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11 *Attorneys for the United States*

12 **UNITED STATES DISTRICT COURT**  
 13 **NORTHERN DISTRICT OF CALIFORNIA**

14 IN RE NATIONAL SECURITY AGENCY )  
 TELECOMMUNICATIONS RECORDS )  
 LITIGATION )  
 15 This Document Relates To: )  
 16 ALL CLAIMS AGAINST ELECTRONIC )  
 COMMUNICATION SERVICE PROVIDER )  
 17 DEFENDANTS (including AT&T, MCI/  
*Verizon, Sprint/Nextel, Cingular* )  
 18 *Wireless/AT&T Mobility, and BellSouth*  
 Defendants) including in: )  
 19 06-00672 06-05268 06-06253 06-07934 )  
 06-03467 06-05269 06-06295 07-00464 )  
 20 06-03596 06-05340 06-06294 07-01243 )  
 06-04221 06-05341 06-06313 07-02029 )  
 21 06-03574 06-05343 06-06388 07-02538 )  
 06-05067 06-05452 06-06385 )  
 22 06-05063 06-05485 06-06387 )  
 06-05064 06-05576 06-06435 )  
 23 06-05065 06-06222 06-06434 )  
 06-05066 06-06224 06-06924 )  
 24 06-05267 06-06254 06-06570; and )  
 Master *MCI/Verizon* Compl. (Dkt. 125); )  
 25 Master *Sprint* Compl. (Dkt. 124); Master )  
*BellSouth* Complaint (Dkt. 126); Master )  
 26 *Cingular* Amended Complaint (Dkt. 455) )  
 )

No. M:06-cv-01791-VRW

**UNITED STATES' NOTICE OF  
 MOTION TO DISMISS OR, IN THE  
 ALTERNATIVE, FOR SUMMARY  
 JUDGMENT**

Date: December 2, 2008  
 Time: 10 a.m.  
 Courtroom: 6, 17th Floor

Chief Judge Vaughn R. Walker

1 PLEASE TAKE NOTICE that, on December 2, 2008 at 10:00 a.m. before Chief Judge  
2 Vaughn R. Walker, the United States of America will move to dismiss or, in the alternative, for  
3 summary judgment as to claims against electronic communication service provider-defendants in  
4 the above-referenced proceeding pursuant to Rules 12(b)(1), (b)(6), or 56 of the Federal Rules of  
5 Civil Procedure. The grounds for this motion are that these actions should now be promptly  
6 dismissed pursuant to Section 201 of Title II of the Foreign Intelligence Surveillance Act of  
7 1978 Amendments Act of 2008, Pub. L. 110-261, 122 Stat. 2467, Title II, § 201 (July 10, 2008)  
8 (“FISA Amendments of 2008” or “Act”). The Act established Section 802(a) of the FISA,  
9 which provides that a civil action “may not lie or be maintained” against electronic  
10 communication services providers alleged to have provided assistance to an element of the  
11 intelligence community, and “shall be promptly dismissed” if the Attorney General of the United  
12 States certifies that one of several circumstances exist with respect to the alleged assistance. *See*  
13 50 U.S.C. § 1885a(a)(1)-(5). The Attorney General has made the requisite certification under  
14 Section 802(a) of the FISA with respect to all claims against the provider-defendants in this  
15 proceeding and, accordingly, those claims should now be promptly dismissed.

16 This motion is supported by the accompanying: (i) Memorandum of Points and  
17 Authorities in Support of the United States Motion to Dismiss or for Summary Judgment; (ii) the  
18 Public Certification of the Attorney General of the United States authorized by Section 802(a) of  
19 the Act, 50 U.S.C. § 1885a(a); (iii) the Classified Certification of the Attorney General of the  
20 United States submitted for the Court’s *in camera, ex parte* as expressly authorized by Section  
21 802(c) of the FISA, 50 U.S.C. § 1885a(c); and (iv) any “supplemental materials” submitted by  
22 the Attorney General with his classified certification (if any), pursuant to Section 802(b)(2) of  
23 the FISA, 50 U.S.C. § 1885a(b)(2).

24 Dated: September 19, 2008

Respectfully Submitted,

25 GREGORY G. KATSAS  
Assistant Attorney General, Civil Division

26 CARL J. NICHOLS  
Principal Deputy Associate Attorney General

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 25 Master MCI/Verizon Compl. (Dkt. 125); )  
 Master Sprint Compl. (Dkt. 124); Master )  
 26 BellSouth Complaint (Dkt. 126); Master )  
 Cingular Amended Complaint (Dkt. 455) )

