CONSOLIDATED CASE NOS.
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE NATIONAL SECURITY AGENCY
TELECOMMUNICATIONS RECORDS LITIGATION

TASH HEPTING, GREGORY HICKS, CAROLYN JEWEL, and ERIK KNUTZEN, on Behalf of Themselves and All Others Similarly Situated,
Plaintiffs-Appellants,

v.

AT&T CORPORATION, AT&T, INC.,
Defendants-Appellees
UNITED STATES OF AMERICA,
Defendant-Intervenor-Appellee.

On Appeal from the United States District Court for the Northern District of California, MDL No. 06-1791-VRW (Walker, C.J.)

BRIEF OF AMICI CURIAE LAW PROFESSORS IN SUPPORT OF APPELLEES AND AFFIRMANCE

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I. INTRODUCTION AND INTEREST OF AMICI

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, Amici are law professors and scholars in constitutional law, federal courts, civil procedure, and legal history and have taught and written about constitutional separation-of-powers, particularly as between the federal courts and the political branches. Amici represent a range of broadly divergent political and ideological views as to the policy, wisdom and justice of the congressional decision to grant immunity to the telecommunications company defendants. But signatories agree that there is no constitutional defect in the statute. Whether Congress should have granted this immunity, amici believe Congress possesses the constitutional power to do so.

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STATEMENT OF CONSENT

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, Amici represent that all parties to this appeal have consented to the filing of this amicus curiae brief.

ARGUMENT

In § 802 of the Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. 100-261 (2008) ("the Act"), *codified at* 50 U.S.C. § 1885a, Congress granted statutory immunity from civil liability to private telecommunications companies for any constitutional, statutory, or common-law violations committed while performing the technical portion of certain electronic surveillance activities at the request of the President of the United States for national security purposes. The statute prohibits civil actions in federal or state court against electronic communications service providers for providing "assistance to an element of the intelligence community." 50 U.S.C. § 1885a(a). Any civil action filed must be dismissed if the Attorney General of the United States certifies to the court that the defendant provider acted in connection with a presidentially authorized surveillance program in place between September 11, 2001 and January 17, 2007, designed to prevent or protect against a terrorist attack on the United States, § 1885a(a)(4)(A), and the defendant provider acted on written assurance from the Attorney General or head of a portion of the intelligence

community (or the Deputy of such person) that the surveillance had been authorized by the President of the United States and had been determined by the President to be lawful. 50 U.S.C.§ 1885a(a)(4)(B).[1] The court may review the Attorney General's certification to ensure that it is supported by "substantial evidence provided to the court," 50 U.S.C. § 1885a(b)(1), including any written requests or directives sent to the provider. *Id.* § 1885a(b)(2).

Appellants challenge the constitutionality of § 802 on a number of grounds, including separation of powers, which is of particular interest to amici. But careful analysis of the actual doctrines that implement the concepts of judicial integrity and non-interference in the business of courts shows that § 802 is fully within Congress' constitutional lawmaking authority.

I. SECTION 802 DOES NOT CONTRAVENE ANY OF THE SPECIFIC CONSTITUTIONAL RULES FOR ASSURING JUDICIAL INTEGRITY OF THE SEPARATION OF POWERS BETWEEN THE POLITICAL BRANCHES AND THE JUDICIARY.

Appellants criticize § 802 as a "legislative incursion upon the proper functioning of the judicial branch." (Appellants Opening Br. at 53). The immunity provision threatens the "integrity of the Judiciary as contemplated in Article III." (Appellants Opening Br. at 57). Section 802, they insist, must be struck down as

[1] The statute identifies other facts that may defeat civil actions if certified, including that the defendant provider did not actually provide assistance to an element of the intelligence community. 50 U.S.C. § 1885a(a)(5).

inconsistent with the text, structure, and traditions of Article III. (Appellants Opening Br. at 57).

It is, however, insufficient to challenge a law on general notions of judicial integrity or undefined respect for the judicial function. Instead, the Supreme Court has given concrete effect to these inchoate ideals of separation of powers, judicial integrity, and judicial function through three concrete Article III principles. Section 802 does not run afoul of any of these and must be recognized as constitutionally valid.

A. Section 802 Constitutionally Amends Applicable Substantive Law Without Dictating To Courts How To Resolve Legal And Factual Issues Or How To Resolve Specific Cases.

Article III prohibits Congress from dictating to the courts how to resolve legal and factual issues in litigation and from directing the outcome of a specific case.

This doctrine has its origins in *United States v. Klein*, 80 U.S. 128 (1872), the Reconstruction-era case in which the Supreme Court struck down a congressional attempt to compel courts to disregard presidential pardons as proof of innocence. *Klein* arose from a three-way conflict among Congress, the President, and the federal courts about the rights of Southern property owners to recover proceeds on property seized by Union authorities during the Civil War, about property owners' use of presidential pardons to establish loyalty and

entitlement to recover proceeds in federal court, and about the effect that federal courts should give to presidential pardons. Congress had included in an 1870 appropriations bill a proviso establishing that acceptance of a presidential pardon must be taken as evidence that the claimant had, in fact, been disloyal to the United States and that no pardon could be offered as proof of loyalty or entitlement to recover proceeds on confiscated property; the Supreme Court lacked jurisdiction over any cause in which a pardon had been used to show innocence. *Klein*, 80 U.S. at 144.

The *Klein* Court invalidated the proviso. It held that that the proviso withheld appellate jurisdiction only "as a means to an end" of denying to presidential pardons the constitutional effect that the Court adjudged them to have. *Klein*, 80 U.S. at 145. Congress had impermissibly prescribed a rule of decision to the courts for pending cases, requiring the courts to resolve cases in a particular way, in favor of the government and against the claimant, whenever the claim of entitlement to proceeds was based on a pardon. *Id.* at 146.

Klein states that Congress cannot prescribe rules of decision in pending causes in a particular way. *Klein*, 80 U.S. at 146-47. But this cannot literally be true, because Congress prescribes a rule of decision for the courts whenever it enacts enforceable substantive law. Recognizing the breadth of that statement, the Supreme Court subsequently has clarified that Congress retains constitutional

authority to amend applicable substantive law. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995); *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992); *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1139 (9th Cir. 2009). And that new civil law can be made retroactive and applicable to pending cases. *Gray v. First Winthrop Corp.*, 989 F. 2d 1564, 1570 (9th Cir. 1993). This Court reads *Robertson* as indicating "a high degree of judicial tolerance for an act of Congress that is intended to affect litigation so long as it changes the underlying substantive law in any detectable way." *Id.* at 1569-70.

Klein has come to mean only that Congress, and the executive acting pursuant to a congressional delegation, cannot tell courts what facts to find, what conclusions to draw from facts, how to apply law to fact, or how to resolve particular cases. *Robertson*, 503 U.S. at 438. "Congress may not predetermine the results in any given case." *Crater v. Galaza*, 491 F.3d 1119, 1128 (9th Cir. 2007). Resolution of legal and factual issues, as well as the ultimate outcome of litigation, must be left to the court's independent best judgment. In general, establishing a new legal standard does not, without more, imply an instruction to the court to apply that standard in any particular way or to find that the new standard was or was not satisfied in a given case. *Robertson*, 503 U.S. at 439; *Apache Survival Coalition v. United States*, 21 F.3d 895, 902 (9th Cir. 1994).

The apparent problem in *Klein* was that the proviso at issue forbade the

Supreme Court to "give the effect to evidence which, in its own judgment, such evidence should have" and "directed [the Court] to give it an effect precisely contrary." *Klein*, 80 U.S. at 147. But the Court in *Miller v. French* distinguished the *Klein* proviso from constitutionally valid laws in which Congress attaches new legal consequences to a court's independent application of a new legal standard. *Miller v. French*, 530 U.S. 327, 349 (2000). "Congress cannot tell courts how to decide a particular case, but it may make rules that affect classes of cases." *Evans v. Thompson*, 518 F.3d 1, 11 (1st Cir. 2008) (quoting *Lindh v. Murphy*, 96 F.3d 856, 872 (7th Cir. 1996), *rev'd* 521 U.S. 320 (1997)).

The district court below held that § 802 does not compel findings or outcomes, but amends substantive federal law by granting telecommunications companies immunity against civil liability for any unlawful surveillance activities. *In re Nat. Sec. Agency Telecommunications Records Litigation*, 633 F. Supp. 2d 949, 963 (N.D. Cal. 2009). It is true that § 802 does not directly amend or override the law (or laws) providing the plaintiffs' claim of right, as some prior cases had done. *See, e.g.*, *Robertson*, 503 U.S. at 434-35; *National Coalition to Save Our Mall v. Norton*, 269 F.3d 1092, 1093-94 (D.C. Cir. 2001) (congressional enactment provided that new legal rule applies "notwithstanding any other provision of law"). Rather, § 802 interposes a statutory bar to liability—a defense to liability—even if the defendants' underlying conduct remains unlawful under the substantive law

that creates the plaintiff's claim.

