Nos. 06-17132 & 06-17137

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TASH HEPTING, *et al.*,

Plaintiffs/Appellees,

v.

AT&T CORP.,

Defendant/Appellant.

TASH HEPTING, *et al.*,

Plaintiffs/Appellees,

v.

United States,

Defendant-Intervenor/Appellant.

On Appeal from the United States District Court
for the Northern District of California

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANTS AND URGING REVERSAL

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INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest federation of business organizations. It represents more than three million businesses of every size, in every business sector, and from every geographic region of the country. One of the Chamber's primary missions is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of national importance to American business.

Unquestionably, this is such a case. Homeland security, especially the protection of our nation's critical infrastructure (85% of which is under private control), continues to be one of the Chamber's top policy priorities.[2] To achieve this vital objective, maintaining an effective "public-private partnership," particularly between key industrial sectors and the national intelligence community, is essential.[3] Indeed, the Chamber represents many industries, such as defense and aerospace, transportation, energy, food and agriculture, chemicals, financial institutions, information technology, and telecommunications, which long have served the nation by assisting the United States Government in a wide range

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[1] Pursuant to Fed. R. App. P. 29(a), all parties have consented to the filing of this brief.

[2] *See* U.S. Chamber of Commerce, Homeland Security Policy Priorities for 2007.

[3] *See, e.g.*, U.S. Chamber of Commerce, Homeland Security Policy Accomplishments for 2006.

of matters relating to national security. Such programs and activities often are highly classified or dependent upon and embedded with classified information. For this reason, the question presented by this appeal—proper judicial application of the state secrets privilege following its formal assertion by the United States in a liability suit concerning a company's or industry's alleged participation with a federal department or agency in particular alleged national security activities—is of paramount concern to the Chamber and its members.[4]

In the interlocutory Order under review, the district court not only rejected the Executive Branch's national security judgment that the state secrets privilege requires dismissal of this action, but also turned that privilege on its head by pointing to Defendant/Appellant AT&T's history of cooperating with the Government in national security matters as a basis for permitting the action to proceed. *See Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 992 (N.D. Cal. 2006). The Chamber is submitting this *amicus* brief to urge the Court to reverse the district court's ruling, and consistent with *United States v. Reynolds*, 345 U.S. 1 (1953), *Kasza v. Browner*, 133 F.3d 1159 (9th Cir. 1998), and other state secrets cases such as *El-Masri v. United States*, No. 06-1667, 2007 WL 625130 (4th Cir.

[4] The Chamber's knowledge of the facts of this case is limited to those set forth in the district court's Order. More specifically, the Chamber has no independent knowledge of either the alleged national security programs at issue in this case or AT&T's alleged participation or involvement in those alleged programs.

Mar. 2, 2007), hold that this litigation must be dismissed. Our brief explains (i) that the Government's longstanding policy, emphatically reaffirmed by both Congress and the Executive Branch after 9/11, is to enlist the aid of a broad spectrum of industries in national security matters whenever necessary; (ii) that such widespread industry cooperation and assistance in national security matters, including those that involve state secrets, has been, and will continue to be, essential to the nation; (iii) that judicial erosion of the state secrets privilege would seriously undermine this vital cooperative relationship between industry and the Government; and (iv) that regardless of whether the subject matter of a suit is a state secret, dismissal is required where the presence of state secrets either would prevent or hinder adjudication of liability issues, including any of the numerous immunities and defenses afforded to corporate defendants by federal law, or otherwise make it impossible or futile to litigate the action.

ARGUMENT

The Plaintiffs/Appellees allege that AT&T is "collaborating with the National Security Agency (NSA) in a massive warrantless surveillance program that illegally tracks the domestic and foreign communications and communication records of millions of Americans." *Hepting*, 439 F. Supp. 2d at 978. Although the Government intervened and moved to dismiss on the ground of the state secrets privilege, the district court, *id.* at 994-95, refused to accept the Executive Branch's

determination that litigating this suit "would pose a grave threat to national security." Brief for the United States (filed Mar. 9, 2007), at 11. Rather than dismissing the action, the court ruled that Appellees can conduct "at least some discovery" regarding AT&T's alleged assistance to NSA. *Hepting*, 439 F. Supp. 2d at 994; *see also id.* at 997-98.

I. THE AMERICAN BUSINESS COMMUNITY SHOULD NOT BE SUBJECTED TO LIABILITY SUITS FOR COOPERATING WITH THE FEDERAL GOVERNMENT IN NATIONAL SECURITY MATTERS THAT ARE ENVELOPED BY OR PERMEATED WITH STATE SECRETS

The Government's intervention and formal assertion of the state secrets privilege, based on its determination that litigating this action "would reveal extraordinarily sensitive intelligence information that, if disclosed, would cause the Nation grievous injury," U.S. Br. at 10-11, should have brought this action to an immediate end.