**MEMORANDUM OF POINTS  
AND AUTHORITIES IN SUPPORT OF  
UNITED STATES' MOTION TO  
DISMISS OR FOR SUMMARY  
JUDGMENT**

Date: December 2, 2008  
 Time: 10 a.m  
 Courtroom: 6, 17<sup>th</sup> Floor

Chief Judge Vaughn R. Walker

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## INTRODUCTION

1 On July 10, 2008, Congress passed the Foreign Intelligence Surveillance Act of 1978  
2 Amendments Act of 2008, Pub. L. 110-261, 122 Stat. 2467, Title II, § 201 (July 10, 2008)  
3 (“FISA Act Amendments of 2008” or “Act”). A critical and central component of the Act is the  
4 enactment of Section 802(a) of the FISA, *see* 50 U.S.C. § 1885a(a), which provides that a civil  
5 action “may not lie or be maintained” against any person, including electronic communication  
6 services providers, for providing assistance to an element of the intelligence community, and  
7 “shall be promptly dismissed” if the Attorney General certifies that one of several possible  
8 circumstances exist, including that the provider did not provide the alleged assistance, *see id.*  
9 § 1885a(a)(5); that the provider assisted the Government subject to an order of the Foreign  
10 Intelligence Surveillance Court (“FISC”) or other certifications or directives authorized by  
11 statute, *see id.* § 1885a(a)(1)-(3); or that the alleged assistance was in connection with an  
12 intelligence activity involving communications authorized by the President after the terrorist  
13 attacks of September 11, 2001, and ending on January 17, 2001, and was designed to detect or  
14 prevent a further terrorist attack on the United States, and was the subject of written requests to a  
15 provider indicating that the activity was authorized by the President and had been determined to  
16 be lawful. *See id.* § 1885a(a)(4).

17 These provisions of the Act reflect Congress’ fundamental policy judgment that  
18 burdensome litigation should not proceed against providers that may have assisted the  
19 Government in unique historical circumstances after 9/11 to detect and prevent another  
20 catastrophic terrorist attack on the United States and, indeed, that such litigation risks serious  
21 harm to national security. Following extensive oversight of the Terrorist Surveillance Program  
22 (“TSP”) authorized by the President after 9/11, the Senate Select Committee on Intelligence  
23 (“SSCI”) concluded that “electronic surveillance for law enforcement and intelligence purposes  
24 depends in great part on the cooperation of the private companies that operate the Nation's  
25 telecommunication system,” *see* S. Rep. 110-209 (2007), accompanying S. 2248, Foreign  
26 Intelligence Surveillance Act of 1978 Amendments Act of 2007, Senate Select Committee on  
27



1 Intelligence (“SSCI Report”) (Exhibit 1 hereto), at 9, and that, if litigation is allowed to proceed  
2 against telecommunication companies alleged to have assisted in such activities, “the private  
3 sector might be unwilling to cooperate with lawful Government requests in the future,” and the  
4 “possible reduction in intelligence that might result from this delay is simply unacceptable for  
5 the safety of our Nation.” *Id.* at 10 (emphasis added). Accordingly, the special procedures  
6 established under the Act for obtaining review and, where the Act is satisfied, prompt dismissal  
7 of such litigation, is vital to the public interest.

8 The Act establishes procedures that permit the Attorney General to demonstrate that the  
9 requirements of the Act have been met without the disclosure of information that would harm  
10 national security, including intelligence sources and methods. Congress specifically authorized  
11 the Attorney General to submit the basis for his certification as to particular provider-defendants  
12 solely for *in camera*, *ex parte* review when the Attorney General finds that this is necessary to  
13 protect national security. *See* 50 U.S.C. 1885a(c)(1). Indeed, the Act’s legislative history makes  
14 clear that the identity of electronic communication service providers from which assistance was  
15 sought, and any activities in which the Government was engaged or in which providers assisted,  
16 or the details regarding any such assistance, must not be disclosed in applying the procedures  
17 established under the Act.

18 As set forth below, plaintiffs generally allege that, following the terrorist attacks of  
19 September 11, 2001, the provider-defendants unlawfully assisted the Government in two ways:  
20 (1) by facilitating an alleged “dragnet” collection of the content of millions of domestic and  
21 international telephone and Internet communications by the Government, and (2) by allegedly  
22 making available to the Government records concerning subscriber telephone and Internet  
23 communications—both without judicial authorization or otherwise not in compliance with law.  
24 Plaintiffs’ claims are plainly encompassed within the Act’s provisions. *See* 50 U.S.C. § 1885(1)  
25 (defining alleged “assistance” by provider-defendants subject to statutory protection).

26 Accordingly, the Government submits herewith, as expressly authorized by Section  
27 802(a), both a public certification from Attorney General Michael B. Mukasey that all of the

1 claims in the civil actions pending in this proceeding against the provider-defendants fall within  
 2 at least one of the five circumstances set forth in the Act, *see* 50 U.S.C. § 1885a(a)(1)-(5), and a  
 3 classified certification that sets forth the basis for his certification as to particular provider-  
 4 defendants. *See* Public Certification of the Attorney General of the United States (hereafter  
 5 Public Certification); *see also* Notice of Lodging *In Camera*, *Ex Parte* Certification of the  
 6 Attorney General of the United States. Section 802(b)(1) of the FISA provides that this  
 7 certification “shall be given effect” unless the Court finds that it “is not supported by substantial  
 8 evidence provided to the court pursuant to this section.” *See* 50 U.S.C. § 1885a(b)(1). As set  
 9 forth below, the Attorney General’s certification complies with all requirements of the Act and is  
 10 supported by substantial evidence. Accordingly, the Court should promptly dismiss the claims  
 11 in this proceeding against electronic communication service providers.<sup>1/</sup>

## 12 BACKGROUND

### 13 A. Claims Against Electronic Communication Service Providers.

14 As the Court is aware, cases against electronic communication service providers first  
 15 arose after media reports in December 2005 alleged that the Government had been undertaking  
 16 certain intelligence activities after the 9/11 attacks. As detailed below, plaintiffs allege that,  
 17 without judicial authorization and in violation of law, the provider-defendants have assisted the

