Nos. 06-17132, 06-17137

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TASH HEPTING, GREGORY HICKS, CAROLYN JEWEL,
and ERIK KNUTZEN, *et al.*,

Plaintiffs-Appellees

v.

AT & T CORP., *Defendant-Appellant*

&

UNITED STATES, *Intervenor-Appellant*

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

BRIEF OF ELECTRONIC PRIVACY INFORMATION CENTER, CENTER FOR DEMOCRACY AND TECHNOLOGY, AND COMPUTER SCIENTISTS FOR PROFESSIONAL RESPONSIBILITY AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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INTERESTS OF *AMICI CURIAE*[1]

The Electronic Privacy Information Center (EPIC) is a public interest research center dedicated to protecting individual privacy and bringing public attention to emerging civil liberties issues. EPIC has sought unsuccessfully to have the Federal Communications Commission and the House Energy and Commerce Committee review these programs, only to be blocked by assertions of national security interests. EPIC is concerned that the privacy violations alleged here be found justiciable in the federal courts lest they become effectively unreviewable by any branch of the government.

The Center for Democracy and Technology (CDT) is a non-profit public policy organization that works to promote democratic values and constitutional liberties including free expression, privacy and open access in the digital age and the increasingly integrated communications media. CDT advocates public policies that protect individual privacy by clearly defining rules for service provider cooperation with government surveillance and responsibilities of companies that provide communications services and collect personally identifiable information from consumers.

Computer Professionals for Social Responsibility (CPSR) is a public-interest alliance concerned about the impact of information and

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

communications technology on society. CPSR works to influence decisions regarding the development and use of computers and to provide expert assessments of the power, promise, and limitations of computer technology.

INTRODUCTION AND SUMMARY

This case involves allegations of a dragnet surveillance program in which AT&T, without legal authority, has provided the communications records and data of its customers to the government over the course of the past five years. AT&T, joined by the government, seeks to dismiss this case on the pleadings, asserting that AT&T customers do not have standing to seek relief because they have not "proven" exactly which of their communications have been diverted.

Contrary to these suggestions, the complaint here presents a classic case for federal adjudication, bearing all the traditional hallmarks of standing sufficient to survive a motion to dismiss. Plaintiffs have alleged direct personal injury, namely that their own communications were diverted by AT&T to the government in violation of federal statutes and the Constitution. *See* Part I. Even if plaintiffs had alleged only a substantial probability of actual or future injury, they would still have standing to assert their claims. *See* Part II. Finally, the state secrets doctrine should not preclude standing at the threshold of the case so long as the district court

can disentangle non-secret from secret information to protect national security. *See* Part III.

It is especially important that this Court not narrow the traditional scope of justiciability in a case involving privacy claims like those here. The statutes and constitutional provisions relied upon in the complaint are designed to interpose the courts between citizens and the government when government conducts surveillance that it naturally would prefer to conduct in secret and wholly at its own discretion. As *Amici*'s own experience attests, such secret programs will often prove resistant to scrutiny by the political branches of government. This litigation should thus proceed, lest the privacy claims here be made effectively unreviewable.

ARGUMENT

I. THE STATUTORY AND CONSTITUTIONAL PRIVACY VIOLATIONS ALLEGED HERE PRESENT A CLASSIC CASE FOR STANDING UNDER ARTICLE III

Article III of the United States Constitution reserves the judicial branch solely for actual "cases" and "controversies." U.S. Const. art. III. As the Supreme Court reaffirmed this Term, "[a]t bottom, 'the gist of the question of standing' is whether petitioners have 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends

for illumination." *Massachusetts v. EPA*, 127 S. Ct. 1438, 1453 (2007) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

Here, plaintiffs present a classic case for federal adjudication: a concrete and personal stake in the outcome, actual adverseness between the parties, and a redressable claim for direct relief. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Specifically, plaintiffs allege that AT&T has violated *their* statutory and constitutional rights, by illegally intercepting and divulging to the government the contents of their private communications as well as their personal communications records. Contrary to AT&T's contention that plaintiffs must "prove standing now," AT&T Br. at 22, plaintiffs need only allege, not prove, the facts necessary to support standing in order to survive a motion to dismiss.[2]