When properly invoked, the state secrets privilege is "absolute," and courts are obliged to accord it the "utmost deference." *Kasza*, 133 F.3d at 1166. "Such deference is appropriate not only for constitutional reasons, but also practical ones: the Executive and the intelligence agencies under his control occupy a position superior to that of the courts in evaluating the consequences of a release of sensitive information." *El-Masri*, *supra* at *5 (affirming dismissal on state secrets grounds of civil suit against Government officials and corporate defendants that

challenged "extraordinary rendition" of suspected terrorists). "[A] proceeding in which the state secrets privilege is successfully interposed must be dismissed if the circumstances make clear that privileged information will be *so central to the litigation* that any attempt to proceed will threaten that information's disclosure." *Id. at* *8 (emphasis added). This includes suits filed against corporate defendants where, as here, the Government has intervened to assert the state secrets privilege. *See, e.g., id.* at *7 (discussing and collecting cases); *Bareford v. Gen. Dynamics Corp.*, 973 F.2d 1138 (5th Cir. 1992) (affirming dismissal of tort action against defense contractor based on Government's assertion of state secrets privilege); *Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544 (2d Cir. 1991) (same); *Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899, 917 (N.D. Ill. 2006) (dismissing complaint challenging AT&T's alleged involvement in NSA's alleged communication records program).

But instead of deferring to the Executive Branch's judgment that moving forward with this suit would reveal state secrets and endanger national security, the district court issued an Order allowing Appellees to conduct certain discovery regarding AT&T's alleged involvement in NSA's Terrorist Surveillance Program. *Hepting*, 439 F. Supp. 2d at 980, 986, 993-94. The convoluted and speculative analysis upon which the district court's decision rests not only seriously undermines the state secrets privilege, but also penalizes AT&T, and by extension

the entire business community, for any past, current, or future assistance to the Government in national security matters that involve state secrets.

A. Numerous Industries Long Have Assisted The Executive Branch With National Security Activities

In the wake of September 11, the Government's need for broad-scale private sector involvement, cooperation, and assistance in national security matters, particularly those relating to homeland security, has become more urgent than ever before. Industry's crucial role in helping the Government protect the nation's critical infrastructures, the vast majority of which are privately owned or operated, is reflected in recent legislation, presidential directives, and federal departmental plans and policies, much of which emphasizes the need for the sharing of information.

For example, in the Critical Infrastructures Protection Act ("CIPA"), enacted shortly after 9/11, Congress declared that "the policy of the United States" is to protect the nation's critical infrastructures through a "public-private partnership." 42 U.S.C. § 5195(c)(2). Similarly, the *National Strategy for Homeland Security* (July 2002) articulated a "National Vision" under which the Government "will forge an unprecedented level of cooperation . . . with private industry." *Nat'l Strat.* at 31. The functions of the Department of Homeland Security (DHS) include "fostering strategic communications with the private sector . . . to provide for collaboration and mutual support to address homeland security challenges." 6

U.S.C. § 112(f)(1), (6). Homeland Security Presidential Directive 7 "establishes a national policy" for critical infrastructure protection, in part by directing federal departments and agencies to "collaborate with appropriate private sector entities and continue to encourage the development of information sharing and analysis mechanisms." HSPD-7, ¶ 25. And most recently, the National Infrastructure Protection Plan ("NIPP"), issued by DHS in June 2006, sets forth a "comprehensive risk management framework" whose "effective implementation . . . is predicated on active participation by government and private sector security partners in robust multi-directional information sharing." NIPP, Information Sharing.

Of course, the American business community's extensive assistance to the Federal Government in national security matters involving state secrets did not begin with the War on Terrorism. Case law on the state secrets privilege reflects a long history of private sector participation in such programs and activities, for example, development, design, or manufacture of weapons systems or other products needed by the U.S. military for national defense. *See, e.g.*, *Reynolds*, 345 U.S. at 529 (testing of secret electronic equipment aboard a B-29 aircraft); *Crater Corp. v. Lucent Techs., Inc.*, 423 F.3d 1260 (Fed. Cir. 2005) (development and manufacture of underwater coupling device for fiber optics); *McDonnell Douglas Corp. v. United States*, 323 F.3d 1006 (Fed. Cir. 2003) (development of A-12

stealth technology aircraft); *Bareford v. Gen. Dynamics Corp.*, *supra* (design and manufacture of Phalanx anti-missile system utilized by U.S. Navy in Persian Gulf during Iraqi-Iranian War); *Zuckerbraun v. Gen. Dynamics Corp.*, *supra* (same); *Mounsey v. Allied Signal*, No. CV 95-4309 SVW (MCx), 2000 WL 34017116 (C.D. Cal. 2000) (unreported) (design and manufacture of electronic system used in U.S. military airplanes and helicopters to identify friendly aircraft); *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486 (C.D. Cal. 1993) (manufacture of air-to-ground missile utilized by U.S. Air Force during Operation Desert Storm); *Nejad v. United States*, 724 F. Supp. 753 (C.D. Cal. 1989) (design and manufacture of AEGIS ship-based air defense system utilized by U.S. Navy in Persian Gulf during Iraqi-Iranian War); *In re Agent Orange Prod. Liab. Lit.*, 97 F.R.D. 427 (E.D.N.Y. 1983) (production of Government-specified "Agent Orange" defoliant during Vietnam War).