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18  
 19 <sup>1</sup> Section 803 of the FISA, as also added by the FISA Act of 2008, expressly preempts  
 20 the authority of any State, *see* 50 U.S.C. § 1885(9) (defining “State”), to conduct an investigation  
 21 into any assistance allegedly furnished to the intelligence community by electronic  
 22 communication service providers, or to require information about such alleged assistance, or  
 23 from imposing any sanction on the provider for such alleged assistance, or from commencing a  
 24 civil action against a provider to enforce requirements to disclose information concerning such  
 25 alleged assistance. *See* 50 U.S.C. § 1885b. Section 803 also authorizes suit by the United States  
 26 to enforce these statutory preemption provisions, and provides for district court jurisdiction to  
 27 review such suits. *See id.* Accordingly, the Act precludes the State investigations at issue in the  
 28 following cases pending in this MDL proceeding: *United States v. Gaw* (07-01242); *United*  
*States v. Palermino* (07-01326); *United States v. O’Donnell* (07-01324); *United States v. Maine*  
*(07-01323)*; *United States v. Volz* (07-01396); *Clayton v. ATT* (07-01187). The disposition of  
 these cases under the Act will be addressed by separate motion. This motion also does not  
 concern pending actions brought solely against Government defendants: *Al-Haramain et al. v.*  
*Bush, et al.* (07-00109); *Center for Constitutional Rights et al. v. Bush, et al.* (07-1115); *Shubert*  
*et al. v. Bush, et al.* (07-00693); and *Guzzi v. Bush, et al.* (06-06225).

1 Government with: (1) an alleged “dragnet” on the collection of the content of communications  
2 of millions of Americans; and (2) the alleged collection of records concerning the plaintiffs’  
3 telephone and electronic communications.

4 The first such suit, *Hepting et al. v. AT&T et al.* (06-00672), alleges that AT&T was  
5 assisting the Government, without court authorization, in both the interception of “vast quantities  
6 of American’s telephone and Internet communications,” and the collection of detailed  
7 communications records about millions of customers. *See Hepting First Amended Complaint*  
8 (“FAC”) ¶¶ 2-6, 41; *see also Hepting et al. v. AT&T et al.*, 439 F. Supp. 2d 974, 996 (N.D. Cal.  
9 2006) (summarizing claims); *see also id.* at 1001, 1005, 1010 (plaintiffs allege “dragnet” that  
10 sweeps in the communication content and records of all or substantially all AT&T customers).  
11 A second group of more than forty lawsuits arose after media reports in May 2006 alleged that  
12 telecommunications carriers were providing telephone call records to the NSA. *See Hepting*,  
13 439 F. Supp. 2d at 988 (citing Leslie Cauley, *NSA Has Massive Database of Americans’ Phone*  
14 *Calls*, USA Today, May 11, 2006). Thereafter, the Judicial Panel on Multi-district Litigation  
15 ordered the transfer of all pending cases to this Court. *See* Dkt. 1 (06-cv-1791-VRW). After  
16 initial case management proceedings, the Court directed the filing of consolidated complaints  
17 setting forth claims against particular provider-defendants, including four consolidated  
18 complaints brought against: (i) *MCI/Verizon Defendants* (Dkt. 125); (ii) *Sprint/Nextel*  
19 *Defendants* (Dkt. 124); (iii) *BellSouth Defendants* (Dkt. 126); and (iv) *Cingular Wireless (AT&T*  
20 *Mobility) Defendants* (Dkts. 121, 455).<sup>2</sup>

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21  
22 <sup>2</sup> All of the defendants in one of the five Master Consolidated Complaints, *see* Dkt. 123  
23 (naming T-Mobile, Comcast Telecommunications, McLeod USA Telecommunications Services,  
24 and Transworld Network Corp.), have been dismissed by stipulation. *See* Dkts. 162, 164, 184,  
25 185. Certain defendants named in other complaints have also been dismissed. *See* Dkt. 230  
26 (dismissing Cellco Partnership dba Verizon Wireless; NYNEX Corp.; GTE Wireless Inc.; GTE  
27 Wireless of the South, Inc.; NYNEX PCS Inc.; Verizon Wireless of the East LP; Verizon  
28 Internet Services Inc.; Bell Atlantic Entertainment and Information Services Group; Verizon  
Internet Solutions Inc.; Verizon Technology Corp; Verizon Advanced Data, Inc.); Dkt. 169  
(dismissing Bright House Networks LLC); Dkt. 170 (dismissing Charter Communications LLC);  
Dkt. 85 (dismissing TDS Communications Solutions, Inc.); Dkt. 235 (dismissing Embarq  
Corporation). In addition, one action that had been pending in this proceeding—*Electron Tubes*  
**United States’ Notice of Motion and Motion to Dismiss and for Summary Judgment**  
**and Memorandum in Support (MDL No. 06-CV-1791-VRW)**