It is inaccurate to argue, as appellants do, that the "day after the President signed [the Act], the legal force and effect of the law governing those causes of action remained the same and continued to apply to these actions in exactly the same manner as it had applied the day before the President signed [the Act]." (Appellant Opening Br. at 18). In fact, the entire substantive legal landscape changed; in light of § 802, civil liability no longer could lie against the underlying conduct. It is immaterial for *Klein* purposes whether Congress amended the law providing the cause of action or added a new immunity as an affirmative shield against liability under that law. Either approach changes applicable law in a "detectable way" by altering the overall body of legal rules on a subject matter, resulting in the potential rejection of claims that might have succeeded under the previous substantive law.

Section 802 establishes a new legal landscape for a class of cases by providing what the court below called a "new, narrowly-drawn and 'focused' immunity." *In re Nat. Sec. Agency Telecommunications Records Litigation*, 633 F. Supp. 2d at 964. That immunity means a telecom provider cannot be liable for engaging in intelligence- and national-security-related surveillance activities conducted in a certain time period if it acted on written presidential request and written presidential assurances of legality from senior executive-branch officials.

Proof of those circumstances is made by the Attorney General's certification, which must be supported by substantial evidence presented to the court. Section 802 does not instruct courts what facts to find; courts exercise independent judgment in determining whether facts supporting the providers' immunity defense have been established through the certification and the substantial evidence offered in support of the certification. Section 802 dictates only the legal consequence - dismissal of the action - once the court has, on its independent judgment, found certain facts and applied those facts to the law in a given case.

Contrary to what appellants suggest, § 802 does not vest complete control over the immunity question in the Attorney General. The court below insisted that § 802 "provides a judicial role." *In re Nat. Sec. Agency Telecommunications Records Litigation*, 633 F. Supp. 2d at 964. The Attorney General's certification introduces the affirmative defense of immunity into the litigation. The statute then requires the court to take evidence and decide whether there is substantial evidence in support of the certification—in other words, to determine whether there is substantial evidence establishing the elements of the statutory immunity defense. The statute does not direct the court to make specified findings or to accept the Attorney General's certification; the court decides those facts independently and in the exercise of its own judgment by examining evidence beyond the certification, including written requests and directives sent to the provider. *See* 50 U.S.C. §

1885a(b)(2). The district court correctly determined that a court "may reject the certification and refuse to dismiss if, in the court's judgment, the certification is not supported by substantial evidence." *In re Nat. Sec. Agency Telecommunications Records Litigation*, 633 F. Supp. 2d at 964. Such retention of independent judgment insulates § 802 against a challenge under this first Article III judicial-integrity doctrine.

B. Section 802 Permissibly Establishes A Statutory Immunity Against Civil Liability Without Telling The Federal Courts How To Understand, Interpret, Or Apply Constitutional Provisions.

A second principle of separation of powers between Congress and the courts provides that Congress cannot dictate to the federal courts the meaning of a constitutional provision or tell the federal courts how to interpret and apply the Constitution. *See City of Boerne v. Flores*, 521 U.S. 507, 535-36 (1997). *Klein* again presents a blatant congressional infringement on this principle. Congress there attempted to command federal courts to treat a presidential pardon as proof of guilt of disloyalty to the Union, regardless of the Court's constitutional judgment as to the effect the pardon should have and regardless of Court precedent treating a pardon as establishing loyalty-in-law. *Klein*, 80 U.S. at 143-44; *id.* at 133-34 (discussing *United States v. Padelford*, 76 U.S. 531 (1869)). Although the specific problem there was Congress attempting to impair the executive's pardon power, *Klein*, 80 U.S. at 147, the Court insisted that there was a twin Article III defect

from Congress compelling the courts to be the instruments of the infringement on presidential power. *Id.* at 147-48. This principle can be generalized to a prohibition on Congress, or the Executive via delegation, compelling courts to decide constitutional questions in a way contrary to what a court's best independent constitutional judgment tells it the Constitution means; judicial authority cannot be used to affirm views antagonistic to the court's actual judgment on constitutional matters. *See* Lawrence G. Sager, Klein*'s First Principle*, 86 GEO. L.J. 2525, 2525 (1998).[2]

This separation of powers doctrine is not implicated by § 802.

First, § 802 defeats statutory and common law claims, which plaintiffs bring in the instant case. The principle against dictating constitutional meaning does not and cannot apply to the meaning of statutes. Congress decides, within constitutional bounds, what statutes to enact and what statutes say and mean; courts are bound to ascertain and apply that congressionally determined meaning. *See Texaco Inc. v. Hasbrouk*, 496 U.S. 543, 568 n.27 (1990) ("[W]e have a duty to be faithful to congressional intent when interpreting statutes and are not free to consider whether, or how, the statute should be rewritten."); *cf. W. Va. Univ. Hosps. v. Casey*, 499 U.S. 83, 115 (1991) (Stevens, J., dissenting) ("In the domain

[2] One commentator referred to this as a prohibition on Congress forcing the courts to speak a "constitutional untruth." Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2545 (1998).

of statutory interpretation, Congress is the master."), *superseded by statute*, 42 U.S.C. § 1988. Congress thus can, without offending judicial integrity, enact a new statutory immunity to defeat claims arising under a different congressional enactment.

Second, § 802 does not compel the court to announce a legal understanding of the Constitution different from what its independent judicial analysis dictates. In fact, § 802 obviates the need for the court to engage in constitutional interpretation at all, because the sub-constitutional immunity defense precludes provider liability regardless of whether the providers in fact violated the Constitution.

Instead, § 802 imposes a sub-constitutional limit on judicial power to provide a remedy for any constitutional violations found. One analogy is to the immunities that limit or entirely prevent civil liability of government officials for past constitutional violations against state actors under 42 U.S.C. § 1983 and against federal actors under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). *See, e.g.*, *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001) (qualified executive immunity); *Bogan v. Scott-Harris*, 523 U.S. 44, 48-49 (1998) (absolute legislative immunity); *Buckley v. Fitzsimmons*, 509 U.S. 259, 268-69 (1993) (absolute prosecutorial immunity); *Stump v. Sparkman*, 435 U.S. 349, 355-56 (1978) (absolute judicial immunity). These immunities protect

government defendants from liability despite, and regardless of, whether the plaintiffs' constitutional rights were violated. They are a long-accepted part of the scheme of constitutional litigation, never questioned on the theory that they infringe on the judiciary's interpretive prerogatives or otherwise breach the separation of the judicial and political branches.

Formally, of course, government-official immunities are not congressional creations; they are common law defenses that survived passage of the § 1983 cause of action because Congress did not clearly indicate its intent to abrogate well-established existing common law rules. *See Buckley*, 509 U.S. at 267-68.[3] But implicit in this understanding of common law immunity is that Congress, had it intended and provided by statute, could have overridden them. It follows that Congress could narrow or expand existing immunities or it could create entirely new immunities or defenses. In fact, Congress has done so; in 1996, it amended § 1983 to provide that judges enjoy immunity not only from liability for damages, as at common law, but also from injunctions. *See* 42 U.S.C. § 1983 ("[I]n any action brought against a judicial officer for an act or omission taken in such

[3] Section 1983 was enacted as § 1 of the Ku Klux Klan Act of 1871. The Supreme Court has held that, absent congressional statement, well-established nineteenth-century common law immunities survived passage of the statute. *See Buckley*, 509 U.S. at 268 ("Certain immunities were so well established in 1871, when § 1983 was enacted, that 'we presume that Congress would have specifically so provided had it wished to abolish' them.") (citing *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967)).

officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.") (as amended by Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, 110 Stat. 3847, 3853, § 309 (1996), *overruling Pulliam v. Allen*, 466 U.S. 522 (1984)).

Congress has similar authority to alter common law immunities available against *Bivens* actions. Of course, *Bivens* does presume that some adequate alternative remedy is available. *See Wilkie v. Robbins*, 551 U.S. 537, 550-51 (2007). But § 802 does not leave plaintiffs without judicial remedy for past constitutional harms; it simply shifts the target of that remedy away from the telecom providers. *Bivens* claims still may be available against current and former government officers who promulgated and executed the allegedly unconstitutional warrantless surveillance program.