The classic and probably best known example of broad-scale American industry cooperation with the Government in what was once a top secret national security matter is the Manhattan Project, which involved development of the atomic bombs that helped to end World War II. "One aspect of the Manhattan Project that has been generally overlooked by historians has been industry's contribution." Atomic Heritage Foundation, *A Manhattan Project History Lesson*, *available at* http://www.atomicheritage.org/manhattanproject.htm. "The nation's

leading companies such as Bechtel, DuPont, General Electric, Babcock & Wilcox, EG&G, Union Carbide, Tennessee Eastman, Westinghouse, Monsanto, Bell Laboratories, AT&T, and Stone & Webster were critical to the effort." *Ibid.* With the advent of the Cold War, President Truman wrote a letter to AT&T's president requesting that the company accept "an opportunity to render an exceptional service in the national interest" by managing Sandia Laboratory, which was then an atomic weapons program engineering facility. AT&T accepted the Sandia management role on a no-profit basis. *See* Sandia Nat'l Lab., History, *available at* http://www.sandia.gov/about/history/faq/faq1.html.

B. The Government's Need For Industry Cooperation In National Security Matters Is Unwavering, And Federal Law Requires A Company To Protect Any Classified Information To Which It Is Given Access

The district court took judicial notice of AT&T's statement that "[w]hen the government asks for our help in protecting American security, and the request is within the law, we provide assistance." *Hepting*, 439 F. Supp. 2d at 992. Neither that statement, nor the court's observation that "it appears AT&T helps the government in classified matters when asked," *id.* at 993, is surprising. As discussed above, both Congress and the Executive Branch have made it clear that national security, particularly post-9/11 homeland security, requires a multi-industry partnership with the Federal Government. For the most part, industry willingly cooperates in national security programs and activities, including those

that are classified. It is important to understand, however, that federal law, including federal procurement law, necessarily underlies such programs and activities,[5] and contains various mechanisms to ensure, when and if necessary, that the Government receives whatever industry assistance it needs to protect national security interests.

For example, the Defense Production Act of 1950 ("DPA") authorizes the President, through Executive Branch issuance of "rated" orders, "to require . . . performance under contracts or orders . . . which he deems necessary or appropriate to promote the national defense." 50 U.S.C. app. § 2071(a); *see also id.* § 2073 (criminal penalties for willfully failing to perform under the DPA); *see generally Hercules, Inc. v. United States,* 516 U.S. 417, 419 (1996) (discussing the Defense Department's utilization of the DPA to require production of Agent Orange during Vietnam War); *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 398 (5th Cir. 1998) (referring to district court's finding that "the defendants were compelled to deliver Agent Orange to the government under threat of criminal sanctions").

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[5] It should be noted that federal appropriations law provides that "[a]n officer or employee of the United States Government . . . may not accept voluntary services for [the] government . . . except for emergencies involving the safety of human life or the protection of property." 31 U.S.C. § 1342.

Regardless of whether a company's participation in a national security program or activity is voluntary, if classified information is involved (including when the very existence of the program, or the company's participation in it, is classified), the company is *required* by federal law to protect that information from disclosure.[6] For example, Executive Order (E.O.) 12829 (Jan. 6, 1993) established the National Industrial Security Program (NISP), which is applicable to all executive departments and agencies, in order "to safeguard Federal Government classified information that is released to contractors, licensees, and grantees of the United States Government," including by requiring "that this information be safeguarded in a manner equivalent to its protection within the executive branch of Government." The NISP Operating Manual ("NISPOM"), issued under E.O. 12829, prescribes specific requirements, restrictions, and other safeguards for release of classified information to government contractors, and is incorporated by reference in the Federal Acquisition Regulation (FAR) "Security Requirements" clause included in government contracts that involve classified information. *See* 48 C.F.R. § 4.402. NISPOM states that "[c]ontractors shall be responsible for safeguarding classified information in their custody or under their control. . . . The extent of protection afforded classified information shall be sufficient to

[6] *See generally* Jennifer K. Elsea, *The Protection of Classified Information: The Legal Framework*, Cong. R. Serv. (Dec. 2006).

reasonably foreclose the possibility of its loss or compromise." Ch. 5, § 5-100. Federal agency officials "shall take appropriate and prompt corrective action whenever a violation of [E.O. 12829], its implementing directives, or the Manual occurs." E.O. 12829, § 203(e).