1 As in *Hepting*, plaintiffs in the consolidated complaints allege that the provider-  
2 defendants participated “in an illegal federal government program to intercept and analyze vast  
3 quantities of American’s telephones and electronic communications and records.” *See Verizon*  
4 *Compl.* ¶ 3; *Sprint Compl.* ¶ 3; *BellSouth Compl.* ¶ 3; *Cingular Compl.* ¶ 3; *see also Hepting*  
5 *FAC* ¶¶ 2-3. Plaintiffs rely on statements made by the President, the Attorney General, and the  
6 Director of National Intelligence in December 2005 concerning what later was called the  
7 “Terrorist Surveillance Program” (“TSP”), under which the President authorized the National  
8 Security Agency (“NSA”) “to intercept the international communications of people with known  
9 links to Al Qaeda and related terrorist organizations.” *See Hepting*, 439 F. Supp. 2d at 986-87;  
10 *see also Hepting FAC* ¶ 32; *Verizon Compl.* ¶ 139-41; *Sprint Compl.* ¶ 19-21; *BellSouth Compl.*  
11 *¶ 39-41; Cingular Compl.* ¶ 28-30. But, as this Court has noted, plaintiffs “allege a surveillance  
12 program of far greater scope than the publicly disclosed ‘terrorist surveillance program.’”  
13 *Hepting*, 439 F. Supp. 2d at 994. Specifically, plaintiffs allege that the NSA, with the assistance  
14 of the provider-defendants, has intercepted “millions of communications made or received by  
15 people inside the United States” and use “powerful computers to scan their contents for  
16 particular names, numbers, words, or phrases.” *See Hepting FAC* ¶ 39; *Verizon Compl.* ¶ 165;  
17 *Sprint Compl.* ¶ 44; *BellSouth Compl.* ¶ 64; *Cingular Compl.* ¶ 53. And plaintiffs separately  
18 allege that the provider defendants have provided the Government with access to records about  
19 their telephone and electronic communications. *See Hepting FAC* ¶¶ 51-63; *Verizon Compl.*  
20 *¶¶ 168-71, 174-75; Sprint Compl.* ¶¶ 48-50, 53-54; *BellSouth Compl.* ¶¶ 68-70, 73-74; *Cingular*  
21 *Compl.* ¶¶ 57-59, 62-63.

22 Plaintiffs allege that these activities were undertaken without judicial authorization, and  
23 seek declaratory and injunctive relief as well as damages based on alleged violations of the First  
24 and Fourth Amendments and other federal and state statutory provisions. *See Hepting FAC* ¶¶ 2;  
25 81, 83, 90-149; *Verizon Compl.* ¶ 177, 201-89; *Sprint Compl.* ¶ 56, 72-141; *BellSouth Compl.*

26 *Inc. v. Verizon Communications, et al.* (06-cv-6433-VRW)—has been dismissed. *See* Dkt. 178.  
27 As a result, the Attorney General’s Certification and this motion need not address these  
28 dismissed parties or actions.

¶ 76, 101-216; *Cingular* Compl. ¶ 65, 90-321.

## B. Summary of Procedural History

On May 13, 2006, the United States moved to intervene in *Hepting* and filed a motion to dismiss or for summary judgment based on the state secrets privilege and related statutory privileges. *See* Dkts. 122-125 (06-cv-672); *see also Hepting*, 439 F. Supp. 2d at 979. The Government supported its assertion of privilege with public and classified declarations (for *in camera*, *ex parte* review) by the Director of National Intelligence and the Director of the National Security Agency. The Court later denied both motions but certified its decision for interlocutory appeal, *see Hepting*, 439 F. Supp. 2d at 1010, and the United States Court of Appeals for the Ninth Circuit granted the Government's and AT&T's petition for interlocutory review. *See* Dkt. 341 (06-cv-672).

In the meantime, actions brought against the *AT&T* Defendants, *Sprint* Defendants, and *Cingular Wireless/AT&T Mobility* Defendants were stayed by stipulation pending disposition of the appeal in *Hepting*. *See* Dkts. 172, 163, 177, 199. Actions against the *MCI/Verizon* Defendants were not stayed, and the Government intervened in those cases and filed a motion to dismiss or for summary judgment again based on the state secrets privilege. *See* Dkts. 253-57. Actions against the *BellSouth* Defendants were stayed pending disposition of the motions filed in the *MCI/Verizon* cases, *see* Dkt. 209, and those motions were terminated by the Court without decision on March 31, 2008, *see* Dkt. 438.

By Order dated August 21, 2008, the Ninth Circuit remanded the *Hepting* appeal in light of the enactment of the FISA Act Amendments of 2008.

## C. FISA Act Amendments of 2008

The FISA Act Amendments of 2008 were the result of extensive deliberations between Congress and the Executive Branch over the need to modernize and streamline provisions of the FISA, and to address the serious burdens and potential harm to national security of lawsuits against electronic communication service providers alleged to have assisted the Government with intelligence activities after the 9/11 attacks.

1 Title I of the Act, which is not at issue in the pending claims against provider-defendants,  
 2 establishes new procedures to facilitate the targeting of communications of persons reasonably  
 3 believed to be outside the United States in order to acquire foreign intelligence information. *See*  
 4 50 U.S.C. §§ 1881a-1881g. Title II of the Act establishes Section 802(a) of the FISA, which  
 5 provides that civil actions brought against persons, including electronic communication services  
 6 providers, alleged to have furnished assistance to an element of the intelligence community shall  
 7 be promptly dismissed if the Attorney General certifies to the district court of the United States  
 8 in which such action is pending that one of several circumstances exist with respect to the  
 9 alleged assistance. *See* 50 U.S.C. § 1885a(a).<sup>3/</sup> Section 802(a) sets forth five separate grounds  
 10 warranting dismissal of such actions, including where any assistance was provided pursuant to:  
 11 (1) an order of the Foreign Intelligence Surveillance Court directing the provider to furnish such  
 12 assistance; or (2) a certification in writing from the Attorney General to the provider under 18  
 13 U.S.C. § 2511(2)(a)(ii)(B) or 18 U.S.C. § 2709(b); or (3) a directive from the Attorney General  
 14 or Director of National Intelligence that the provider furnish assistance authorized by the Protect  
 15 America Act of 2007 or the FISA Act of 2008. *See* 50 U.S.C. § 1885a(a)(1)-(3).