The point is that § 802, like qualified immunity and other officer immunities, is a sub-constitutional affirmative defense, existing apart from the constitutional source of the plaintiff's claim of right and precluding judicial remedy, even if a constitutional violation has occurred. Nothing in the long-standing analysis of these other remedies suggests a separation-of-powers bar were Congress, in its legislative discretion, to create a new, narrowly defined sub-constitutional immunity defense as to some defendants or under certain circumstances. Section 802 does no more than this.

Another analogy is to the limits on federal habeas corpus relief under the Antiterrorism and Effective Death Penalty Act ("AEDPA"). In interpreting AEDPA, courts have recognized the essential distinction between congressional attempts to dictate constitutional meaning and congressional attempts to control judicial remedies. A federal court cannot grant habeas relief, even for a found constitutional violation committed in state criminal proceedings, unless the state-court adjudication produced a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court. 28 U.S.C. § 2254(d)(1). This Court held that this provision comports with Article III's "distribution of constitutional authority." *Crater v. Galaza*, 491 F.3d 1119, 1128 (9th Cir. 2007). Section 2254(d)(1) "did not instruct courts to discern or deny a constitutional violation," but "simply sets additional standards for granting relief in cases." *Id.* at 1127. The statute did not restrict the power of federal courts to interpret the Constitution according to their best understanding of its meaning, but only established standards for what constitutional violations, if found, warranted federal habeas relief. *Id.* (stating that regulating "relief is a far cry from limiting the interpretive power of the courts") (quoting *Lindh*, 96 F.3d at 872). The First Circuit echoed that conclusion, stating that there "is a world of difference between telling a court how to decide a case given a certain set of facts and limiting the availability of relief *after* a judge

independently determines the existence of a right and the reach of Supreme Court precedent." *Evans v. Thompson*, 518 F.3d 1, 11 (1st Cir. 2008) (emphasis in original).

The First Circuit explicitly recognized the analogy between § 2254(d)(1) and executive qualified immunity, which similarly prevents damages liability where the federal right found to have been violated was not clearly established at the time of the violation. *See id.* at 9-10 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) and *Anderson v. Creighton*, 483 U.S. 635, 638-39 (1987)). The court understood both as sub-constitutional rules shielding government officers from judicial relief, even in the face of actual constitutional violations.

Section 802 establishes a similar limitation on the remedial power of the courts and achieves the same end as both § 2254(d)(1) and qualified immunity. Section 802 prevents courts from imposing liability on service providers and from granting a remedy to plaintiffs against providers, even where there has been a constitutional violation, where the court finds substantial evidence in support of the elements of the statutory immunity defense.

In light of this Court's decision in *Crater* and the fact that no court ever has suggested that analogous official immunities violate separation of powers, it follows that § 802 also does not violate the separation of powers.

C. Consistent With Its Constitutional Power, Congress In § 802 Amended Substantive Civil Law Retroactively To Apply To Future And Pending Actions, Without Attempting To Reopen Final Judgments Of The Judicial Department.

In *Plaut v. Spendthrift Farm*, 514 U.S. 211 (1995), the Supreme Court discussed a third "postulate of Article III just as deeply rooted" as *Klein*'s two principles—Article III establishes a judicial department empowered to finally decide cases, thus Congress cannot reopen or disturb final judgments rendered by the judicial department. *Id.* at 218-19.

Plaut arose from congressional efforts to amend and lengthen the limitations period for securities fraud actions. In *Lampf, Pleva, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 364 (1991), the Supreme Court had held that the limitations period on securities fraud claims expired one year after discovery of facts showing the violation and within three years of the violation. Congress responded by providing that, for all actions filed on or before June 19, 1991 (the day *Lampf* was decided), district courts should adopt the limitations period of the state in which they sit. 15 U.S.C. § 78aa-1; *Plaut*, 514 U.S. at 214-15. This new limitations period "indisputably does set out substantive legal standards for the Judiciary to apply, and in that sense changes the law (even if solely retroactively)." *Plaut*, 514 U.S. at 218.

The problem was that Congress also commanded that any claims previously dismissed as time-barred under the old limitations rule, some of which had

received final appellate review and some of which no longer were subject to review, should be reinstated if the claim would have been timely had the new limitations period been affect at the time of filing. 15 U.S.C. § 78aa-1(b); *Plaut*, 514 U.S. at 214-15. *Plaut* rejected this provision as an infringement on the judicial process. The Court distinguished between a final judgment of the judicial department and a judgment of a lower court still pending on review in a higher court within the judicial hierarchy; that is, it distinguished between a lower court judgment on which all appeals had been foregone or completed and a lower court judgment that remains on appeal or subject to appeal. *Id.* at 227. The former constituted a "final" decision from the judicial department, while the latter did not. Thus, Congress could enact a new law and, by clearly making it retroactive, require appellate courts to apply that law in reviewing judgments still on appeal, even if the judgment under review was rendered before the new law took effect. *Id.* at 226. The reviewing court must decide the case according to the law existing at the time of its decision. *Id.* at 227. For example, there would be no constitutional problem in requiring courts to apply a new, retroactive limitations period to a case pending on appeal that had been dismissed by the district court as time-barred.

But once all appeals have been completed (or time for seeking appeal has expired), the judicial department is deemed to have spoken and to have rendered a final judgment—to have issued "the last word of the judicial department with

regard to a particular case or controversy." *Id.* at 227. Congress cannot declare that the law applicable to that finalized case or controversy was anything other than what the courts said it was, not can Congress enact retroactive legislation compelling the court to reopen and redo that final judgment. *Id.* This Court understands *Plaut* only to prohibit laws that reach final decisions by the judiciary as a whole (according to congressionally established rules for appeals and review), not to cases still pending in a particular court. *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1139 (9th Cir. 2009).

Section 802 in no way implicates *Plaut* or the separation of powers concerns underlying it. Section 802 is ordinary retroactive legislation—"legislation that prescribes what the law *was* at an earlier time, when the act whose effect is controlled by the legislation occurred." *Plaut*, 514 U.S. at 225 (emphasis in original). Section 802 by its terms applies only to pending and future cases and does not compel (or purport to compel) reopening of final judgments issued by the judicial department. Of course, there are no such judgments—the instant action plainly is still pending within the judicial department and § 802 took effect before even the first level of the Article III hierarchy had spoken in this case. *See In re Nat. Sec. Agency Telecommunications Records Litigation*, 633 F. Supp. 2d 949, 955 (N.D. Cal. 2009) (discussing § 802 for first time on motion to dismiss). Third, the statutory requirement that civil actions "not lie or be maintained" and

that such actions be "promptly dismissed" upon submission of a supported certification presumes a pending, not final, action.

Appellants attempt to convert *Plaut*'s basic separation of powers principle into a more vigorous prohibition against Congress compelling courts to act "in a manner that is inconsistent with inherent judicial functions." (App. Opening Br. at 53-56). The target of this prohibition is the "substantial evidence" standard of § 802(b)(1). But, as the court below noted, "the substantial evidence standard appears to have been in use for nearly a century in federal courts in a form closely resembling that in use today." *Nat. Sec. Agency Telecommunications Records Litigation*, 633 F. Supp. 2d at 957-58. In effect, § 802(b) specifies the quantum of evidence a reviewing court must find before it accepts and gives effect to the immunity defense. The Attorney General must present to the court substantial evidence in support of the statutory elements to obtain dismissal. But Congress unquestionably has the power to establish and alter evidentiary requirements applicable to claims and defenses created by federal statute. *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 389 (1983) (citing *Steadman v. SEC*, 450 U.S. 91, 95 (1981)).

Appellants argue that the substantial evidence standard "provides a form of judicial review that is deferential to the point of meaninglessness." (App. Opening Br. at 56). But appellants only criticize the way the Attorney General gathered

evidence prior to making the certification to the court below, (App. Opening Br. at 56-57), not necessarily the analysis a court makes in reviewing independent "evidence provided to the court" in support of the certification. *See* 50 U.S.C. § 1885a(b)(1). In other words, there is nothing inherent in the substantial evidence standard (other than being somewhat less demanding than a standard such as preponderance of the evidence) that makes it meaningless or toothless.

II. CONGRESS HAS ENACTED MANY LAWS SIMILAR TO § 802, SUCH THAT INVALIDATING § 802 WOULD REPRESENT AN UNPRECEDENTED AND UNWARRANTED LIMITATION ON CONGRESS' LEGISLATIVE AUTHORITY.