C. Subjecting Companies To Litigation For Allegedly Assisting The Federal Government In National Security Activities, Especially Where The Government Has Invoked The State Secrets Privilege, Would Damage Incentives For Private Sector Cooperation And Thereby Imperil National Security

According to the district court, "dismissing this case at the outset would sacrifice liberty for no apparent enhancement of security." *Hepting*, 439 F. Supp. 2d at 995. This erroneous conclusion flies in the face of high-level federal intelligence officials' carefully considered judgment regarding the dire consequences that litigation of Appellees' claims would have on national security, particularly the threat from al Qaeda. Furthermore, the district court's narrow view of what the Executive Branch needs to do to maintain or enhance national security completely ignores the deleterious impacts that proceeding with this or similar litigation would have on the multiplicity of industries which own and/or operate vital components of the nation's critical physical, virtual, and economic infrastructures. The Government continually depends upon such industries for cooperation and assistance in national security matters, including homeland

security programs and activities that involve highly classified information falling under the state secrets privilege.

Unless the district court's ruling is reversed and this action is dismissed, the most obvious adverse effect on industry would be the immediate creation—by the judiciary—of formidable *disincentives* and *obstacles* for individual companies or entire industries to cooperate when Executive Branch departments and agencies request their assistance in national security matters that either are classified or involve classified information. The advent of a judicially weakened state secrets privilege would force such companies and industries, which represent a broad cross section of the American business community, to weigh their sense of patriotic duty against the heavy costs and burdens of being subjected to potential, highly publicized, politically volatile litigation, as well as potential liability, merely for acting, as they have in the past, as good corporate citizens by providing national security assistance to the Government when called upon to do so. To the extent that companies or industries decline to cooperate fully in such activities, the self-sustaining "public-private partnership" that both Congress and the Executive Branch seek to foster in the post-9/11 world (see discussion *supra* at I.A.) would suffer. Further, unless the district court's Order is reversed, those companies and industries that, at least initially, continue to cooperate with the Government either may find themselves the target of liability suits in which, due to the presence of

classified information, they cannot adequately respond, or thrust into the dilemma of being ordered by a court to reveal classified information which federal law *prohibits* them from disclosing (see discussion *supra* at I.B.).

Erosion of the state secrets privilege also could create more subtle, but very real, potential physical or financial dangers for cooperating companies and industries. For example, if despite the Government's assertion of the state secrets privilege it were revealed in litigation that a particular corporate defendant is engaged in assisting the United States in an anti-terrorism program, that company's facilities and personnel could be targeted by terrorists. Or domestic political opponents of the Government's national security policies or programs could try to organize publicity campaigns or boycotts against cooperating companies or industries. Indeed, there has been massive publicity about Appellees' claims in this suit, including their allegations about alleged terrorist surveillance activities being conducted at a particular AT&T switching facility. *See, e.g.,* Ryan Singel, *Whistle-Blower Outs NSA Spy Room*, Wired News (April 7, 2006).

There also would be very substantial costs to the Government in addition to the deterioration of national security caused by the loss or diminution of private sector cooperation. For example, federal departments and agencies might have to increase significantly their budgets, and their cadres of headquarters and field personnel, to try to compensate for loss of private sector national security partners.

And, in the event that a corporate defendant were required to pay damages in a third-party liability suit challenging its assistance to the Government for a national security activity in which a government contract was involved, the defendant may be able to seek reimbursement from the Government.

II. AN ACTION CHALLENGING A COMPANY'S ALLEGED ASSISTANCE TO THE FEDERAL GOVERNMENT IN AN ALLEGED NATIONAL SECURITY PROGRAM MUST BE DISMISSED IF STATE SECRETS WOULD PREVENT ADJUDICATION OF THE CASE

Reynolds and its progeny establish that a trial court should consider a succession of related factors in determining whether a suit must be dismissed where, as the district court recognized here, the Executive Branch "has satisfied the . . . threshold requirements for properly asserting the state secrets privilege," *Hepting*, 439 F. Supp. 2d at 993. *See Kasza*, 133 F.3d at 1166-67 (discussing effects of the state secrets privilege).

The district court did consider the first factor requiring dismissal—whether "the 'very subject matter of the action' is a state secret," *Id.* at 1166 (quoting *Reynolds*, 345 U.S. at 11 n.26); *see generally Tenet v. Doe*, 544 U.S. 1 (2005) (reaffirming *Totten v. United States*, 92 U.S. 105 (1876)). Despite the Government's refusal, on the ground of the state secrets privilege, to confirm or deny the fundamental predicate for Appellees' claims (i.e., their allegations that AT&T allegedly is providing assistance to the Government in an alleged broad,

multi-faceted terrorist surveillance program), the court somehow found that "the very subject matter of this action is hardly a secret." *Hepting,* 439 F. Supp. 2d at 994. The Court proceeded to contradict that finding by also indicating that "[t]he existence of this alleged program and AT&T's involvement, if any, remains far from clear." *Id.* at 994-95.