A. Plaintiffs Invoke Statutory and Constitutional Privacy Rights Personal to Them

Plaintiffs claim that AT&T, their telecommunications provider, "has provided and continues to provide the government with direct access to all

[2] In its motion to dismiss, the Government also moved in the alternative for summary judgment. As explained in Appellees' Brief at 73, however, plaintiffs filed a statement under Rule 56(f) specifying the discovery they should be permitted to conduct before having to respond to a motion for summary judgment, and the district court appropriately chose in its discretion not to treat the motion to dismiss as a motion for summary judgment.

or a substantial number of the communications transmitted through its key domestic telecommunications facilities, including direct access to streams of domestic, international and foreign telephone and Internet communications." SER 9 (Amended Compl. at 8). This alleged conduct, if proven in the course of discovery and trial, would violate the Electronic Communications Privacy Act (ECPA), the Communications Act of 1934, the Foreign Intelligence Surveillance Act (FISA), and the Fourth Amendment. Plaintiffs, as customers of AT&T, are precisely the aggrieved persons whom these federal privacy statutes exist to protect, and are the direct beneficiaries of the protections of the Fourth Amendment.

1. Privacy harms

The federal privacy statutes invoked here aim to protect the privacy and anonymity of people who communicate by telephone or e-mail. The Communications Act of 1934, Title III, and ECPA safeguard privacy by prohibiting telephone and internet service providers from divulging information about customers' communications. *See* 47 U.S.C. § 605; 18 U.S.C §§ 2511, 2702. *See also* FISA, 50 U.S.C. § 1809. These statutes provide private rights of action for persons whose communications or records are intercepted or divulged. *See* 47 U.S.C. § 605(e)(3)(a); 18 U.S.C. § 2520(a); 18 U.S.C. § 2707 (a); 50 U.S.C. § 1810. Plaintiffs are the very

"subscriber[s] . . . aggrieved," 18 U.S.C. § 2707(a), whom Congress sought to protect by enacting these laws.

Plaintiffs allege a concrete and personal injury: that AT&T intercepted and divulged plaintiff's communications and records to the NSA, The violation of the right to privacy has long been recognized as a personal tort.[3] The right to privacy "is not simply an absence of information about [us] in the minds of others; rather it is the *control* we have over information about ourselves." Charles Fried, *Privacy*, 77 Yale L.J. 475 (1968). In the modern information age, a person's ability to control his personal information has become ever more critical; accordingly, "academics and the law have gravitated towards the idea of privacy as a personal right to control the use of one's data." Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 Vand. L. Rev. 1609, 1659 (1999).

2. Procedural harms

AT&T is alleged to have infringed not only the substantive privacy protections guaranteed to plaintiffs but also upon the procedural components of the Store Communications Act (SCA) and the Wiretap Act as amended by ECPA. The two sections at issue here prohibit the interception and

[3] As famously stated in 1890: "The right to privacy" is held "against the world"; the remedy is "[a]n action of tort for damages in all cases." Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 213, 219 (1890).

disclosure of plaintiffs' communications and records. 18 U.S.C. §§ 2511, 2702. Under the Wiretap Act, a communications service can only assist the government in the interception or electronic surveillance of communications if the government provides (a) a court order based on probable cause or (b) a certification from the Attorney General or other select officials ensuring that all legal requirements have been met and that no court order is necessary. 18 U.S.C. § 2511(2)(a)(ii). Similarly, under the SCA, a communications service can only disclose its stored information to the government if the government presents a valid warrant or court order, or in limited circumstances, a subpoena. 18 U.S.C. § 2702(b). The complaint adequately alleges that AT&T evaded these procedural protections.