16 Section 802(a) also bars a cause of action in any “covered civil action” where the  
 17 assistance alleged to have been provided by an electronic communication service provider was—

- 18 (A) in connection with an intelligence activity involving communications that  
 was—
- 19 (i) authorized by the President during the period beginning on  
 20 September 11, 2001, and ending on January 17, 2007; and
- 21 (ii) designed to detect or prevent a terrorist attack, or activities in  
 preparation for a terrorist attack, against the United States; and

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23 <sup>3</sup> The definition of “person” under the Act includes an “electronic communication  
 24 service provider,” which is a telecommunications carrier as defined in 47 U.S.C. § 153; a  
 25 provider of electronic communication service as defined in 18 U.S.C. § 2510; a provider of a  
 26 remote computing service as defined in 18 U.S.C. § 2711; any other communication service  
 27 provider who has access to wire or electronic communications either as such communications are  
 transmitted or as such communications are stored; a parent, subsidiary, affiliate, successor, or  
 assignee of the foregoing entities; or an officer, employee, or agent thereof. *See* 50 U.S.C.  
 § 1885(6), (8). It is indisputable that the provider-defendants in this proceeding qualify as  
 “persons” and “electronic communication service providers” for purposes of the Act.

1 (B) the subject of a written request or directive, or a series of written requests  
2 or directives, from the Attorney General or the head of an element of the  
intelligence community (or the deputy of such person) to the electronic  
communication service provider indicating that the activity was—

3 (i) authorized by the President; and

4 (ii) determined to be lawful[.]

5 50 U.S.C. § 1885a(a)(4).<sup>4/</sup>

6 Finally, Section 802(a) also provides that a cause of action may not lie against a provider-  
7 defendant where the Attorney General certifies that the provider “did not provide the alleged  
8 assistance.” 50 U.S.C. § 1885a(a)(5).

9 A certification by the Attorney General that at least one of these five conditions has been  
10 met “shall be given effect unless the court finds that such certification is not supported by  
11 substantial evidence provided to the court pursuant to this section.” 50 U.S.C. § 1885a(b)(1).  
12 Section 802 provides further that, in its review of a certification under subsection (a), the court  
13 may examine certain “supplemental materials” that track the various grounds for the certification  
14 in Section 802(a), namely any court order (§ 802(a)(1)); an Attorney General certification under  
15 18 U.S.C. § 2511(2)(a)(ii)(b) (§ 802(a)(2)); and any directive or written request seeking  
16 assistance (§ 802(a)(3) or (4)). *See id.* § 1885a(b)(2).

17 Section 802 of the FISA also establishes special procedures for implementing this  
18 provision without the disclosure of information that would harm national security. Specifically,

19 \_\_\_\_\_  
20 <sup>4</sup> The Act defines several key terms referenced in this provision. A “covered civil  
21 action” to which Section 802(a)(4) applies is defined to mean a civil action filed in a Federal or  
State court that—

22 (A) alleges that an electronic communication service provider furnished assistance to  
23 an element of the intelligence community; and

24 (B) seeks monetary or other relief from the electronic communication service  
25 provider related to the provision of such assistance.

26 *See* 50 U.S.C. § 1885(5). “Assistance” means “the provision of, or the provision of access to,  
27 information (including communication contents, communications records, or other information  
relating to a customer or communication), facilities, or another form of assistance.” *See id.*  
§ 1885(1).

1 Section 802(c) provides that, if the Attorney General files a declaration under 28 U.S.C. §1746  
2 attesting that disclosure of a certification or any accompanying supplemental materials would  
3 harm the national security of the United States, the court shall review such certification and  
4 supplemental materials *in camera* and *ex parte*, and may not in any public order following such  
5 review disclose which of the five alternatives under Section 802(a) form the basis for the  
6 certification. *See* 50 U.S.C. § 1885a(c)(1). To further protect national security interests, Section  
7 802(d) also provides that “[t]o the extent that classified information is relevant to the proceeding  
8 or would be revealed in the determination of an issue, the court shall review such information *in*  
9 *camera* and *ex parte*, and shall issue any part of the court’s written order that would reveal  
10 classified information *in camera* and *ex parte* and maintain such part under seal.” 50 U.S.C.  
11 § 1885a(d).

12 The relevant legislative history to the Act<sup>5/</sup> sets forth the background and purpose of  
13 Section 802 of the FISA. *See* S. Rep. 110-209 at 7-12 (Exhibit 1). Following extensive  
14 oversight of the TSP,<sup>6/</sup> the Senate Select Committee on Intelligence—the committee that  
15 originated legislation that ultimately became the FISA Amendments Act of 2008—concluded  
16 that “there is a strong national interest in addressing the extent to which the burden of litigation  
17 over the legality of surveillance should fall on private parties.” *Id.* at 8. In reaching this  
18 conclusion, the SSCI found that, beginning soon after September 11, 2001, the Executive Branch

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19 <sup>5</sup> No formal conference was convened to resolve the differences between the original  
20 House and Senate versions of the Act (S. 2248 and H.R. 3773). Instead, following an agreement  
21 reached without a formal conference, the House passed a new bill, H.R. 6304, which contains “a  
22 complete compromise of the differences between the House and Senate versions.” *See* 154  
23 Cong. Rec. S6097, 6129 (daily ed. June 25, 2008) (Section-by-Section Analysis and Explanation  
24 of H.R. 6304, the FISA Act Amendments of 2008). H.R. 6304 is a “direct descendant” of the  
25 original House and Senate bills, and “the legislative history of those measures constitutes the  
26 legislative history of H.R. 6304.” *Id.* (A true and correct copy of the Section-by-Section  
27 Analysis is submitted herewith as Exhibit No. 2).