As to the second factor requiring dismissal, the district court "decline[d] to decide at this time whether this case should be dismissed on the ground that the government's state secrets assertion will preclude evidence necessary for plaintiffs to establish a *prima facie* case or for AT&T to raise a valid defense to the claims." *Id.* at 994; *see generally El-Masri*, *supra* at *7 ("the unavailability of privileged state secrets as evidence will necessarily lead to dismissal"); *Kasza*, 133 F.3d at 1166. Instead, the court indicated that "[p]laintiffs appear to be entitled to at least some discovery . . . to assess the state secrets privilege in light of the facts." *Hepting*, 439 F. Supp. 2d at 994.

Finally, the district court did not address *at all* the third factor requiring dismissal—whether dismissal is necessary because even limited discovery directed to corporate defendants, or other evidentiary proceedings, would be impossible, futile, or unmanageable in view of the Executive Branch's exclusive, constitutionally derived power to withhold and/or deny individual access to

classified documents that are necessary for litigation of the action. *See Dept. of the Navy v. Egan*, 484 U.S. 518 (1988).

Although the Chamber defers to the Government's discussion of why the subject matter of this suit is state secret, *see* U.S. Br. at 16-26, we do wish to address the second and third factors requiring dismissal, namely why a suit like this must be dismissed if the presence of state secrets makes litigation of the action infeasible. In *El-Masri,* the Fourth Circuit explained that

> [t]he controlling inquiry is not whether the general subject matter of an action can be described without resort to state secrets. Rather, we must ascertain whether an action can be *litigated* without threatening the disclosure of such state secrets. Thus, for purposes of the state secrets analysis, the "central facts" and "very subject matter" of an action are those facts that are essential to prosecuting the action or defending against it.

2007 WL 625130, at *8 (rejecting plaintiff's contention that alleged Government and media disclosures about the existence of a rendition program obviates the need for dismissal of the action).

More specifically, it is important for the Court to understand that a panoply of immunities and defenses is available to corporate defendants in national security-related liability suits, and thus, as a matter of fundamental fairness, a district court must dismiss such a suit if the Government's invocation of the state secrets privilege disables or hinders a corporate defendant from asserting or demonstrating its entitlement to applicable immunities or defenses. It is equally

important for the Court to recognize that apart from immunities and defenses, the Executive Branch's plenary control over production of and access to classified information often interposes an insurmountable barrier to management or adjudication of any litigation in which such information plays a central role. That too constitutes a basis for dismissing an action when the state secrets privilege has been invoked.

A. Corporate Defendants Which Provide National Security-Related Assistance To The Government Are Entitled To Assert Numerous Federal Law Immunities and Defenses That May Implicate State Secrets

An action must be dismissed if it cannot be litigated without encroaching upon information protected from disclosure by the state secrets privilege. *See, e.g., Kasza*, 133 F.3d at 1166-67. This includes, of course, a corporate defendant's right to assert, or demonstrate its entitlement to, any of the federal immunities or defenses which, depending upon the particular circumstances of a case, are afforded to companies that provide goods or services—including national security-related services—to the Federal Government. *Ibid.*; *see El Masri*, *supra* at *9 (explaining that "the defendants could not properly defend themselves without using privileged evidence"); *Molerio v. FBI*, 749 F.2d 815, 825 (D.C. Cir. 1984). Although the Chamber has no specific knowledge of the facts of this case, some of the immunities and defenses that a corporate defendant otherwise may have available include the following:

1. Constitutionally-Derived Immunities And Defenses

Sovereign Immunity. "As a general matter, the federal courts may not entertain an action against the federal government without its consent." *Koohi v. United States*, 976 F.2d 1328, 1332 (9th Cir. 1992). Sovereign immunity also bars suits against a private sector defendant if a damages award ultimately would impact the U.S. Treasury. *See generally Land v. Dollar*, 330 U.S. 731, 738 (1947) (if "the judgment sought would expend itself on the public treasury . . . the suit is one against the sovereign"). One example would be a liability suit against a government contractor where the contract provides for Government reimbursement of third-party liability claims. *See generally Boyle v. United Techs. Corp.*, 487 U.S. 500, 511-12 (1988) ("The financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself . . . .").

Derivative Sovereign Immunity. Insofar as a company is acting as a contractor for or agent of the Federal Government in connection with national security-related activities, it would be cloaked, albeit derivatively, with sovereign immunity, which would bar any unconsented action challenging such activities. *See generally Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 22 (1940) ("[t]he action of the agent is 'the act of the government'"); *Boyle*, 487 U.S. at 505 & n.1 (discussing *Yearsley* and noting "that the liability of independent contractors

performing work for the Federal Government, like the liability of federal officials, is an area of uniquely federal interest"); *see also Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982) (discussing "state action" principle under which a private entity performs services that otherwise would be performed by the Government); *Dobyns v. E-Systems, Inc.*, 667 F.2d 1219, 1220 n.1, 1222 (5th Cir. 1982) (same) (*citing Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961); *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978)).

