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10 Robert J. Pushaw, Ronald D. Rotunda, Stephen F. Smith,
Michael E. Solimine, William W. Van Alstyne, and
11 Howard M. Wasserman

12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION
15

16 In re:

17 NATIONAL SECURITY AGENCY
18 TELECOMMUNICATIONS RECORDS
19 LITIGATION
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23 This Document Relates To All Cases Except:
Al-Haramain Islamic Foundation, Inc. v. Bush
24 (07-109); *Center for Constitutional Rights v.*
Bush (07-01115); *Guzzi v. Bush* (06-6225);
25 *Shubert v. Bush* (07-693); *Clayton v. AT&T*
Comm'ns of the Southwest (07-1187); *United*
26 *States v. Adams* (07-01323); *United States v.*
Clayton (07-01242); *United States v.*
27 *Palermino* (07-1326); *United States v. Rabner*
(07-01324); *United States v. Volz* (07-01396)
28

MDL Dkt. No. 06-1791-VRW

**MOTION OF AMICI CURIAE LAW
PROFESSORS FOR LEAVE TO FILE
BRIEF IN SUPPORT OF (1) THE
CONSTITUTIONALITY OF § 802 OF
THE FOREIGN INTELLIGENCE
SURVEILLANCE ACT OF 1978
AMENDMENTS ACT OF 2008, AND (2)
THE MOTION OF THE UNITED
STATES TO DISMISS (Dkt. 469);
[PROPOSED] ORDER**

Date: December 1, 2008
Time: 10 am
Courtroom: 6, 17th Floor
Judge: Hon. Vaughn R. Walker

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE THAT Steven G. Calabresi, Don Doernberg, Richard D.
3 Freer, Stephen B. Presser, Robert J. Pushaw, Ronald D. Rotunda, Stephen F. Smith,
4 Michael E. Solimine, William W. Van Alstyne, and Howard M. Wasserman (collectively,
5 “Amici Curiae Law Professors”) respectfully request the Court’s leave to participate as
6 amici curiae in the above-captioned litigation in support of (1) the constitutionality of § 802
7 of the Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008 and (2) the
8 Motion of the United States to Dismiss or, In the Alternative, For Summary Judgment (Dkt.
9 469). To ensure ample opportunity for Plaintiffs to respond to the arguments in Amici
10 Curiae Law Professors’ 15-page brief, Amici Curiae Law Professors file this motion on the
11 same day the United States and Carrier Defendants file their briefs in support of the United
12 States’ Motion to Dismiss. While the United States and Carrier Defendants have consented
13 to this motion, Plaintiffs have not. Plaintiffs have not yet determined whether they intend
14 to oppose this motion. Notably, this Court granted amicus curiae Brennan Center for
15 Justice leave to submit a 20-page brief in opposition to the Government’s motion to dismiss
16 (Dkt. 502), despite the Brennan Center’s lack of consent from the United States and Carrier
17 Defendants.

18 **I. Standard For Motion for Leave to File Brief of Amici Curiae**

19 The Court has broad discretion to permit third parties to participate in an action as
20 amici curiae. *Gerritsen v. de la Madrid Hurtado*, 819 F.2d 1511, 1514 n.3 (9th Cir. 1987).
21 Participation of amici curiae may be appropriate where legal issues in a case have potential
22 ramifications beyond the parties directly involved or where amici can offer a unique
23 perspective to aid the Court. *Sonoma Falls Dev., LLC v. Nev. Gold & Casinos, Inc.*, 272 F.
24 Supp. 2d 919, 925 (N.D. Cal. 2002). Indeed, as noted above, this Court has already granted
25 amicus curiae Brennan Center for Justice leave to submit a brief in opposition to the
26 Government’s motion to dismiss (Dkt. 502).