3. Constitutional violation

Plaintiffs have also alleged injury from AT&T's violation of their Fourth Amendment rights against unreasonable search and seizure. The Constitution prohibits the government or its agents (here, AT&T) from engaging in electronic surveillance without a warrant issued upon probable cause. *United States v. U.S. District Court (Plamondon)*, 407 U.S. 297, 321-22 (1972); *see also Berger v. New York*, 388 U.S. 41, 58-59 (1967). Here, plaintiffs allege an infringement of this interest through the warrantless seizure of their communications or records that is adequate to support

standing. As the Supreme Court has noted, the standing inquiry under the Fourth Amendment is merely a "[r]igorous application of the principle that the rights secured by this Amendment are personal." *Rakas v. Illinois*, 439 U.S. 128, 140 (1978). Where plaintiffs are "aggrieved by the defendants' unconstitutional pattern of conduct in contravention of the Fourth Amendment," they have alleged personal injury-in-fact sufficient to establish standing. *LaDuke v. Nelson*, 762 F.2d 1318, 1326 (9th Cir. 1985).

Moreover, the Constitution forbids indiscriminate general searches; the government or its agents cannot go "roving" through citizens' private information en masse. *Berger*, 388 U.S. at 59. Here, AT&T is alleged to have provided the government access to its customers' information wholesale.

B. The Privacy Harms Alleged Here Are Personal and Concrete, Not General or Abstract

Unlike litigants who pursue generalized public grievances in court, plaintiffs allege personal injury in which they have a concrete stake. Unlike other cases in which standing has been found defective, plaintiffs allege direct personal injury from violations of their substantive and procedural rights as defined by federal statute and the Constitution. Plaintiffs thus have posed "a question eminently suitable to resolution in federal court." *Massachusetts v. EPA*, 127 S. Ct. at 1453.

1. Statutory causes of action

Plaintiffs' claim that AT&T violated their statutory rights alone constitutes "injury in fact" sufficient to allege standing. As the Supreme Court has noted, "[t]he injury . . . required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" *Defenders of Wildlife*, 504 U.S. at 578 (citing *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (internal quotation omitted)). Here, plaintiffs assert their legal right, protected by statute, not to have their telecommunications service divert their private communications and records to NSA analysts. Federal statutes forbid the exact conduct in which AT&T has allegedly engaged, and Congress has granted plaintiffs a private right of action to sue violators under these privacy statutes. *See* 47 U.S.C. § 605(e)(3)(a); 18 U.S.C. § 2520(a); 18 U.S.C. § 2707(a); 50 U.S.C. § 1810. Such authorization "is of critical importance to the standing inquiry"; here, Congress has "identif[ied] the injury it seeks to vindicate and relate[d] the injury to the class of persons entitled to bring suit." *Massachusetts v. EPA*, 127 S. Ct. at 1453 (citing *Defenders of Wildlife*, 504 U.S. at 580).

In addition, plaintiffs have alleged an independently sufficient procedural injury, as there is no evidence that AT&T took the procedural steps required by federal statute before diverting plaintiff's personal data to

the government, under ECPA or the Fourth Amendment. "When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Massachusetts v. EPA*, 127 S. Ct. at 1453; *see also Defenders of Wildlife*, 504 U.S. at 572 n.7.

2. Plaintiffs allege direct personal harm

Plaintiffs have a personal stake in obtaining an injunction to stop AT&T from violating their statutory and procedural rights, and to redress the injuries that have already occurred. To have standing, plaintiffs must allege a harm that is "particularized" as to them, that is, that "affect[s] the plaintiff in a personal and individual way," *Defenders of Wildlife*, 504 U.S. at 561 n.1; a plaintiff "who seeks to invoke judicial power [must] stand to profit in some personal interest," *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 39 (1976). Here, plaintiffs seek an injunction against AT&T so that, in the future, they will be able to make telephone calls and send emails from the privacy of their own homes without the content of those communications or information about whom they are contacting and for how long being transmitted directly to the NSA. Plaintiffs have alleged "specific, concrete facts demonstrating that the

challenged practices harm [them], and that [they] personally would benefit in a tangible way from the court's intervention." *Warth*, 422 U.S. at 508.