Official Immunity. In *Westfall v. Erwin*, 484 U.S. 292 (1988), the Supreme Court held that federal officials are "absolutely immune" from state-law tort liability provided that "the challenged conduct is within the outer perimeter of an official's duties and is discretionary in nature." *Id.* at 293, 300. Although "application of the *Westfall* test to federal officials was superseded by Congress's passage [of the "*Westfall* Act," 28 U.S.C. 2679(d)], the *Westfall* test remains the framework for determining when nongovernmental persons or entities are entitled to the same immunity." *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 72 (2d Cir. 1998) (collecting cases).[7]

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[7] The courts long have recognized the unfairness and detrimental effects of penalizing those who aid the Government and its officials. *See, e.g., United States v. Barker*, 546 F.2d 940, 948-49 (D.C. Cir. 1976) ("[T]he public policy of encouraging citizens to respond ungrudgingly to the request of officials for help in the performance of their duties remains quite strong. . . . It would appear to serve both justice and public policy in a situation where an individual acted at the behest

(footnote continued on next page)

Political Question Doctrine. "The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. American Cetacean Soc'y,* 478 U.S. 221, 230 (1986). *See Baker v. Carr*, 369 U.S. 186 (1969) (setting forth six independent tests for application of the political question doctrine ("PQD")); *see also Vieth v. Jubelirer*, 541 U.S. 267, 277-78 (2004) (discussing *Baker* tests); *Alperin v. Vatican Bank*, 410 F.3d 532, 544-46 (9th Cir. 2005) (discussing PQD). "A case may meet every other jurisdictional and justiciability hurdle and still be barred by the presence of a political question." *Fisher v. Halliburton, Inc.*, 454 F. Supp. 2d 637, 639 (S.D. Tex. 2006), *appeal docketed*, No. 06-20915 (5th Cir. Nov. 27, 2006) (holding that the PQD requires threshold dismissal of a state-law tort suit against a contractor that provided logistical support services to the U.S. military in Iraq). As the Solicitor General recently explained to the Supreme Court in a brief opposing a certiorari petition that challenged application of the PQD, after "the Executive Branch determined that critical national security considerations" required certain actions, "[t]he courts

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(footnote continued from previous page)

of a government official to allow the individual a defense based upon his reliance on the official's authority if he can show that his reliance was objectively reasonable under the particular circumstances of his case.")

may not now review those decisions through the prism of tort law." Br. for the Resp. in Opp. at 10, *Bancoult v. McNamara*, No. 06-502.

2. Statutory Immunities And Defenses

Defense Production Act ("DPA"). Section 707 of the DPA provides that "[n]o person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation, or order issued pursuant to this Act." 50 U.S.C. app. § 2157. In *Hercules, Inc. v. United States,* 516 U.S. at 429, the Supreme Court held that "[t]he statute plainly provides immunity" and "expressly provid[es] a defense to liability." Nothing in the DPA, which authorizes Executive Branch issuance of "rated" orders compelling provision of goods or services (see discussion *supra* at I.B.), suggests that tort claims are excluded from the broad grant of immunity in § 707. Indeed, "section 707 was enacted as the *quid pro quo* to . . . the section [50 U.S.C. app. § 2071(a)] authorizing the President to compel acceptance and give high priority to defense contracts." *In re Agent Orange Prod. Liab. Lit.*, 597 F. Supp. 740, 845 (E.D.N.Y. 1984).

Government Certification To Conduct Electronic Surveillance. "No cause of action shall lie in any court against any provider of wire or electronic communication service . . . for providing information, facilities, or assistance in accordance with the terms of a . . . certification." 18 U.S.C. § 2511(2)(a)(ii).

Although the Government has asserted the state secrets privilege as to whether such a certification was issued in this case, the district court acknowledged that if there were a valid certification, this provision clearly would preclude at least some of the claims asserted here. *Hepting*, 439 F. Supp. 2d at 995.[8]

3. Federal Common Law Immunities And Defenses

Government Contractor Defense. In *Boyle*, the Supreme Court reaffirmed that "a few areas, involving 'uniquely federal interests' . . . are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts -- so-called 'federal common law'." 487 U.S. at 504. The Court in *Boyle* indicated that federal procurement and civil liability of federal officials for actions taken in the course of their duties are two such areas of uniquely federal interest. *See* 487 U.S. at 504-505, 505 n.1. Based on *Boyle* and its progeny, numerous courts have recognized and applied the "government contractor defense," under which companies that provide goods or services to the Government are entitled to the same immunity from liability suits afforded to the Government pursuant to the Federal Tort Claims Act ("FTCA"),

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[8] In the telecommunications area, *see also* 18 U.S.C. § 2520(d) (good faith reliance on investigative or law enforcement officer's request for interception); *id.* § 2707(e) (same for customer records); *id.* § 2702(c)(4) (emergency disclosure of customer records to governmental entity).

see 28 U.S.C. § 2680 (setting forth various exceptions to the FTCA's limited waiver of sovereign immunity). *See, e.g., Koohi*, 976 F.2d at 1336 ("the Supreme Court has recognized that the exceptions to the FTCA may preempt common law tort actions against defense contractors under certain circumstances") (citing *Boyle*). Even prior to *Boyle*, the Ninth Circuit and other federal courts recognized that the FTCA's discretionary function exception, 28 U.S.C. § 2680(a), preempts certain tort actions against defense contractors. *See McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 448-49 (9th Cir. 1983).