Section 802 reflects a common type of legislation and is not a unique or unheard-of enactment. Congress has enacted numerous statutes empowering the executive to waive the application of underlying statutory rules under certain circumstances. (Appendix A, attached). Similarly, Congress frequently enacts legislation empowering the President or executive branch officials to make factual or legal determinations and to act in a manner that alters legal relationships if such determinations are made. (Appendix B, attached). Section 802 is of a piece with both categories of enactments: it empowers the Attorney General to reach particular factual conclusions and to decide whether to present those factual conclusions to the court and to certify the case for dismissal. But § 802 does not vest final word in the executive; the court is not bound to accept the Attorney General's factual conclusions and retains power to engage in full independent

review of the certification to ensure that it has evidentiary support. 50 U.S.C. § 1885a(b)(2); *In re Nat. Sec. Agency Telecommunications Records Litigation*, 633 F. Supp. 2d at 964.

Section 802 exemplifies one particular type of legislation that Congress has enacted or considered in recent years: creating a federal statutory immunity from liability for a class of defendants against a class of claims brought under some substantive law. Congress intended through these laws to protect substantial federal interests over which it had constitutional power to legislate and which it deemed threatened by the ongoing litigation. If § 802 is a "legislative incursion" on the judiciary that threatens the "integrity" of the courts, then so are many other congressional enactments and proposals.

The prime example of this legislation is the Protection of Lawful Commerce in Arms Act of 2005 ("PLCAA"), Pub. L. No. 109-92, 119 Stat. 2095 (2005), *codified* at 15 U.S.C. § 7901, *et seq*. The PLCAA provides immunity from civil liability for a group of defendants (gun sellers, manufacturers, and trade associations) against "qualified civil liability actions" (primarily state-law claims based on injuries resulting from a third person's criminal or unlawful use of a firearm). *See* 15 U.S.C. § 7902(a), 7903(5)(A). The PLCAA applies both prospectively to future claims and retroactively to pending actions, which must be dismissed. *See id.* § 7902(b). The law was prompted by a series of state-law tort

actions instituted by governments and private groups seeking to hold members of the gun industry liable for the harms caused by third-party gun violence and seeking to enjoin and abate manufacturers' and sellers' activities as a public nuisance. *See id.* § 7901(a)(3); *see, e.g.*, *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1130-31 (9th Cir. 2009); *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 389-91 (2d Cir. 2008); *NAACP v. AcuSport, Inc.*, 271 F. Supp. 2d 435 (E.D.N.Y. 2003). In barring such civil suits, Congress stated its purpose was to protect interstate and foreign commerce in lawful firearms, *id.* § 7901(b)(4), and to protect citizens' Second Amendment rights. *Id.* § 7901(b)(2), (b)(3). And Congress did it not by altering the substantive law providing the plaintiffs' cause of action, something Congress was largely powerless to do because the claims were brought under state common law. Instead, Congress gave defendants a federal affirmative defense to interpose against liability, even if the underlying conduct did violate the claim-creating substantive state law.[4]

This Court upheld the PLCAA under all the Article III doctrines raised here. *Ileto*, 565 F.3d at 1139-40. First, this Court recognized that the PLCAA amended

[4] Congress considered a substantially similar bill targeting state-law actions brought against the fast-food industry to recover for obesity and health problems caused by the high fat content of fast food; the bill passed the House of Representatives in 2005, but died in the Senate. *See* Personal Responsibility in Food Consumption Act of 2005, H.R. 554, 109th Cong. (2005) (as passed by House of Representatives, October 19, 2005); *cf. Pelman ex rel. Pelman v. McDonald's Corp.*, 396 F.3d 508 (2d Cir. 2005) (reversing dismissal of class-action by overweight minors against several fast-food restaurants).

controlling law, rather than compelling results under old law, because the statute set forth a new legal standard—defined "qualified civil liability actions" must be dismissed—applicable to all cases. *Ileto*, 565 F.3d at 1139. Second, this Court rejected the argument that the PLCAA ran afoul of *Plaut*, concluding that the statute applied only to pending and future cases and did not purport to undo final judgments from the judicial department. *Id.* at 1139. Importantly, this Court stated that the "mere fact that members of Congress wanted to preempt *this* pending case by name does not change our analysis." *Id.* at 1139-40 (emphasis in original).[5]

Section 802 is structurally identical to the PLCAA. It was motivated by disapproval of a class of lawsuits that threatened federal interests—federal constitutional and statutory claims against telecommunications providers that, in Congress' view, interfered with the intelligence community's efforts to protect national security by securing technical cooperation from providers in necessary counterterrorism surveillance activities. The Act clothes a class of defendants (electronic communications service providers) with an immunity that defeats a particular class of claims (those based on assistance provided to elements of the federal intelligence community with presidentially authorized intelligence activities that providers have been assured are lawful) if the court finds, in its

[5] This Court's conclusion as to the PLCAA is consistent with that of the Second Circuit, which upheld it against similar separation of powers arguments. *City of New York*, 524 F.3d at 395-96.

independent judgment, substantial evidence in support of the immunity. And Congress enacted § 802 for the same permissible reason—to preempt and defeat identifiable pending litigation against the providers.

Appellants attempt to distinguish § 802 from the PLCAA because the latter "unconditionally" amends the substantive law that created the claim and abolishes the plaintiffs' cause of action in all cases, while the former applies only in those cases in which the Attorney General, exercising "unlimited and standardless discretion," submits a certification to the court. (Appellants Opening Br. at 16-17). This, they argue, makes § 802 an invalid delegation of lawmaking authority, ceding to the executive the power to determine the substantive law that will apply in the case.

Both premises of this argument fail. First, neither the PLCAA nor § 802 amends the substantive law providing plaintiffs' claims of right; the state-created tort of public nuisance remains unchanged, just as the constitutional and statutory legal rights that plaintiffs assert in the instant case remain unchanged by § 802. Both acts work by establishing an immunity that relieves defendants of liability regardless of whether their conduct violated other, claim-creating substantive law. By altering the overall legal landscape through a federal statutory defense against plaintiffs' claims, Congress established a new legal landscape through both laws. As discussed earlier, this Court maintains "a high degree of judicial tolerance for

an act of Congress that is intended to affect litigation so long as it changes the underlying substantive law in any detectable way." *Gray v. First Winthrop Corp.*, 989 F. 2d 1564, 1569-70 (9th Cir. 1993).

Second, the PLCAA is unconditional and applicable "in all cases" only to the extent the defendant asserts the federal statutory immunity in court. As with any other defense, the defendant must introduce the PLCAA into the case; a defendant's failure to do so should mean the issue is not in the case. *See* Fed. R. Civ. P. 8(c); *Morrison v. Mahoney*, 399 F.3d 1042, 1046 (9th Cir. 2005). Were a gun-industry defendant to not introduce the immunity, controlling law in the case would be not the PLCAA, but the claim-creating state public-nuisance or tort law. Section 802 functions the same way—if the Attorney General does not submit a certification, § 802 immunity is not in the case and the various constitutional, statutory, and common law provisions asserted by plaintiffs remain controlling law. Either statute illustrates the unremarkable notion that if a defense is not raised, it is not in the case and the defendant may be liable under the substantive law providing the original claim of right.

What makes § 802 procedurally different is the mechanism in which that defense is introduced—not by the defendant in its responsive pleading, *see* Fed. R. Civ. P. 8(c), but by the Attorney General in his certification to the court. *See* 50 U.S.C. § 1885a(a). But the manner of introducing the immunity is a procedural

distinction without a difference. A gun manufacturer might be liable if it (for whatever reason) did not assert PLCAA immunity and controlling state law establishes liability; a telecom provider might be liable if the Attorney General (for whatever reason) did not submit a certification (and thus did not activate the immunity) and controlling constitutional or statutory law establishes liability. The Attorney General's decision whether to introduce a legal immunity as a defense does not constitute unilateral amendment or rewriting of substantive law. Rather, it exemplifies the Attorney General's inherent discretion not to invoke or introduce a legal rule in a given case of criminal or civil enforcement. *See Sierra Club v. Whitman*, 268 F.3d 898, 902 (9th Cir. 2001) (discussing *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)), and the presumption of executive discretion over enforcement decisions).

CONCLUSION

Amici reiterate that their concern is not with the policy, wisdom or justice of § 802, a point about which the signatories might disagree among themselves. Amici instead are concerned with the proper understanding and application of separation of powers and the three concrete legal doctrines that give effect to inchoate ideals of judicial integrity and legislative non-interference with core judicial functions. Those doctrines, rightly framed, should lead this Court to conclude that § 802 does not contravene any of them and is well within the scope

of Congress' powers as to Article III.

