestic security." 407 U.S. at 318. It rejected the argument that the surveillance was directed at "the collecting and maintaining of intelligence with respect to subversive forces, and [] not an attempt to gather evidence for specific criminal prosecutions." *Id.* at 318-19. And it rejected the argument "that courts . . . have neither the knowledge nor the techniques necessary to determine" whether the "surveillance was necessary to protect national security," issues that "involve a large number of complex and subtle factors beyond the competence of courts to evaluate." *Id.* at 319. Most important for this case, the Court rejected the argument "that disclosure to a magistrate of all or even a significant portion of the information involved" in the surveillance would endanger "the national security and . . . the lives of informants and agents . . . . Secrecy is the essential ingredient in intelligence gathering." *Id.*

Instead, holding that "[o]fficial surveillance, whether its purpose be criminal investigation or ongoing intelligence gathering, risks infringement of constitutionally protected privacy of speech, " *id.* at 320, the Court insisted a warrant be procured. Although the warrant procedure imposes an "added burden" upon the Executive branch, the warrant will "reassur[e] . . .

the public generally that *indiscriminate wiretapping and bugging of law-abiding citizens cannot occur*," *id.* at 321 (emphasis added), which is precisely what the SAC alleges here.

Second, the Dragnet violates the Fourth Amendment's proscription against general searches. The use of "general warrants" was "a motivating factor behind the Declaration of Independence . . . . The Fourth Amendment's requirement that a warrant 'particularly describ(e) the place to be searched, and the persons or things to be seized,' repudiated these general warrants and makes general searches impossible." *Berger*, 388 U.S. at 58 (citing the Fourth Amendment). The Dragnet is even worse than a general warrant, because it is a general search without a warrant. Rather than target any "particular[] . . . place to be searched" or "persons or things to be seized," U.S. Const. amend. IV, it indiscriminately targets every call and every email of every person. No such general search has ever been permitted in any Fourth Amendment case.

Third, the Dragnet violates the Fourth Amendment because the indiscriminate eavesdropping of millions of Americans is "unreasonable" and not based on "probable cause." *Id.* The Dragnet sweeps millions of Americans without probable cause to believe either that they committed a crime, or even that they are an "agent of a foreign power." 50 U.S.C. § 1805(a)(3). Wiretapping without probable cause violates the Fourth Amendment. *See, e.g.*, *United States v. White*, 401 U.S. 745, 758 (1971); *Berger*, 388 U.S. at 58. Defendants do not challenge the sufficiency of plaintiffs' Fourth Amendment claim because they cannot. As alleged, defendants violated the Fourth Amendment.

2. The Dragnet is a Crime and Violates FISA

The Dragnet not only violates the Fourth Amendment; it is a crime under a federal statute. FISA is the "exclusive charter" intended to "regulate the exercise of [presidential] authority" over intelligence surveillance. S. Rep. No. 95-604(I), at 15-16 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3904, 3916-17. FISA was specifically designed to "curb the practice by which the Executive branch may conduct warrantless electronic surveillance on its own unilateral

determination that national security justifies it." S. Rep. No. 95-604(I), at 8, *reprinted in* 1978 U.S.C.C.A.N. at 3910.

The procedures set out in FISA and in Title III[9] are "the *exclusive means* by which electronic surveillance . . . and the interception of domestic wire, oral, and electronic communications may be conducted," 18 U.S.C. § 2511(2)(f) (emphasis added),[10] *even* during emergencies and times of war. In an emergency, FISA permits the Executive to conduct warrantless surveillance for up to 7 days. *See* 50 U.S.C. § 1805(e)(1). FISA also permits electronic surveillance without a court order for 15 calendar days after a formal declaration of war. *See* 50 U.S.C. § 1811.

The Spying Program undisputedly involves "electronic surveillance" of Americans. *See* 50 U.S.C. § 1801(f) (defining the term). Any person who "engages in electronic surveillance under color of law except as authorized by statute" and without "a search warrant or court order" is guilty of a federal crime, "punishable by a fine of not more than $10,000 or imprisonment for not more than five years, or both." 50 U.S.C. § 1809. In addition, any "aggrieved person," defined as any person "whose communications or activities were subject to electronic surveillance," 50 U.S.C. § 1801(k)), other than a foreign power or an agent of a foreign power, "shall have a cause of action against any person" who violated 50 U.S.C. § 1809. *See* 50 U.S.C. § 1810.

As alleged in the SAC, defendants "engage[d] in electronic surveillance" of plaintiffs without "a search warrant or court order," and therefore violated FISA. 50 U.S.C. §§ 1809(b), 1810.

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[9] Pub. L. No. 90-351, 83 Stat. 311 (1968) (codified as amended at 18 U.S.C. §§ 2510-2522).