The foregoing are examples of the *numerous* federal immunities and defenses to which a corporate defendant may be entitled in a national security-related liability suit. But many of them cannot be pursued in such a suit without delving into classified information, which cannot be disclosed if the state secrets privilege has been properly invoked. Subjecting a corporate defendant to potential litigation and liability while depriving it of immunities and defenses to which it otherwise is entitled not only would be unfair, but also significantly impair incentives for that company and its industry to cooperate with the Government in national security programs and activities. Therefore, insofar as a defendant, due to the Government's assertion of the state secrets privilege, cannot identify, invoke, or otherwise pursue applicable immunities or defenses, the case must be dismissed.

B. An Action Enveloped By Or Permeated With State Secrets Also Must Be Dismissed Because The Executive Branch Alone Possesses The Authority To Control Production Of And Access To Classified Information

No matter how carefully a district court attempts to circumscribe discovery or protect its content, the Executive Branch's *exclusive control* over disclosure of and/or access to classified information that otherwise would be needed for adjudication of an action requires dismissal where, as here, the state secrets privilege has been asserted. The "authority to classify and control access to information bearing on national security . . . flows primarily from [the] constitutional investment of power in the President and exists quite apart from any explicit congressional grant." *Egan*, 484 U.S. at 527. E.O. 12958, as amended by E.O. 13292, "prescribes a uniform system for classifying, safeguarding, and declassifying national security information, including information relating to defense against transnational terrorism." 68 Fed. Reg. 15,315 (Mar. 28, 2003). This includes the requirement that a person may have access to classified information only if, *inter alia*, "a favorable determination of eligibility for access has been made by an agency head or the agency head's designee." *Id.* at 15,324; *see generally Egan*, 484 U.S. at 528 ("Presidents, in a series of Executive Orders, have sought to protect sensitive information . . . by delegating this responsibility to the heads of agencies."). Any individual afforded access to classified information, including any litigation counsel whom the Government chooses to "clear," must

protect it from disclosure in the same manner as Executive Branch personnel (see discussion *supra* at I.B.).

A trial court is constitutionally *powerless* to compel the Executive Branch (or a private party) either to disclose classified information, or to enable unauthorized individuals or entities to review such information, which in any event could not be used in litigation if the state secrets privilege has been properly invoked. The Executive Branch's absolute control over disclosure of and access to classified information is squarely illustrated by two unpublished mandamus orders that the Federal Circuit issued in the "*A-12*" litigation (involving a suit by defense contractors against the United States in connection with termination of the contract for production of the A-12 stealth attack aircraft). In the first Order, the court of appeals was called upon to decide whether the Court of Federal Claims had exceeded its authority by reviewing and reversing the Secretary of the Air Force's "predictive judgment" (i.e., determination) regarding the number of plaintiffs' representatives (with proper security clearances) who could have access to certain highly classified documents relating to the litigation. Relying upon *Egan*'s holding that "the protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it," 484 U.S. at 529, the court of appeals granted the Government's mandamus petition. The court concluded that "the

Secretary's predictive judgment in this case is not reviewable by the non-expert Court of Federal Claims (on the non-expert Court of Appeals for the Federal Circuit, for that matter)." *In re United States*, 1 F.3d 1251, Misc. No. 370, 1993 WL 262656 (Fed. Cir. Apr. 19, 1993), at **7. The court explained that "[b]ecause this [Executive Branch] power is rooted in the Constitution, separation of powers is implicated and bars judicial review of any exercise of that power, at least where, as here, no specific statute purports to provide to the contrary." *Id.* at **9.

In its Order, the Federal Circuit also confirmed that "the State Secrets Privilege cases show, at a minimum, that the *trial court does indeed lose authority over discovery of national security documents.*" *Id.* at **5 (emphasis added); *see also McDonnell Douglas*, 323 F.3d at 1021 ("State Secrets privilege allows the United States to block discovery in a lawsuit of any information that, if disclosed, would adversely affect national security."). The same panel shortly thereafter applied this crucial limitation on trial courts when it granted a second mandamus order in the *A-12* litigation. In the second Order, the court of appeals overturned the trial court's discovery ruling requiring the Air Force to grant special access to plaintiffs' counsel to review certain highly classified documents relating to other defense procurements. The Government had asserted the state secrets privilege based upon the Acting Secretary of the Air Force's declaration "that he 'personally determined' that disclosure of the information 'could be expected to cause

exceptionally grave damage to national security.'" *In re United States*, 1 F.3d 1251, Misc. No. 374, 1993 WL 262658 (Fed. Cir. Apr. 30, 1993), at **2. In mandating that the trial court vacate its discovery order, the court of appeals explained that the "Acting Secretary's authority [over classified documents] derives . . . from the constitutional grant of power to the Executive to command the military and to conduct foreign affairs." *Id.* at **4. "[I]t is clear that the Acting Secretary *was the only person who had the authority to decide whether this information could be disclosed* to counsel, and therefore, *his assertion of the privilege is dispositive* unless the assertion is shown to be inappropriate, unlawful, or fraudulent." *Ibid.* (emphasis added; underscoring in original).