28 <sup>6</sup> The SSCI Report describes the committee’s extensive oversight of the President’s  
program, including seven hearings, classified briefings, answers to written questions, and formal  
testimony from companies alleged to have participated in the program. *Id.* at 2. The committee  
also reviewed correspondence that was provided to private sector entities concerning the  
President’s program, as well as the presidential authorizations that supported them. *See id.*



1 provided written requests or directives to certain electronic communication service providers to  
2 obtain their assistance with communications intelligence activities that had been authorized by  
3 the President. *See id.* at 9. The SSCI Report indicates that the letters were furnished at regular  
4 intervals to providers who assisted the Government, stated that the activities had been authorized  
5 by the President, and provided that the activities had been determined to be lawful by the  
6 Attorney General, except for one letter that covered a period of less than sixty days. *Id.*<sup>7</sup>

7 The SSCI made no assessment of the legality of the President's program, but simply  
8 recognized that, at a unique moment in history, immediately after the nation had suffered its  
9 worst terrorist attack, private sector entities accepted written representations from high-level  
10 Government officials that assistance was needed to prevent another attack, and had been  
11 authorized by the President and determined to be lawful. *See S. Rep. 110-209* at 9-10. The  
12 SSCI Report noted in particular the "extraordinary nature of the time period" following the 9/11  
13 attacks, and recognized that the Terrorist Surveillance Program was "an early warning system  
14 . . . to detect and prevent the next terrorist attack . . . a program with a military nature that  
15 requires speed and agility." *See id.* at 4. The report also recognized that the TSP was authorized  
16 amid the backdrop of the 9/11 attacks— indeed, that at the very time the President was  
17 authorizing TSP, Congress had authorized the President "to use all necessary and appropriate  
18 force against those nations, organizations, or persons he determines planned, authorized,  
19 committed, or aided" in the attacks. *Id.* (quoting Authorization for Use of Military Force, Pub.  
20 L. 107-40, 115 Stat. 224, Section 2(a) (2001)). In addition, the SSCI found that there was "a  
21 continuing and immediate threat of further attacks on the United States" in October 2001 when  
22 the TSP was authorized, and that concerns about a further terrorist attack "have persisted to the  
23 present day"— citing the United Kingdom aviation plot of August 2006 and the bombing plots in  
24 Germany in 2007. *Id.* at 5.

25 The SSCI Report also makes clear, however, that Section 802(a)(4)—which provides for

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26 <sup>7</sup> That letter, which like all the others stated that the activities had been authorized by the  
27 President, stated that the activities had been determined to be lawful by the Counsel to the  
28 President. *See id.*

1 dismissal of certain “covered civil actions” that concern assistance furnished by providers  
2 subject to written requests after the 9/11 attacks—is restricted to “discrete past activities” and is  
3 a “one-time response to an unparalleled national experience in the midst of which  
4 representations were made that assistance to the Government was authorized and lawful.” *See* S.  
5 Rep. 110-209 at 10-11. Under these circumstances, the SSCI found that providers should not be  
6 burdened by litigation based on allegations that they assisted the Government at this critical  
7 time. This conclusion is buttressed by significant national security considerations—notably that  
8 the cooperation of telecommunication companies is essential to intelligence and law enforcement  
9 matters, and that the possible reduction in that cooperation caused by protracted litigation against  
10 these providers “is simply unacceptable for the safety of our Nation.” *Id.* at 10.

11 The SSCI Report indicates that the Act is meant to apply to the numerous lawsuits  
12 pending in this Court. The report recounts that the lawsuits pending in this proceeding allege  
13 that electronic communication service providers assisted the federal government in intercepting  
14 phone and Internet communications of people within the United States, and that some of the  
15 lawsuits seek to enjoin the providers from furnishing records to the intelligence community,  
16 while others seek damages for alleged statutory and constitutional violations from the alleged  
17 provision of records to the intelligence community. *See* S. Rep. 110-209 at 7. The report also  
18 states that the Government intervened and sought dismissal of these suits based on the state  
19 secrets privilege, that “the future outcome of this litigation is uncertain,” and that “[e]ven if these  
20 suits are ultimately dismissed on state secrets or other grounds, litigation is likely to be  
21 protracted. . . .” *Id.*

22 Section 802 of the FISA—the culmination of the Legislative and Executive Branches’  
23 careful deliberations on the matter—was enacted to avoid the need to consider the Government’s  
24 state secrets privilege assertion, but in a manner that does not disclose classified national security  
25 information identifying any providers that may have assisted the Government or information  
26 concerning alleged activities. The SSCI found that the “details of the President’s program are  
27 highly classified” and that, as with other intelligence matters, the identities of persons or entities