[10] Rejecting the so-called "inherent authority" argument, Congress expressly rejected language that would have made FISA and Title III the "exclusive *statutory* means" under which electronic surveillance could be conducted, instead making those statutes simply the "exclusive means" governing such surveillance. H.R. Conf. Rep. No. 95-1720, at 35 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4048, 4064 (emphasis added); *see also* S. Rep. 95-604(I), at 6, *reprinted in* 1978 U.S.C.C.A.N. at 3907 ("The bill recognizes no inherent power of the President in this area.").

B. Separation of Powers Principles Require the Court to Review the Unconstitutional Conduct Alleged

It is, then, in the context of a criminal, unconstitutional Dragnet that the President now invokes the state secrets privilege. But nothing in the history of this limited evidentiary privilege permits this Court to dismiss the case. To the contrary, core constitutional principles forbid it.

"It is emphatically the province and duty of the judicial department to say what the law is." *Marbury*, 5 U.S. at 177. This duty is especially great where constitutional rights are at stake. "[A]lthough the attempt to claim Executive prerogatives or infringe liberty in the name of security and order may be motivated by the highest of ideals, the judiciary must remain vigilantly prepared to fulfill its own responsibility to channel Executive action within constitutional bounds." *Zweibon v. Mitchell*, 516 F.2d 594, 604 (D.C. Cir. 1975) (*en banc*) (plurality op.). It is particularly "the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." *Reid*, 354 U.S. at 40 (citation omitted).

"With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law." *Youngstown Sheet*, 343 U.S. at 655 (Jackson, J., concurring). "Ours is a government of divided authority on the assumption that in division there is not only strength but freedom from tyranny." *Reid*, 354 U.S. at 40; *The Federalist No. 47* (James Madison) ("The accumulation of powers, legislative, executive, and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny"); *Hamdan v. Rumsfeld*, 548 U.S. 557, 638 (2006) (Kennedy, J., concurring) ("Concentration of power puts personal liberty in peril of arbitrary action by officials, an incursion the Constitution's three-part system is designed to avoid.").

These fundamental separation of powers principles and the obligations of Article III courts are not altered in wartime. In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), which reversed on

due process grounds the dismissal of a citizen "enemy combatant's" petition for habeas corpus, the Supreme Court held that "we have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." *Id.* at 536 (plurality op.); *see also Ex Parte Milligan*, 71 U.S. 2, 120 (1866) ("The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."); *Youngstown Sheet*, 343 U.S. at 650 (Jackson, J., concurring) ("Aside from suspension of the privilege of the writ of habeas corpus in time of rebellion or invasion, when the public safety may require it, [the founders] made no express provision for exercise of extraordinary authority because of a crisis. I do not think we rightfully may so amend their work."). "Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." *Hamdi*, 542 U.S. at 536 (plurality opinion).

It is a core constitutional principle that the President is *un*able to assert Commander-in-Chief and "foreign affairs" powers within the domestic sphere. In the *Youngstown Sheet* case, striking down President Truman's executive order seizing steel production facilities in order to avert a strike during the Korean War, the Court held that the President's power does not extend to regulating private domestic activities, however connected to the actual conduct of war: "Even though 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities." 343 U.S. at 587.

The SAC alleges a domestic spying program, in the United States, affecting millions of American citizens, most of whom have never traveled abroad on vacation, much less to affiliate with the Al Qaeda terrorist network. This case falls within the heartland of *Youngstown*.

Another core separation of powers principle directly applicable here is "the deeply rooted and ancient opposition in this country to the extension of military control over civilians." *Reid*, 354 U.S. at 33; *see id.* at 23-24 ("The Founders envisioned the army as a necessary institution, but one dangerous to liberty if not confined within its essential bounds."); *Laird v. Tatum*, 408 U.S. 1, 15 (1972) (recognizing "a traditional and strong resistance of Americans to *any military intrusion into civilian affairs*" that "has deep roots in our history") (emphasis added); *Youngstown Sheet*, 343 U.S. at 632 (Douglas, J., concurring) ("[O]ur history and tradition rebel at the thought that the grant of military power carries with it authority over civilian affairs."); *Toth v. Quarles*, 350 U.S. 11, 13 (1955) ("[A]ssertion of military authority over civilians cannot rest on the President's power as commander-in-chief, or on any theory of martial law."). As the Supreme Court wrote in 1957, "[t]he country ha[d] remained true to that faith," a faith "firmly embodied in the Constitution," for "almost one hundred seventy years." *Reid*, 354 U.S. at 40.