Dated: February 17, 2010

HOWARD M. WASSERMAN

By: */s/ Howard M. Wasserman*
Howard M. Wasserman

Counsel of Record for Amici Law Professors

CERTIFICATE OF COMPLIANCE PURSUANT TO
FED. R. APP. P. 32(A)(7)(C) AND
CIRCUIT RULE 32-1 FOR
CONSOLIDATED CASE NOS.
09-16676, 09-16677, 09-16679, 09-16682, 09-16683, 09-16684, 09-16685, 09-16686, 09-16687, 09-16688, 09-16690, 09-16691, 09-16692, 09-16693, 09-16694, 09-16696, 09-16697, 09-16698, 09-16700, 09-16701, 09-16702, 09-16704, 09-16706, 09-16707, 09-16708, 09-16709, 09-16710, 09-16712, 09-16713, 09-16717, 09-16719, 09-16720, 09-16723

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached amicus brief with appendices is proportionately spaced, has a typeface of 14 points and contains 6,471 words.

Dated: February 17, 2010

/s/ Howard M. Wasserman
Howard M. Wasserman

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 17, 2010.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by first-class mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants:

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APPENDIX A

SELECTED STATUTES AUTHORIZING EXECUTIVE BRANCH OFFICIALS TO WAIVE EXISTING LAWS IN CERTAIN CIRCUMSTANCES

Statute	Relevant Language
21st Century Department of Justice Appropriations Authorization Act, 18 U.S.C. § 3612(h)	"The Attorney General may waive all or part of any interest or penalty under this section [which governs the collection of unpaid fine or restitution] or any interest or penalty relating to a fine imposed under any prior law if, as determined by the Attorney General, reasonable efforts to collect the interest or penalty are not likely to be effective."
Commercial Space Launch Amendments Act, 49 U.S.C. § 70105(3)	"The Secretary [of Transportation] may waive a requirement, including the requirement to obtain a license [for commercial space transportation], for an individual applicant if the Secretary decides that the waiver is in the public interest and will not jeopardize the public health and safety, safety of property, and national security and foreign policy interests of the United States."
Controlled Substances Act, 21 U.S.C. § 824(d)	"The Attorney General may, in his discretion, suspend any registration [to manufacture, distribute, or dispense a controlled substance or list I chemical] simultaneously with the institution of proceedings under this section, in cases where he finds that there is an imminent danger to the public health or safety."
Cuban Liberty and Democratic Solidarity (Libertad) Act, 22 U.S.C. § 2295a(d)(2)(A)	"The President may waive the requirement of paragraph (1) [stating that the United States shall withhold assistance for an independent state of the former Soviet Union if that state supports intelligence facilities in Cuba] if the President certifies to the appropriate congressional committees that the provision of such assistance is important to the national security of the United States, and, in the case of such a certification made with respect to Russia, if the President certifies that the Russian Government has assured the United States Government that the Russian Government is not sharing intelligence data collected at the Lourdes facility with officials or agents of the Cuban Government."
Domestic Chemical Diversion Control Act, 21 U.S.C. § 822(d)	"The Attorney General may, by regulation, waive the requirement for registration of certain manufacturers, distributors, or dispensers [of controlled substances] if he finds it consistent with the public health and safety."
Enhanced Partnership with Pakistan Act, 22 U.S.C. § 8425(b)(1) and (2)	"The Secretary of State, in consultation with the Secretary of Defense, may waive the requirements of subsection (a)[requiring that any direct cash security-related assistance or non-assistance payments by the United States to the Government of Pakistan may only be provided or made to civilian authorities of a civilian government of Pakistan] if the Secretary of State certifies to the appropriate congressional committees that the waiver is important to the national security

	interest of the United States."
Export Administration Act, 50 App. U.S.C. § 2410(c)	"The President may waive the application of any sanction imposed on any person pursuant to this section [which imposes sanctions on a foreign person who knowingly assists a foreign country to acquire chemical or biological weapons], after the end of the 12-month period beginning on the date on which that sanction was imposed on that person, if the President determines and certifies to the Congress that such waiver is important to the national security interests of the United States."
Federal Employment Compensation Act, 5 U.S.C. § 8121	"The Secretary [of Labor] may waive . . . for reasonable cause shown" the requirements that a claim for compensation for work related injuries contain certain information and be sworn to and "accompanied by a certificate of the physician of the employee stating the nature of the injury."
Foreign Relations Authorization Act, 22 U.S.C. § 4316(c)	"The Secretary [of State], after consultation with the Director of Central Intelligence and the Director of the Federal Bureau of Investigation, may waive application of the restrictions required by subsection (a) of this section [which prohibits the personnel of an international organization from traveling to the United States if the individual is a national of any foreign country whose government engages in intelligence activities that are harmful to national security] if the Secretary determines that the national security and foreign policy interests of the United States so require."
Grain Standards Act, 7 U.S.C. § 77(a)(1)	The Secretary of Agriculture "may waive" the requirements regarding official weighing and inspection "in emergency or other circumstances which would not impair the objectives of this chapter."
Homeland Security Act, 14 U.S.C. § 666(a)	"Notwithstanding any other law, each contract awarded by the Coast Guard for construction or services to be performed in whole or in part in a State that has an unemployment rate in excess of the national average rate of unemployment (as determined by the Secretary of Labor) shall include a provision requiring the contractor to employ, for the purpose of performing that portion of the contract in that State, individuals who are local residents and who, in the case of any craft or trade, possess or would be able to acquire promptly the necessary skills. The Secretary of Homeland Security may waive the requirements of this subsection in the interest of national security or economic efficiency."
Immigration and Nationality Act, 8 U.S.C. § 1157(c)(1)	"Subject to [certain] numerical limitations . . . the Attorney General may, in the Attorney General's discretion and pursuant to such regulations as the Attorney General may prescribe, admit any refugee who is not firmly resettled in any foreign country, is determined to be of special humanitarian concern to the United States, and is admissible . . . as an immigrant under this chapter."

Immigration and Nationality Act, 8 U.S.C. § 1157(c)(4)	"The refugee status of any alien (and of the spouse or child of the alien) may be terminated by the Attorney General pursuant to such regulations as the Attorney General may prescribe if the Attorney General determines that the alien was not in fact a refugee within the meaning of section 1101(a)(42) of this title at the time of the alien's admission."
Immigration and Nationality Act, 8 U.S.C. § 1159(c)	"The Secretary of Homeland Security or the Attorney General may waive any other provision of such section [which outlines requirements for the adjustment of status of an alien] with respect to such an alien for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest."
Immigration and Nationality Act, 8 U.S.C. § 1182(a)(3)(D)(iv)	"The Attorney General may, in the Attorney General's discretion, waive the application of clause (i) [which provides that any immigrant who is or has been a member of the Communist party or any other totalitarian party is ineligible for a visa to enter the United States] in the case of an immigrant who is the parent, spouse, son, daughter, brother, or sister of a citizen of the United States or a spouse, son, or daughter of an alien lawfully admitted for permanent residence for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest if the immigrant is not a threat to the security of the United States."
Immigration and Nationality Act, 8 U.S.C. § 1182(e)	"[U]pon the favorable recommendation of the Director [of the United States Information Agency] . . . the Attorney General may waive the requirement of such two-year foreign residence abroad in the case of any alien whose admission to the United States is found by the Attorney General to be in the public interest." *See Abdelhamid v. Ilchert*, 774 F.2d 1447, 1450 (9th Cir. 1985) (noting that the statute "does not expressly limit [the Director's] discretion in deciding whether or not to make a favorable recommendation [to the Attorney General]").
Immigration and Nationality Act, 8 U.S.C. § 1182e(c)	The Secretary of State "may waive" the prohibitions against issuing a visa to a foreign national involved in forced population control policies "if the Secretary (1) determines that it is important to the national interest of the United States to do so; and (2) provides written notification to the appropriate congressional committees containing a justification for the waiver."
Immigration and Nationality Act, 8 U.S.C. § 1186a(c)(4)	"The Attorney General, in the Attorney General's discretion, may remove the conditional basis of the permanent resident status for an alien who fails to meet the requirements of paragraph (1) [which sets forth various guidelines for the removal of conditional resident status for aliens] if the alien demonstrates that-- (A) extreme hardship would result if such alien is