1 who provide assistance to the U.S. Government are protected as vital sources and methods of  
 2 intelligence.” See S. Rep. 110-209 at 9. Notably, the SSCI expressly stated that “[i]t would be  
 3 inappropriate to disclose the names of the electronic communication service providers from  
 4 which assistance was sought, the activities in which the Government was engaged or in which  
 5 providers assisted, or the details regarding any such assistance.” *Id.*; see also *id.* (“identities of  
 6 persons or entities who provide assistance to the intelligence community are properly protected  
 7 as sources and methods of intelligence”). Thus, Section 802(a) is designed to protect  
 8 information that is also subject to the Government’s privilege assertions in this proceeding, but  
 9 authorizes judicial review to determine, through special *ex parte, in camera* proceedings, under a  
 10 deferential standard of review, if particular facts and circumstances exist with respect to alleged  
 11 assistance by the provider-defendants that would warrant dismissal under the Act.<sup>8/</sup>

12 As set forth below, and in the Attorney General’s classified certification submitted for *in*  
 13 *camera, ex parte* review, the Attorney General has certified that at least one of the circumstances  
 14 set forth in Section 802(a) have been met with respect to all claims in these proceedings against  
 15 the provider-defendants, see generally, Public Certification of the Attorney General of the  
 16 United States, and the pending actions against these defendants should therefore be dismissed.

### ARGUMENT

#### **I. THE ATTORNEY GENERAL HAS CERTIFIED THAT THE CLAIMS AGAINST THE PROVIDER-DEFENDANTS IN THESE PROCEEDINGS FALL WITHIN AT LEAST ONE OF THE PROVISIONS OF SECTION 802(a) OF THE FISA.**

17 The Attorney General’s certification addresses whether the provider-defendants furnished  
 18 assistance to the Government in connection with plaintiffs’ alleged content dragnet and the  
 19 alleged provision of communication records to the Government. To the extent it may be at issue,  
 20 the Attorney General’s certification also addresses whether the provider-defendants furnished  
 21 assistance in connection with the Terrorist Surveillance Program. The plaintiffs in these  
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 26 <sup>8</sup> At the same time, the Act expressly preserves and does not waive or preempt the  
 27 Government’s prior state secrets privilege assertion, see 50 U.S.C. § 1885a(h) (“Nothing in this  
 section shall be construed to limit any otherwise applicable immunity, privilege, or defense  
 under any other provision of law”).

1 proceedings have clearly alleged that the provider-defendants provided “assistance” to the  
2 Government as defined in the Act, which includes the provision of, or the provision of access to,  
3 information, including communication contents and communications records, *see* 50 U.S.C.  
4 § 1885(1), and the Attorney General’s certification, including his classified certification,  
5 indicates that plaintiffs’ claims are subject to dismissal based on at least one of the five grounds  
6 set forth in Section 802(a)(1)-(5), *see* 50 U.S.C. § 1885a(a)(1)-(5).

7 A. *Content Dragnet Allegations*: First, as noted above, the plaintiffs have alleged a  
8 content collection program of “far greater scope” than the TSP, in which the President  
9 authorized the NSA to intercept certain “one-end” international communications to or from the  
10 United States that the Government reasonably believed involved a member of agent of al Qaeda  
11 or affiliated terrorist organization. *See* Public Certification, ¶ 6; *see also Hepting*, 439 F. Supp.  
12 2d at 994. While confirming the existence of the TSP, the Government has previously denied  
13 the existence of the alleged “dragnet” collection on the content of plaintiffs’ communications.  
14 *See id.* at 996; *see also* Public Declaration of Lt. Gen. Keith Alexander, Director of the National  
15 Security Agency, in the *Verizon/MCI* Actions (Dkt. 254) ¶ 17. Accordingly, the Attorney  
16 General has certified on the public record that, because there was no such alleged content-  
17 dragnet, no provider participated in that alleged activity, and each of the provider-defendants is  
18 entitled to statutory protection with respect to claims based upon this allegation pursuant to  
19 Section 802(a)(5) of the FISA (50 U.S.C. § 1885a(a)(5)). *See* Public Certification ¶ 6. Because  
20 information about alleged NSA activities that would be necessary to disprove plaintiffs’ content  
21 dragnet allegations cannot be disclosed without causing exceptional harm to national security,  
22 the basis for the Attorney General’s certification concerning the alleged content dragnet is set  
23 forth in his classified certification submitted *in camera, ex parte* review. *See* Public Certification  
24 ¶ 6; *see also* Alexander *Verizon* Declaration ¶ 17.

25 B. *Terrorist Surveillance Program*: The Attorney General’s certification also addresses  
26 whether or not any provider-defendant assisted the NSA with the publicly acknowledged TSP.  
27 Although the plaintiffs do not appear to directly challenge that activity, any allegation in these

1 proceedings against a provider-defendant that may encompass TSP assistance is covered by the  
2 Attorney General's certification. With respect to any TSP assistance, the Attorney General has  
3 certified that the provider-defendants are entitled to statutory protection based on at least one of  
4 the provisions contained in Section 802(a)(1) through (5) of the Act, which includes the  
5 possibility that a provider-defendant did not provide any assistance, *see* 50 U.S.C.  
6 § 1885a(a)(1)-(5). *See* Public Certification ¶ 7. The Attorney General has also attested, pursuant  
7 to Section 802(c)(1) of the Act, 50 U.S.C. § 1885a(c)(1), that disclosure of the basis for his  
8 certification with respect to whether particular provider-defendants assisted with the TSP would  
9 cause exceptional harm to national security and, therefore, is set forth in his classified  
10 certification submitted for *ex parte, in camera* review. *See id.* ¶ 7.