The Executive Branch does not invoke the state secrets privilege in every case involving classified information. But here, the Government's broad assertion of that privilege encompasses the entire action. This necessarily includes information, if any, relating to the gravamen of the Appellees' claims, namely AT&T's alleged assistance to NSA in alleged terrorist communications surveillance activities—alleged assistance which in the interest of national security neither the Government nor AT&T will confirm or deny (and about which the Chamber has no knowledge). The district court's Order, however, would allow Appellees to conduct "at least some discovery" against AT&T, *Hepting*, 439 F. Supp. 2d at 994, in an attempt to obtain information which, if it exists, would be

essential to their liability claims but is encompassed by the Government's assertion of the state secrets privilege. In so doing, the court failed to heed its own admonition regarding the classified "mosaic" that bits and pieces of information can comprise. *See id.* at 982 ("[T]he District of Columbia Circuit noted that even 'seemingly innocuous' information is privileged if that information is part of a classified 'mosaic' that 'can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate.'") (quoting *Halkin v. Helms*, 598 F.2d 1, 8 (D.C. Cir. 1978)); *see also El-Masri*, *supra* at *5 ("The executive branch's expertise in predicting the potential consequences of intelligence disclosures is particularly important given the sophisticated nature of modern intelligence analysis . . . '[w]hat may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene.'") (quoting *United States v. Marchetti*, 466 F.2d 1309, 1318 (4th Cir. 1972)).

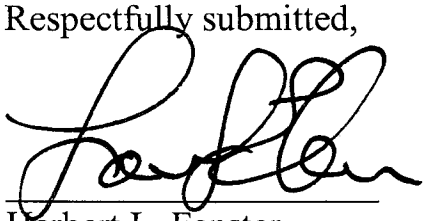
Furthermore, the court's ruling utterly fails to take into account the *certainty* that, in view of the broad assertion of the state secrets privilege in this case, the Executive Branch, in the interest of national security, *also* will exercise its exclusive constitutional power *both* to refuse to disclose (or allow AT&T to disclose) any such classified information, *and* to deny to Appellees access to any such information. That in turn would render futile any discovery process against AT&T, such as that which the district court's Order allows, as well as any

subsequent evidentiary proceedings. To be sure, "the state secrets doctrine does not represent a surrender of judicial control over access to the courts." *El Masri*, *supra* at *12. But because state secrets, which the Government *will not reveal*, envelop this suit, it would be impossible for the district court to adjudicate the action. *See id.* at *10 ("the 'central facts" or "very subject matter' of a civil proceeding, for purposes of our dismissal analysis, are those facts necessary to litigate it — not merely to discuss it in general terms"); *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 281 (4th Cir. 1980) (en banc opinion rejecting suggestions by merits panel regarding how district court could attempt to navigate around difficulties of managing litigation embedded with classified information covered by state secrets privilege) ("It is evident that any attempt on the part of the plaintiff to establish a prima facie case would so threaten disclosure of state secrets that the overriding interest of the United States and the preservation of its state secrets precludes any further attempt to pursue this litigation."); *Terkel*, 441 F. Supp. 2d at 917 (rejecting plaintiffs' "several proposals for how they might maintain this lawsuit while allowing protection of state secrets").

CONCLUSION

This Court should reverse the district court's Order and hold that the action must be dismissed.

Respectfully submitted,



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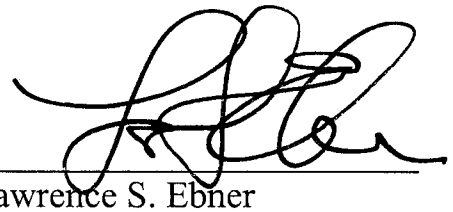
Dated: March 20, 2007

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, that the foregoing *amicus* brief is proportionately spaced, has a typeface of 14 points, and contains 6969 words.



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March 20, 2007

CERTIFICATE OF SERVICE

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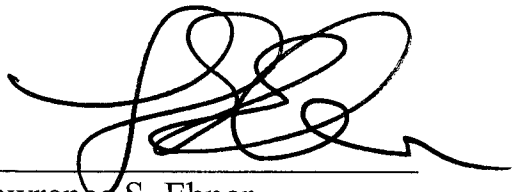

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