	removed, (B) the qualifying marriage was entered into in good faith by the alien spouse, but the qualifying marriage has been terminated (other than through the death of the spouse) and the alien was not at fault in failing to meet the requirements of paragraph (1), or (C) the qualifying marriage was entered into in good faith by the alien spouse and during the marriage the alien spouse or child was battered by or was the subject of extreme cruelty perpetrated by his or her spouse or citizen or permanent resident parent and the alien was not at fault in failing to meet the requirements of paragraph (1).”
Immigration and Nationality Act, 8 U.S.C. § 1221(h)	The Attorney General “may waive” the requirements regarding the duties of departing and arriving vessels and aircraft to provide manifest information about each passenger, crew member, or occupant “upon such circumstances and conditions as the Attorney General may by regulation prescribe.”
Immigration and Nationality Act, 8 U.S.C. § 1227(a)(3)(C)(ii)	“The Attorney General may waive [the requirement that an alien found to have engaged in document fraud be deported] in the case of an alien lawfully admitted for personal residence if no previous civil money penalty was imposed against the alien [for the violation] and the offense was incurred solely to assist, aid, or support the alien’s spouse or child (and no other individual). No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this clause.”
Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)C	In removal proceedings involving battered spouses, children, and parents, the Attorney General has the discretion to waive the 1 year time limit to file a motion to reopen after a final order of removal in the case of an alien who demonstrates extraordinary circumstances or extreme hardship to the alien's child.
Immigration and Nationality Act, 8 U.S.C. § 1229c(a)(2)(B)(i)	The Attorney General “may waive” an alien’s application for voluntary departure if the alien seeks to remain in the United States in order to obtain medical treatment.
Immigration and Nationality Act, 8 U.S.C. § 1255a(d)(2)(B)(i)	“[T]he Attorney General may waive any other provision of section 1182(a) of this title [regarding classes of aliens ineligible for visas or admission] in the case of individual aliens for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.”
Immigration and Nationality Act, 8 U.S.C. § 1323(e)	In instances where a transportation company has unlawfully brought aliens into the United States and is subject to a fine, “[the] fine may be reduced, refunded, or waived under such regulations as the Attorney General shall prescribe in cases in which (1) the carrier demonstrates that it had screened all passengers on the vessel or aircraft in accordance with procedures

	prescribed by the Attorney General, or (2) circumstances exist that the Attorney General determines would justify such reduction, refund, or waiver."
Immigration and Nationality Act, 8 U.S.C. § 1324c(d)(7)	"The Attorney General may waive the penalties imposed by this section with respect to an alien who knowingly fails to present a document relating to the alien's eligibility to enter the United States upon arriving in the United States, if, under specified sections of the same title, the alien is granted asylum . . . or withholding of removal."
Immigration and Nationality Act, 8 U.S.C. § 1442(c)	"The Attorney General may, in his discretion, upon investigation fully establishing the loyalty of any alien enemy who did not have an application for naturalization pending at the beginning of the state of war, except such alien enemy from the classification of alien enemy for the purposes of this subchapter, and thereupon such alien shall have the privilege of filing an application for naturalization."
Immigration and Nationality Act, 8 U.S.C. § 1446(a)	"The Attorney General may, in his discretion, waive a personal investigation [otherwise required before a person may be naturalized] in an individual case or in such cases or classes of cases as may be designated by him."
Implementing Recommendations of the 9/11 Commission Act of 2007, 6 U.S.C. § 1135(m)(3)	"The Secretary [of Transportation] may waive the limitation on operational costs specified in subparagraphs (B) through (E) of paragraph (1) [which establishes a program for making grants to eligible public transportation agencies for security improvements] if the Secretary determines that such a waiver is required in the interest of national security, and if the Secretary provides a written justification to the appropriate congressional committees prior to any such action."
Implementing Recommendations of the 9/11 Commission Act of 2007, 8 U.S.C. § 1187(d)	"The Secretary of Homeland Security, in consultation with the Secretary of State, may for any reason (including national security) refrain from waiving the visa requirement in respect to nationals of any country which may otherwise qualify for designation [of a visa waiver] or may, at any time, rescind any waiver or designation previously granted under this section."
Intelligence Authorization Act, 10 U.S.C. § 433(b)	"If the Secretary of Defense determines, in connection with a commercial activity authorized pursuant [to the Secretary's authority to authorize commercial activities necessary to provide security for intelligence activities abroad] that compliance with certain Federal laws or regulations pertaining to the management and administration of Federal agencies would create an unacceptable risk of compromise of an authorized intelligence activity, the Secretary may, to the extent necessary to prevent such compromise, waive compliance with such laws or regulations."
Intelligence Authorization Act,	"The President may waive the application to a significant foreign narcotics trafficker of any sanction

21 U.S.C. § 1903(g)(1)	authorized by this chapter if the President determines that the application of sanctions under this chapter would significantly harm the national security of the United States."
Intelligence Reform and Terrorism Prevention Act, 50 U.S.C. § 402a(e)(5)	"Where essential to meet extraordinary circumstances affecting vital national security interests of the United States, the President may on a case-by-case basis waive the requirements of paragraph (1), (2), or (3) [requiring the head of each department or agency within the executive branch to work with the Federal Bureau of Investigation to disclose when classified information is being, or may have been, disclosed in an unauthorized manner to a foreign power] as they apply to the head of a particular department or agency, or the Director of the Federal Bureau of Investigation."
Internal Revenue Service Restructuring and Reform Act 26 U.S.C. § 6325(b)(1)	"Subject to such regulations as the Secretary [of the Treasury] may prescribe, the Secretary may issue a certificate of discharge of any part of the property subject to any lien imposed under this chapter if the Secretary finds that the fair market value of that part of such property remaining subject to the lien is at least double the amount of the unsatisfied liability secured by such lien and the amount of all other liens upon such property which have priority over such lien." *See E.J. Friedman Co., Inc. v. United States*, 6 F.3d 1355, 1359 (9th Cir. 1993) (noting that "[t]he section commits the decision to discharge a lien to agency discretion, and the statute is drawn such that there is no standard against which to judge the IRS's exercise of discretion").
Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1853a(c)(2)	If a fishery has "historically processed the fish outside of the United States" and "the United States has a seafood safety equivalency agreement with the country where processing will occur," the Secretary of the Interior "may waive" the requirement (for approval of "a limited access privilege program to harvest fish") that "all fish harvested . . . be processed on vessels of the United States or on United States soil."
National Defense Authorization Act, 10 U.S.C. § 119(e)(1)	"The Secretary of Defense may waive any requirement under subsection (a), (b), or (c) [which requires the Secretary of Defense to submit to the defense committees a report on special access programs] if the Secretary determines that inclusion of that information in the report would adversely affect the national security. Any such waiver shall be made on a case-by-case basis."
National Defense Authorization Act, 10 U.S.C. § 184(f)(3)	"The Secretary of Defense may waive reimbursement of the costs of activities of the Regional Centers for foreign military officers and foreign defense and security civilian government officials from a developing country if the Secretary determines that attendance of such personnel without reimbursement is in the national security interest of the United States."

National Defense Authorization Act, 10 U.S.C. § 377(c)	The Secretary of Defense "may waive" the requirement that a civilian law enforcement agency that received support "reimburse the Department of Defense for that support," if the support "is provided in the normal course of military training or operations" or "results in a benefit to the element of the Department of Defense . . . that is substantially equivalent to that which would otherwise be obtained from military operation or training."
National Defense Authorization Act, 10 U.S.C. § 382(c)(2)	"In extraordinary circumstances, the Secretary of Defense may waive the requirement for reimbursement [of the use of Department of Defense resources to prepare for, prevent, or respond to an act or threat of an act of terrorism] if the Secretary determines that such a waiver is in the national security interests of the United States and submits to Congress a notification of the determination."
National Defense Authorization Act, 10 U.S.C. § 532(f)	"The Secretary of Defense may waive the requirement of paragraph (1) of subsection (a) [requiring that an original appointment as a commissioned officer in the Army, Navy, Air Force, or Marine Corps be a citizen of the United States] when the Secretary determines that the national security so requires."
National Defense Authorization Act, 10 U.S.C. § 2410i(c)	"The Secretary of Defense may waive the prohibition in subsection (b) [prohibiting the Department of Defense from awarding a contract to a foreign entity unless the entity certifies that it does not comply with the secondary Arab boycott of Israel] in specific instances when the Secretary determines that the waiver is necessary in the national security interests of the United States."
National Defense Authorization Act, 22 U.S.C. § 2797(b)(1)(e)	"In any case other than one in which an advisory opinion has been issued under subsection (d) of this section [authorizing the Secretary of State to issue an advisory opinion as to whether a foreign person who knowingly exports, transfers or conspires to trade in any Missile Control Technology Regime ("MTCR") equipment that contributes to the production of missiles in a country that is not an MCTR adherent is subject to sanctions], the President "may waive" sanctions if the President determines that such waiver is essential to the national security of the United States."
National Wildlife Refuge System Administration Act, 16 U.S.C. § 668dd(d)(2)	"[T]he Secretary [of the Interior] may not grant to any Federal, State, or local agency or to any private individual or organization any right-of-way, easement, or reservation in, over, across, through, or under any area within the [National Wildlife Refuge] system . . . unless the grantee pays to the Secretary [fair market value or fair rental value]. If any Federal, State, or local agency is exempted from such payment by any other provision of Federal law, such agency shall otherwise compensate the Secretary by any other means agreeable to the Secretary . . . except that . . . the Secretary may waive such requirement for