27 **II. Statement of Identity and Interest of Amici Curiae**

28 Amici are law professors and scholars in constitutional law, federal courts, and civil

1 procedure, who have taught, written, and spoken, and hold strong views about, the
2 constitutional separation-of-powers issues related to the Supreme Court precedent of *United*
3 *States v. Klein*, 80 U.S. 128 (1871). Amici wish to submit a brief to this court analyzing the
4 history, meaning, and doctrinal effects of *Klein* and to show that this precedent, properly
5 understood and applied, does not render unconstitutional the immunity provisions of § 802
6 of the Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008. Amici
7 believe that, to the extent issues related to *Klein* are implicated in the instant case, it is
8 essential that those issues be thoroughly analyzed and correctly resolved as a matter of law.

9 Amici represent a broad range of divergent political and ideological views as to the
10 policy, wisdom and justice of the congressional decision to grant immunity to the
11 telecommunications company defendants. But signatories agree that there is no
12 constitutional defect in the statute. Regardless of whether Congress should have granted
13 this immunity, signatories believe Congress possesses the constitutional power to do so.

14 Amici are:

- 15 • Steven G. Calabresi, George C. Dix Professor of Law, Northwestern University
16 School of Law
- 17 • Don Doernberg, Professor of Law, Pace Law School
- 18 • Richard D. Freer, Robert Howell Hall Professor of Law, Emory University School
19 of Law
- 20 • Stephen B. Presser, Raoul Berger Professor of Legal History, Northwestern
21 University School of Law
- 22 • Robert J. Pushaw, James Wilson Endowed Professor of Law, Pepperdine
23 University School of Law
- 24 • Ronald D. Rotunda, Professor of Law, Chapman University School of Law
- 25 • Stephen F. Smith, John V. Ray Research Professor, University of Virginia School
26 of Law
- 27 • Michael E. Solimine, Donald P. Klekamp Professor of Law, University of
28 Cincinnati College of Law

- 1 • William W. Van Alstyne, Lee Professor, William & Mary Marshall-Wythe School
- 2 of Law
- 3 • Howard M. Wasserman, Associate Professor of Law, Florida International
- 4 University College of Law

5 **CONCLUSION**

6 Wherefore, Amici request this court’s leave to submit an amicus brief on the scope
7 and meaning of *United States v. Klein*, arguing that § 802 is constitutionally valid under
8 that precedent.

9 Dated: November 5, 2008.

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15 By /s/ Susan T. Kumagai
Susan T. Kumagai

By /s/ Howard Wasserman
Howard Wasserman

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17 Steven G. Calabresi, Don Doernberg, Richard D. Freer, Stephen B. Presser, Robert J.
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18 Alstyne, and Howard M. Wasserman

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
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NATIONAL SECURITY AGENCY
TELECOMMUNICATIONS RECORDS
LITIGATION

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(07-01324); *United States v. Volz* (07-01396)

MDL Dkt. No. 06-1791-VRW
[PROPOSED] ORDER

Good cause appearing, the Motion of Amici Curiae Law Professors Steven G. Calabresi, Don Doernberg, Richard D. Freer, Stephen B. Presser, Robert J. Pushaw, Ronald D. Rotunda, Stephen F. Smith, Michael E. Solimine, William W. Van Alstyne, and Howard M. Wasserman for leave to file a brief in support of (1) the constitutionality of § 802 of the Foreign Intelligence Surveillance Act of 1978 Amendments Act Of 2008, and (2) the Motion of the United States to Dismiss or, in the Alternative, for Summary Judgment (Dkt. 469), is hereby GRANTED.

IT IS SO ORDERED.

Dated: November ____, 2008

Hon. Vaughn R. Walker
United States Chief District Judge

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CERTIFICATE OF SERVICE

I certify that a copy of this document was served electronically on November 5, 2008, on counsel of record in compliance with Federal Rule 5, Local Rule 5-6 and General Order 45, by use of the Court's ECF system.

/s/ Susan T. Kumagai
SUSAN T. KUMAGAI