11 *C. Communication Records Allegations:* Finally, with respect to plaintiffs' allegations  
12 concerning the collection of telephone and electronic communication records, the Attorney  
13 General has also certified that the provider-defendants are entitled to statutory protection based  
14 on at least one of the provisions contained in Section 802(a)(1) through (5) of the Act, which  
15 includes the possibility that a provider-defendant did not provide any assistance, *see* 50 U.S.C.  
16 § 1885a(a)(1)-(5). Public Certification ¶ 8. Because the existence of this alleged activity or any  
17 such assistance by the provider-defendants has not been confirmed or denied by the Government,  
18 *see Hepting*, 439 F. Supp. 2d at 997, the Attorney General has again attested, pursuant to Section  
19 802(c)(1) of the Act, 50 U.S.C. § 1885a(c)(1), that disclosure of the basis for his certification  
20 with respect to the communication records allegations would cause exceptional harm to national  
21 security and, therefore, is set forth in his classified certification submitted for *ex parte, in camera*  
22 review. *See id.* ¶ 8.

## 23 **II. THE ATTORNEY GENERAL'S CERTIFICATION IS SUPPORTED BY 24 SUBSTANTIAL EVIDENCE.**

25 Section 802(b) of the FISA provides that the Attorney General's certification "shall be  
26 given effect unless the court finds that such certification is not supported by substantial evidence  
27 provided to the court[.]" 50 U.S.C. § 1885a(b)(1). The "substantial evidence" standard of  
28 review is well-established in law and is "highly deferential[.]" *Pal v. INS*, 204 F.3d 935, 937 n.2

1 (9th Cir. 2000). “Substantial evidence is such relevant evidence as a reasonable mind might,  
2 upon consideration of the entire record, accept as adequate to support a conclusion.” *McCarthy*  
3 *v. Apfel*, 221 F.3d 1119, 1125 (9th Cir. 2000) (citing *Richardson v. Perales*, 402 U.S. 389, 401  
4 (1971)). Such review is not *de novo*—that is, under this standard of review, “[i]t is not for the  
5 court to strike down conclusions that are reasonably drawn from the evidence and findings in the  
6 case” or “to substitute its own conclusions for those which the [Attorney General] had fairly  
7 drawn from such findings.” *Illinois Cent. R. Co. v. Norfolk & W. Ry. Co.*, 385 U.S. 57, 69 (1966)  
8 (citations omitted).

9 The Attorney General’s certification covers discrete factual findings: whether a provider-  
10 defendant provided alleged assistance or not; whether, if assistance was provided, the provider-  
11 defendant acted subject to an order, certification, directive, or written request that satisfies one of  
12 the provisions of Section 802(a). *See* 50 U.S.C. § 1885a(a)(1)-(5). Thus, the narrow issue  
13 presented by this motion is whether information submitted to the Court reasonably supports the  
14 conclusion that one of these specific factual circumstances exists. The Attorney General has set  
15 forth these facts in his certification submitted for *in camera*, *ex parte* review, and a review of  
16 that certification, as well as any supplemental materials provided (if any), makes clear that the  
17 certification is amply supported by substantial evidence.

18 **III. THE ATTORNEY GENERAL HAS PROPERLY DETERMINED THAT THE  
19 PARTICULAR BASIS FOR HIS CERTIFICATION CANNOT BE DISCLOSED.**

20 Finally, the Attorney General has properly utilized the procedure set forth in Section  
21 802(c) of the Act and determined that disclosure of the basis for his certification with respect to  
22 the provider-defendants would cause exceptional harm to national security. *See* Public  
23 Certification ¶ 9. Consistent with the Government’s prior state secrets privilege assertion, the  
24 Act is based on a recognition by Congress that the identities of persons or entities who provide  
25 assistance to the intelligence community are properly protected as sources and methods of  
26 intelligence, along with the information concerning any alleged activities in which the providers  
27 are alleged to have assisted. *See* S. Rep. 110-209 at 9. The special procedures in Section 802(a)

1 requested assistance and is entitled to statutory protection without the disclosure of sensitive  
2 national security information and resulting harm to national security. In this manner, the Act  
3 provides some basis for judicial review under special procedures, while avoiding the need to  
4 consider dismissal of these actions pursuant to the state secrets privilege. Dismissal under the  
5 FISA Act of 2008 should—and obviously would—moot the need to consider the Government’s  
6 privilege assertion as a separate basis for dismissal.

7 The Attorney General’s determination that the classified information in his certification,  
8 including the basis for his certification as to particular defendants, cannot be disclosed without  
9 causing exceptional harm to national security, is amply well-founded but cannot be described  
10 further on this record. *See Classified Certification of the Attorney General of the United States.*<sup>9/</sup>

11 **CONCLUSION**

12 For the foregoing reasons, all claims against the electronic communication service  
13 providers in this proceeding should be promptly dismissed.

14 September 19, 2008

Respectfully Submitted,

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23

24  
25 <sup>9</sup> To the extent the procedures in Section 802 do not result in dismissal of this action,  
26 then, as noted above, the state secrets privilege is not waived by the Act, *see* 50 U.S.C.  
27 § 1885a(h), and the United States does not waive or withdraw its prior state secrets and statutory  
28 privilege assertions in *Hepting* and *Verizon* actions, and for the reasons previously set forth in  
those assertions, dismissal of all the pending actions would continue to be required.

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