	compensation if he finds such requirement impracticable or unnecessary."
Naval Vessel Transfer Act, 22 U.S.C. § 2796a(b)	"The President may waive the requirements of this section [which requires the President to provide a certification to the Speaker of the House of Representatives and the Chairman of the Committee on Foreign Relations of the Senate before entering into or renewing any agreement with a foreign country to lease any defense article] if he states in his certification, that an emergency exists which requires that the lease or loan be entered into immediately in the national security interests of the United States."
Omnibus Consolidated and Emergency Supplemental Appropriations Act, 22 U.S.C. § 6713(e)(5)	"The President may waive some or all of the sanctions provided under paragraph (3) [which imposes sanctions on foreign governments who knowingly assist a person to divulge United States confidential business information] if he determines and certifies in writing to the Speaker of the House of Representatives and the Committee on Foreign Relations of the Senate that such waiver is necessary to protect the national security interests of the United States."
Omnibus Consolidated and Emergency Supplemental Appropriations Act, 49 U.S.C. § 44908(b)	"The President shall suspend assistance provided under the Foreign Assistance Act of 1961 (22 U.S.C. 2151 et seq.) or the Arms Export Control Act (22 U.S.C. 2751 et seq.) to a country in which is located an airport [that the Secretary of Transportation deems does not take effective security measures] if the Secretary of State decides the country is a high terrorist threat country. The President may waive this subsection if the President decides, and reports to Congress, that the waiver is required because of national security interests or a humanitarian emergency."
Prioritizing Resources and Organization for Intellectual Property Act, 42 U.S.C. § 3713(d)	"The Federal share of a grant received under this section may not exceed 90 percent of the costs of a program or proposal funded under this section [which establishes a state grant program for training and prosecution of computer crimes] unless the Attorney General waives, wholly or in part, the requirements of this subsection."
Protect Our Children Act of 2008, 42 U.S.C. § 17616(a)(3)(C)	"The Attorney General may waive, in whole or in part, the matching requirement" that is otherwise required under the statute to obtain funds remaining after grants have been issued "if the State or local [Internet Crimes Against Children] task force demonstrates good cause or financial hardship."
Reagan National Defense Authorization Act, 10 U.S.C. § 2208(j)(2)	"The Secretary of Defense may waive the conditions in paragraph (1) [providing that the Secretary of a military department may authorize a working capital funded industrial facility to manufacture articles under a Department of Defense contract] in the case of a particular sale if the Secretary determines that the waiver is necessary for reasons of national security and notifies Congress regarding the reasons for the waiver."
REAL ID Act,	"Notwithstanding any other provision of law, the

8 U.S.C. § 1103 note	Secretary of Homeland Security shall have the authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section." *See County of El Paso v. Chertoff*, 2008 WL 4372693 (W.D. Tex. Aug. 29, 2008) (upholding statute against non-delegation challenge); *Save Our Heritage Org. v. Gonzales*, 533 F. Supp. 2d 58 (D.D.C. 2008) (same); *Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119 (D.D.C. 2007) (same); *Sierra Club v. Ashcroft*, 2005 U.S. Dist. LEXIS 44244 (S.D. Cal. Dec. 12, 2005) (same).
Tariff Act of 1930, 19 U.S.C. § 1641(c)(2)	Regarding permits for customs brokers, the Secretary of the Treasury "may," if satisfied that the broker fulfills certain conditions, waive the requirement that the broker regularly employ at least one licensed person in a given district.
Trade Sanctions Reform and Export Enhancement Act, 22 U.S.C. § 7207(a)(3)	"The President may waive the application of paragraph (1) [which prohibits US government assistance for exports to Cuba or for commercial exports to Iran, Libya, North Korea, or Sudan] with respect to Iran, Libya, North Korea, and Sudan to the degree the President determines that it is in the national security interest of the United States to do so, or for humanitarian reasons."
USA Patriot Act, 8 U.S.C. § 1226a(a)(3)	Upon having reasonable grounds to believe that an alien is engaging in certain prohibited activities or "is engaged in any other activity that endangers the national security of the United States," the Attorney General "may certify" the alien for detention until removal.
USA Patriot Improvement and Reauthorization Act, 21 U.S.C. § 971(f)(1)	"The Attorney General may by regulation waive the 15-day notification requirement for exports and imports of a listed chemical to a specified country if the Attorney General determines that such notification is not required for effective chemical diversion control programs or is required by treaty or other international agreement to which the United States is a party."
Violence Against Women and Department of Justice Reauthorization Act, 42 U.S.C. § 14071(a)(2)(B)	"The Attorney General may waive the requirements of subparagraph (A) [requiring that a court consider the recommendation of a board of experts before determining whether a person is a sexually violent predator] if the Attorney General determines that the State has established alternative procedures or legal standards for designating a person as a sexually violent predator."

APPENDIX B

SELECTED STATUTES AUTHORIZING EXECUTIVE BRANCH OFFICIALS TO TAKE ACTION PREDICATED ON FACTUAL DETERMINATIONS OR JUDGMENTS

Statute	Relevant Language
Air Transportation Safety and System Stabilization Act, 49 U.S.C. § 44303(b)	For acts of terrorism occurring between September 22, 2001 and May 31, 2009, the Secretary of Transportation "may certify that the air carrier was a victim of an act of terrorism and in the Secretary's judgment, based on the Secretary's analysis and conclusions regarding the facts and circumstances of each case, shall not be responsible for losses suffered by third parties . . . that exceed $100,000,000, in the aggregate, for all claims by such parties arising out of such act."
Atomic Testing Liability Act, 50 U.S.C. § 2783(c)	"A contractor against whom a civil action or proceeding [for injury or loss due to exposure to radiation from an atomic weapons testing program contracted by the United States] is brought shall promptly deliver all processes served upon that contractor to the Attorney General of the United States. Upon certification by the Attorney General that the suit against the contractor is within the provisions of subsection (b) of this section [regarding exclusivity of remedy], a civil action or proceeding commenced in a State court shall be removed [to the applicable federal court]." *See In re Consolidated United States Atmospheric Testing Litigation*, 820 F.2d 982 (9th Cir. 1987) (upholding the statute against various constitutional challenges)
Controlled Substances Act, 21 U.S.C. § 824(d)	"The Attorney General may, in his discretion, suspend any registration [to manufacture, distribute, or dispense a controlled substance or list I chemical] simultaneously with the institution of proceedings under this section, in cases where he finds that there is an imminent danger to the public health or safety."
Endangered Species Act, 16 U.S.C. § 1533(e)	"The Secretary [of the Interior] may, by regulation of commerce or taking, and to the extent he deems advisable, treat any species as an endangered species or threatened species even though it is not listed pursuant to this section if he finds that—(A) such species so closely resembles in appearance, at the point in question, a species which has been listed pursuant to such section that enforcement personnel would have substantial difficulty in attempting to differentiate between the listed and unlisted species; (B) the effect of this substantial difficulty is an additional threat to an endangered or threatened species; and (C) such treatment of an unlisted species will substantially facilitate the enforcement and further the policy of this

	chapter." *See United States v. Hill*, 896 F. Supp. 1057, 1059–62 (D. Colo. 1995) (rejecting non-delegation challenge).
Extension and Termination of National Emergency Powers Under the Trading with the Enemy Act, 50 U.S.C. App. § 5 note	The President "may extend the exercise of [already existing embargoes] for one-year periods upon a determination for each such extension that the exercise of such authorities with respect to such country for another year is in the national interest of the United States." *See Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1437 (9th Cir. 1996) (upholding the statute against non-delegation challenge).
Federal Employment Compensation Act, 5 U.S.C. § 8121	"The Secretary [of Labor] may waive . . . for reasonable cause shown" the requirements that a claim for compensation for work related injuries contain certain information and be sworn to and "accompanied by a certificate of the physician of the employee stating the nature of the injury."
Food Stamp Act of 1977, 7 U.S.C. § 2015(o)(4)	"On the request of a State agency, the Secretary [of Agriculture] may waive the applicability of [the work requirement] to any group of individuals in the State [receiving nutrition assistance] if the Secretary makes a determination that the area in which the individuals reside (i) has an unemployment rate of over 10 percent; or (ii) does not have a sufficient number of jobs to provide employment for the individuals."
Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(g)(1)(A)	"[T]he court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere."
Grain Standards Act, 7 U.S.C. § 77(a)(1)	The Secretary of Agriculture "may waive" the requirements regarding official weighing and inspection "in emergency or other circumstances which would not impair the objectives of this chapter."
Immigration and Nationality Act, 8 U.S.C. § 1157(c)(1)	"Subject to [certain] numerical limitations . . . the Attorney General may, in the Attorney General's discretion and pursuant to such regulations as the Attorney General may prescribe, admit any refugee who is not firmly resettled in any foreign country, is determined to be of special humanitarian concern to the United States, and is admissible . . . as an immigrant under this chapter."
Immigration and Nationality Act, 8 U.S.C. § 1157(c)(4)	"The refugee status of any alien (and of the spouse or child of the alien) may be terminated by the Attorney General pursuant to such regulations as the Attorney General may prescribe if the Attorney General determines that the alien was not in fact a refugee