Nor does this personal stake diminish simply because those harms are "'widely shared.'" *Massachusetts v. EPA*, 127 S. Ct. at 1456 (*quoting FEC v. Akins,* 524 U.S. 11, 24 (1998)). Plaintiffs' claims here stand in sharp contrast to those cases in which litigants lack standing because they seek merely to vindicate "generalized grievance[s]," *Warth*, 422 U.S. at 499, or to litigate "public rights," *Defenders of Wildlife*, 504 U.S. at 578. *See, e.g.*, *Laird v. Tatum*, 408 U.S. 1, 3 (1972) (denying standing to challenge "only [] the existence and operation of [an Army] intelligence gathering and distributing system"(internal citation omitted)); *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 489-90 (1982) (denying standing to taxpayers to challenge the provision of public land to a religious school); *Raines v. Byrd*, 521 U.S. 811, 830 (1997) (denying standing to Members of Congress to challenge the constitutionality of the Line Item Veto Act); *Allen v. Wright*, 468 U.S. 737, 766 (1984) (denying standing to parents of minority students to challenge the failure of the IRS to deny tax-exempt status to segregated schools).

In contrast, plaintiffs here seek to vindicate their own rights: it is their own communications and records that their telecommunications service is

alleged to be releasing to government analysts. Plaintiffs are far from mere "concerned bystanders," *Valley Forge*, 454 U.S. at 473 (internal citation omitted), seeking to vindicate "the public's nonconcrete interest in the proper administration of the laws," *Defenders of Wildlife*, 504 U.S. at 581 (Kennedy, J., concurring). Rather, as customers aggrieved under federal statute, they have a "direct stake in the outcome" of this suit. *Valley Forge*, 454 U.S. at 473 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972)).

C. Plaintiffs Also Allege Causation and Redressability Sufficient To Establish Standing

Plaintiffs have alleged an injury that can be fairly "traced to" the alleged willful actions of AT&T, *Simon*, 426 U.S. at 41, and for which there is "an available remedy which will have a 'substantial probability' of redressing the plaintiff's injury," *City of Los Angeles v. Lyons*, 461 U.S. 95, 129 n.20 (1983) (internal citation omitted). AT&T is the party in control of plaintiffs' communications and records, the party that has allegedly diverted those communications and records to the government, and the party that can halt the interception and disclosure of these communications and records going forward. Here, the possibility is not "remote" that AT&T could redress plaintiffs' harm, *Simon*, 426 U.S. at 44 (citing *Warth*, 422 U.S. at 507); if plaintiffs obtain the injunction and damages sought, their records will no longer be gathered by AT&T and disclosed to government officials.

The complaint here "suffers from none of [the] defects" of other cases dismissed for failing the case or controversy requirements of Article III. *Massachusetts v. EPA*, 127 S. Ct. at 1452. Cases are not justiciable when "parties seek adjudication of a political question, *Luther v. Borden*, 7 How. 1 (1849), when they ask for an advisory opinion, *Hayburn's Case*, 2 Dall. 409 (1792), or when the question sought to be adjudicated has been mooted by subsequent developments, *California v. San Pablo & Tulare R. Co.*, 149 U.S. 308 (1893)." *Id.* Nor do plaintiffs allege claims that fall outside the "zone of interest[]" of the statutes invoked, *Valley Forge*, 454 U.S. at 475 (internal citation omitted), or that rest on the rights of third parties, *Warth*, 422 U.S. at 509. Rather, their case against AT&T presents a "real, earnest, and vital controversy" that should be permitted to proceed in federal court. *Chicago & Grand Truck Ry. Co. v. Wellman*, 143 U.S. 339, 345 (1892).