This core constitutional principle is very much at stake here, where the President seeks to justify a spying program upon the American people by the intelligence arm of the Department of Defense, based upon a war against a foreign terrorist organization. *Youngstown Sheet*, 343 U.S. at 642 (Jackson, J., concurring) (explicating dangers of permitting use of President's foreign affairs power to "enlarge his mastery over the internal affairs of the country").

C. The President Cannot Use the State Secrets Privilege to Create Immunity from Suit for Unconstitutional Acts

It takes little imagination to project the result of a holding dismissing this case on state secrets grounds. If the NSA installed a secret camera into the bedroom of every Muslim-American, every black American, every Republican, or simply every American, there is little doubt that (i) *someone* under surveillance could be a terrorist, and therefore, (ii) revealing the program could impair national security. Such dragnets would still violate, *inter alia*, the Fourth Amendment, the First Amendment, and the Equal Protection Clause. But under defendants'

logic—the very rule they want this Court to uphold in this case—an Article III court could not declare the program unconstitutional, enjoin it, or even permit its revelation. The secrecy surrounding the illegal program becomes *de facto* immunity for the program itself.

Youngstown is instructive. The Supreme Court held that President Truman could not seize the nation's steel mills, even to assure steel production in wartime. Under the Government's argument, however, *Youngstown* is no longer good law if the President acts both illegally *and* secretly. Had the President secretly seized the mills, and asserted the state secrets privilege, no plaintiff and no court could have revealed, much less enjoined, the seizure. Even if steel mill whistleblowers discovered and reported the program, no court could enjoin it. The analysis is the same with telecommunications companies. In the Government's view, if the NSA simply seized AT&T, Verizon, Sprint, *et al.* in secret, in order to intercept the calls and email of all Americans (including some terrorists), again—no plaintiff and no court could reveal, much less enjoin, the program.

To state the Government's position is to recognize its dangerous absurdity. It is a legal regime of absolute, unchecked Executive power. It simply cannot be that the President can, through the state secrets privilege, immunize any and all illegal conduct with national security implications. In brief after brief, oral argument after argument, for the last five years, plaintiffs have challenged the Government to articulate *some* constitutional limitation on the state secrets privilege. In each case, the Government has failed. In defendants' view, if revealing a program might compromise national security, no Article III court can enjoin the program, period. It does not matter if the program is illegal, criminal, or unconstitutional. It does not matter whether or not it violates the rights of 3, 300, or 300 million Americans.

This national security *uber alles* doctrine has no place in our Constitutional jurisprudence. Courts have rejected it in every possible context, from the so-called "enemy combatant" doctrine, *see Hamdi*, 542 U.S. 507, to military tribunals for alleged terrorists, *Hamdan*,

548 U.S. 557, the seizure of factories in wartime, *Youngstown Sheet*, 343 U.S. 579, even to military justice for civilians *voluntarily* living on foreign U.S. military bases, *Reid*, 354 U.S. at 33.

The Government's position is particularly disturbing where, as here, it seeks to prevent the Court from exercising its right and duty under *Marbury* to opine on the merits, especially in a constitutional case. Here defendants seek to use a common law privilege to deny plaintiffs a judicial forum to assert core Fourth Amendment rights. *Reynolds* was a tort case brought by three people. But as the Supreme Court held in *Webster*, a case that post-dates *Reynolds*, a "serious constitutional question . . . would arise" if even "a federal *statute* were construed to deny any judicial forum for a colorable constitutional claim." *Webster*, 486 U.S. at 603 (citation omitted). In *Webster*, notwithstanding plaintiff's status as a former CIA employee, and notwithstanding the CIA Director's claim that "judicial review even of [plaintiff's] constitutional claims" will be "to the detriment of national security," *id.* at 604, the Supreme Court refused to dismiss the case. Instead, and in contrast to *Reynolds*, the Court instructed the district court to "balance [plaintiff's] need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission." *Id.*; *see also Stehney v. Perry*, 101 F.3d 925, 934 (3d Cir. 1996) (permitting constitutional challenge to the NSA's revocation of plaintiff's national security clearance in part to avoid the "serious constitutional question that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim").

Though *Webster* cited *Reynolds*, the *Webster* court struck a different balance where constitutional rights were at stake–permitting the case to proceed, and discovery to be held, and a careful balancing of the parties' respective interests.[11]

[11] This case is even stronger than *Webster*, because Congress passed a law (FISA) authorizing discovery, not requiring dismissal. The constitutional interests at stake here are also far greater than in *Webster*. *Webster* involved a single

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If any case placed the conflict between this limited common law doctrine and the Constitution into stark relief, it is this one. Had the President violated the Constitution openly, announcing that the NSA indiscriminately intercepts the calls/emails of millions of Americans, an Article III court would enjoin the program within a day. That the President violates the Constitution *secretly* does not change the constitutional calculus.