	within the meaning of section 1101(a)(42) of this title at the time of the alien's admission."
Immigration and Nationality Act, 8 U.S.C. § 1182(e)	"[U]pon the favorable recommendation of the Director [of the United States Information Agency] . . . the Attorney General may waive the requirement of such two-year foreign residence abroad in the case of any alien whose admission to the United States is found by the Attorney General to be in the public interest." *See Abdelhamid v. Ilchert*, 774 F.2d 1447, 1450 (9th Cir. 1985) (noting that the statute "does not expressly limit [the Director's] discretion in deciding whether or not to make a favorable recommendation [to the Attorney General]").
Immigration and Nationality Act, 8 U.S.C. § 1182e(c)	The Secretary of State "may waive" the prohibitions against issuing a visa to a foreign national involved in forced population control policies "if the Secretary (1) determines that it is important to the national interest of the United States to do so; and (2) provides written notification to the appropriate congressional committees containing a justification for the waiver."
Immigration and Nationality Act, 8 U.S.C. § 1221(h)	The Attorney General "may waive" the requirements regarding the duties of departing and arriving vessels and aircraft to provide manifest information about each passenger, crew member, or occupant "upon such circumstances and conditions as the Attorney General may by regulation prescribe."
Immigration and Nationality Act, 8 U.S.C. § 1227(a)(3)(C)(ii)	"The Attorney General may waive [the requirement that an alien found to have engaged in document fraud be deported] in the case of an alien lawfully admitted for personal residence if no previous civil money penalty was imposed against the alien [for the violation] and the offense was incurred solely to assist, aid, or support the alien's spouse or child (and no other individual). No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this clause."
Immigration and Nationality Act, 8 U.S.C. § 1255a(d)(2)(B)(i)	"[T]he Attorney General may waive any other provision of section 1182(a) of this title [regarding classes of aliens ineligible for visas or admission] in the case of individual aliens for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest."
Immigration and Nationality Act, 8 U.S.C. § 1324c(d)(7)	"The Attorney General may waive the penalties imposed by this section with respect to an alien who knowingly" fails to present a document relating to the alien's eligibility to enter the United States upon arriving in the United States, if, under specified sections of the same title, the alien "is granted asylum . . . or withholding of removal."
Immigration and Nationality Act, 8 U.S.C. § 1442(c)	"The Attorney General may, in his discretion, upon investigation fully establishing the loyalty of any alien enemy who did not have an application for naturalization pending at the beginning of the state of

	war, except such alien enemy from the classification of alien enemy for the purposes of this subchapter, and thereupon such alien shall have the privilege of filing an application for naturalization."
Immigration and Nationality Act, 8 U.S.C. § 1446(a)	"The Attorney General may, in his discretion, waive a personal investigation [otherwise required before a person may be naturalized] in an individual case or in such cases or classes of cases as may be designated by him."
Intelligence Authorization Act, Fiscal Year 1991, 10 U.S.C. § 433(b)	"If the Secretary of Defense determines, in connection with a commercial activity authorized pursuant [to the Secretary's authority to authorize commercial activities necessary to provide security for intelligence activities abroad] that compliance with certain Federal laws or regulations pertaining to the management and administration of Federal agencies would create an unacceptable risk of compromise of an authorized intelligence activity, the Secretary may, to the extent necessary to prevent such compromise, waive compliance with such laws or regulations."
Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1853a(c)(2)	If a fishery has "historically processed the fish outside of the United States" and "the United States has a seafood safety equivalency agreement with the country where processing will occur," the Secretary of the Interior "may waive" the requirement (for approval of "a limited access privilege program to harvest fish") that "all fish harvested . . . be processed on vessels of the United States or on United States soil."
National Wildlife Refuge System Administration Act, 16 U.S.C. § 668dd(d)(2)	"[T]he Secretary [of the Interior] may not grant to any Federal, State, or local agency or to any private individual or organization any right-of-way, easement, or reservation in, over, across, through, or under any area within the [National Wildlife Refuge] system . . . unless the grantee pays to the Secretary [fair market value or fair rental value]. If any Federal, State, or local agency is exempted from such payment by any other provision of Federal law, such agency shall otherwise compensate the Secretary by any other means agreeable to the Secretary . . . except that . . . the Secretary may waive such requirement for compensation if he finds such requirement impracticable or unnecessary."
No Child Left Behind Act of 2001, 20 U.S.C. § 7426(e)	The Secretary of a department providing funds to be used in implementing a plan for the integration of education and related services provided to Indian students "shall have the authority to waive any regulation, policy, or procedure promulgated by that department that has been so identified by the entity or department, unless the Secretary of the affected department determines that such a waiver is inconsistent with the objectives of this subpart or those provisions of the statute from which the program involved derives authority that are specifically applicable to Indian students."

Protect Our Children Act of 2008, 42 U.S.C. § 17616(a)(3)(C)	"The Attorney General may waive, in whole or in part, the matching requirement" that is otherwise required under the statute to obtain funds remaining after grants have been issued "if the State or local [Internet Crimes Against Children] task force demonstrates good cause or financial hardship."
REAL ID Act, 8 U.S.C. § 1103 note	"Notwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section." *See County of El Paso v. Chertoff*, 2008 WL 4372693 (W.D. Tex. Aug. 29, 2008) (upholding statute against non-delegation challenge); *Save Our Heritage Org. v. Gonzales*, 533 F. Supp. 2d 58 (D.D.C. 2008) (same); *Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119 (D.D.C. 2007) (same); *Sierra Club v. Ashcroft*, 2005 U.S. Dist. LEXIS 44244 (S.D. Cal. Dec. 12, 2005) (same).
Small Business Investment Act of 1958, 7 U.S.C. § 2009cc-8(c)(2)	"The Secretary [of Agriculture] may, in the discretion of the Secretary and based on a showing of special circumstances and good cause, permit the private capital of a rural business investment company . . . to be less than $10,000,000[,] . . . if the Secretary determines that the action would not create or otherwise contribute to an unreasonable risk of default or loss to the Federal Government."
Tariff Act of 1930, 19 U.S.C. § 1641(c)(2)	Regarding permits for customs brokers, the Secretary of the Treasury "may," if satisfied that the broker fulfills certain conditions, waive the requirement that the broker regularly employ at least one licensed person in a given district.
Trade Sanctions Reform and Export Enhancement Act of 2000, 22 U.S.C. § 7207(a)(3)	"The President may waive the application of paragraph 1 [forbidding the provision of U.S. government assistance] with respect to Iran, Libya, North Korea, and Sudan to the degree the President determines that it is in the national security interest of the United States to do so, or for humanitarian reasons." *See Acree v. Republic of Iraq*, 370 F.3d 41, 64 n.3 (D.C. Cir. 2004) (citing the statute as an example of the "waivers that the President is routinely empowered to make") (Roberts, J., concurring).
USA Patriot Act, 8 U.S.C. § 1226a(a)(3)	Upon having reasonable grounds to believe that an alien is engaging in certain prohibited activities or "is engaged in any other activity that endangers the national security of the United States," the Attorney General "may certify" the alien for detention until removal.
10 U.S.C. § 377(c)	The Secretary of Defense "may waive" the requirement that a civilian law enforcement agency that received

	support "reimburse the Department of Defense for that support," if the support "is provided in the normal course of military training or operations" or "results in a benefit to the element of the Department of Defense . . . that is substantially equivalent to that which would otherwise be obtained from military operation or training."
26 U.S.C. § 6325(b)(1)	"Subject to such regulations as the Secretary [of the Treasury] may prescribe, the Secretary may issue a certificate of discharge of any part of the property subject to any lien imposed under this chapter if the Secretary finds that the fair market value of that part of such property remaining subject to the lien is at least double the amount of the unsatisfied liability secured by such lien and the amount of all other liens upon such property which have priority over such lien."
	See E.J. Friedman Co., Inc. v. United States, 6 F.3d 1355, 1359 (9th Cir. 1993) (noting that "[t]he section commits the decision to discharge a lien to agency discretion, and the statute is drawn such that there is no standard against which to judge the IRS's exercise of discretion").