D. In Order to Survive a Motion to Dismiss, Plaintiffs Need Only Allege, Not Prove, Facts Sufficient to Establish Standing

AT&T and the government repeatedly suggest that plaintiffs must not merely allege personal and concrete injury but must prove as much even at the pleading stage. *See, e.g.*, Gov't Br. at 26 ("[E]ach element [of standing] must not only be alleged, but proven."); AT&T Br. at 23 ("It is not sufficient merely to allege standing; the burden is upon the plaintiff to *demonstrate*

each element of standing."). No such proof is in fact required on a motion to dismiss. Article III standing need only "be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Defenders of Wildlife*, 504 U.S. at 561. Accordingly, "while a plaintiff must 'set forth' by affidavit or other evidence 'specific facts' to survive a motion for summary judgment, and must ultimately support any contested facts with evidence adduced at trial, '[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Bennett v. Spear*, 520 U.S. 154, 168 (1997) (quoting *Defenders of Wildlife*, 504 U.S. at 561, and *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990)) (internal citation omitted).

The Supreme Court has repeatedly made this principle clear: "[A] suit will not be dismissed for lack of standing if there are sufficient 'allegations of fact'—not proof—in the complaint or supporting affidavits." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 65 (1987) (discussing *Warth*, 422 U.S. at 501). After all, "[t]he purpose of the standing doctrine is to ensure that the plaintiff has a concrete dispute

with the defendant, not that the plaintiff will ultimately prevail against the defendant." *Hall v. Norton*, 266 F.3d 969, 976-77 (9th Cir. 2001). Thus, "in the context of standing, it is the nonfrivolous claims of a party that are determinative, not whether the party can sustain those claims by proof on the merits." *City of St. Louis v. Department of Transportation*, 936 F.2d 1528, 1532 (8th Cir. 1991).

Each case that AT&T cites for the proposition that plaintiffs must *prove* standing is, in fact, a summary judgment decision, not a decision on a motion to dismiss.[4] *See Smelt v. County of Orange*, 447 F.3d 673, 678 (9th Cir. 2006); *Defenders of Wildlife*, 504 U.S. at 561. Indeed, in *Martin v. Morgan Drive Away, Inc.*, the Fifth Circuit held the district court *erred* by summarily disposing of a case on standing when there was a material factual dispute and the parties did not have adequate time to complete discovery and develop jurisdictional facts. 665 F.2d 598, 602 (5th Cir. 1982). AT&T incorrectly cites this case for the proposition that "a district court must resolve [factual] dispute[s] and determine its own jurisdiction." AT&T Br. at 24. Rather than resolving factual disputes, on a motion to dismiss a

[4] Even if this were a motion for summary judgment, *see supra* note 1, AT&T applies the wrong standard: to survive summary judgment, plaintiffs need not "prove" or "establish" standing; they need only show that there "is a genuine question of material fact as to the standing elements." *Central Delta Water Agency v. United States,* 306 F.3d 938, 947 (9th Cir. 2002).

district court must accept as true all material allegations of the complaint and construe any ambiguity in favor of the plaintiff. *Pennell v. City of San Jose*, 485 U.S. 1, 7 (1988).

Viewed under the appropriate standard, the complaint alleges facts sufficient to support standing for each named plaintiff. Contrary to the government's and AT&T's assertions, plaintiffs did allege that AT&T injured each and every plaintiff individually. At best, AT&T has an argument that the complaint is ambiguous; however, as noted earlier, any ambiguity must be construed in favor of the plaintiff, *Pennell*, 485 U.S. at 7. And as explained in Appellees' brief, Hepting Br. at 72, plaintiffs are alleging that *at least one of each plaintiff's* communications was diverted from AT&T to the government, a direct allegation that AT&T has injured each plaintiff. Because this is a motion to dismiss, no more factual evidence than plaintiffs have provided is necessary.