IV. Defendants' Limited Assertion of Sovereign Immunity Does Not Support Dismissal

The Government advances only a single immunity argument in the *Shubert* case: that the United States, and Defendants Obama, Alexander, and Holder (in their official capacities only) enjoy sovereign immunity from Plaintiffs' FISA claim.

These defendants are not immune under 50 U.S.C. § 1810. First, Congress waived immunity by expressly making federal officers acting in their official capacities subject to suit for damages. *In re Nat'l Sec. Agency Telecomm. Records Litig.*, 564 F. Supp. 2d 1109, 1124-25 (N.D. Cal. 2008), *rev'd sub nom. Al-Haramain Islamic Fdn., Inc. v. Obama*, --- F.3d ---, 2012 WL 3186088, at *4 (9th Cir. Aug. 7, 2012); 50 U.S.C. § 1810. Second, Congress waived immunity by expressly making "any . . . entity," including the United States, subject to suit. *See* 50 U.S.C. § 1801(m) (defining "Person(s)" amenable to suit to include "any. . . entity").[12] For all the reasons set forth *supra* and in Judge Walker's opinion in *In re Nat'l Sec. Agency Telecomm. Records Litig.*,

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plaintiff, asserting fairly weak constitutional claims. *See Webster*, 486 U.S. at 602 ("We share the confusion of the Court of Appeals as to the precise nature of respondent's constitutional claims."). *Shubert* is a putative class of millions of Americans, asserting extremely serious violations of the Fourth Amendment. Defendants' radical attempt to deny plaintiffs a judicial forum to assert their Fourth Amendment claims must be rejected. *Webster*, 486 U.S. at 603.

[12] FISA provides a cause of action for damages against any "person" who commits unlawful electronic surveillance in violation of 50 U.S.C. § 1809. FISA defines a "person" to include any "entity," *without excepting the United States*, as do, for example, provisions of the Electronic Communications Privacy Act (ECPA). *See, e.g.*, 18 U.S.C. §§ 2520 - 2707(a). "Entity" includes "governmental entities" such as the United States. *See Adams v. City of Battle Creek*, 250 F.3d 980, 985 (6th Cir. 2001); *Organizacion JD Ltda v. U.S. Dep't Of Justice*, 18 F.3d 91, 94 (2d Cir. 1994). Had Congress meant to except "the United States" from the scope of the word "entity" in section 1801(m), Congress could and would have done so.

564 F. Supp. 2d at 1124-25, all incorporated herein, sovereign immunity should not bar the FISA claim against any defendant in this case.

Nevertheless, plaintiffs recognize that, in *Al-Haramain Islamic Foundation, Inc.*, 2012 WL 3186088, at *4, the Ninth Circuit recently held that the United States enjoys sovereign immunity for claims under 50 U.S.C. § 1810. Though plaintiffs intend to press (and preserve) the arguments against immunity set forth *supra*, at this district court level, this Court is constrained to follow the Ninth Circuit's holding.[13]

CONCLUSION

The President offers no limiting principle for this breathtaking extension of the state secrets privilege. Any unconstitutional conduct, any violation of law–no matter how many people it affects, no matter how violative of fundamental rights–cannot be stopped, or even revealed, if its revelation might harm national security. Such an awesome power "either has no beginning or it has no end. If it exists, it need submit to no legal restraint. . . . [It may not] plunge us straightway into dictatorship, but it is at least a step in that direction." *Youngstown Sheet*, 343 U.S. at 653 (Jackson, J., concurring).

Plaintiffs respectfully request that the Court (1) determine that the SAC states a valid legal claim; (2) deny defendants' motion; and (3) grant such other relief as is just and proper.

[13] The holding, of course, does not apply to plaintiffs' FISA claims against defendants in their individual capacities, which the Government does not (and could not) challenge on immunity grounds. *See, e.g.*, *Fazaga v. Fed. Bureau of Investigation*, No. 8:11-cv-00301-CJC, --- F. Supp. 2d ---, 2012 WL 3541711 (C.D. Cal. Aug. 14, 2012) (citing *Al-Haramain*, dismissing § 1810 claim against Government but denying motion to dismiss against government agents). In addition, contrary to defendants' suggestion, plaintiffs have included requests for declaratory relief and injunctive relief. SAC at 26 ¶ B. To the extent plaintiffs' claims seek declaratory and injunctive relief, *Al-Haramain* is irrelevant. *See, e.g.*, *Tuscon Airport Auth. v. Gen. Dynamics Corp.*, 136 F.3d 641 (9th Cir. 1998); *Paper, Allied-Indus. Chem. & Energy Workers Int'l Union v. U.S. Dep't of Energy*, No. CV-04-194-E-BLW, 2005 WL 2152818, at *4 (D. Idaho Sept. 7, 2005).

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