II. EVEN IF PLAINTIFFS HAD ALLEGED ONLY PROBABILISTIC HARM, A PROBABILISTIC INJURY IS SUFFICIENT TO ESTABLISH ARTICLE III STANDING

Plaintiffs have each alleged an actual injury caused by AT&T. But even if plaintiffs had only alleged—or were only later able to prove at trial—a probabilistic injury, that allegation would be sufficient for Article III standing purposes. Alleging a substantial probability that a plaintiff was

harmed by a defendant's actions is enough to create a non-hypothetical case or controversy. Furthermore, when, as here, a plaintiff seeks prospective relief, that plaintiff need only allege a substantial probability of future harm from a defendant's conduct.

A. Injury-in-Fact Requirements Are Met If a Plaintiff Alleges a Substantial Probability of Actual Injury

Plaintiffs need only allege a substantial probability of harm to fulfill Article III standing requirements. Even if AT&T and the government were correct that plaintiffs have only alleged a probabilistic injury and not existing actual injury, it is well established that "[a] probabilistic harm, if nontrivial, can support standing," *Walters v. Edgar*, 163 F.3d 430, 434 (1998) (Posner, C.J.). "To establish an injury in fact based on a probabilistic harm, a plaintiff must show that there is a substantial probability that harm will occur." *Maine People's Alliance & Natural Resources Defense Council v. Mallinckrodt, Inc.*, 471 F.3d 277, 284 (1st Cir. 2006); *see also International Brotherhood of Teamsters v. Transportation Security Administration*, 429 F.3d 1130, 1134 (D.C. Cir. 2005) (stating that to establish standing on summary judgment, the plaintiff must "show a 'substantial probability' that it has been injured, that the defendant caused its injury, and that the court could redress that injury" (quoting *American Petroleum Institute v. EPA*, 216 F.3d 50 (D.C. Cir. 2000)).

The Supreme Court has consistently held that standing may be established based on probabilistic injury. As the Court itself noted, it "routinely recognizes probable economic injury resulting from [governmental actions] that alter competitive conditions as sufficient to satisfy the [Article III 'injury-in-fact' requirement]." *Clinton v. City of New York*, 524 U.S. 417, 433 (1998) (quoting 3 Kenneth Davis & Richard Pierce, *Administrative Law Treatise* 13-14 (3d ed. 1994) (alterations in original)). Accordingly, in *Bryant v. Yellen*, 447 U.S. 352, 367 (1980), where respondents' alleged injury was an inability to purchase excess lands, the Court found standing even though respondents "could not with certainty establish" that they would be able to purchase excess lands if the statute at issue was held applicable.

While often applied to probabilistic economic injury, the principle is not limited to that form of harm. For example, the Court has applied the probabilistic harm principle generally to parties wishing to challenge statutes. Parties need not wait for injury before suing; rather, they have standing when they can demonstrate "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298 (1979) (citing *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974)). The Court has further

generalized that "there is no difference for purposes of Art. III standing—personal interest sufficient for concrete adverseness—between a small but certain injury and a harm of a larger magnitude discounted by some probability of its nonoccurrence." *Simon*, 426 U.S. at 61 n.10. Thus, in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), the Court found standing for the petitioner to challenge subcontractor compensation clauses—offering financial incentives to prime contractors for hiring disadvantaged subcontractors—on equal protection grounds even though the company was not challenging any particular contract. The Court held that it was enough that the petitioner would *likely* bid on another contract with a similar clause in the relatively near, but not imminent, future.

Applying these principles, it is now well-established that increased risk of future injury is sufficient to establish Article III injury-in-fact. Under *Central Delta Water Agency v. United States*, 306 F.3d 938, 949 (9th Cir. 2002), "a credible threat of harm is sufficient to constitute actual injury for standing purposes." In *Covington v. Jefferson County*, 358 F.3d 626, 638 (9th Cir. 2004), for example, this Court held that plaintiffs living across the street from an improperly run landfill had standing (and injury-in-fact) based on the increased risk that plaintiffs might eventually be harmed by the landfill. *See also Churchill County v. Babbitt*, 150 F.3d 1072, 1078 (9th Cir.

1998), *as amended*, 158 F.3d 491 (9th Cir. 1998) (holding that claimant need only establish "the reasonable probability of the challenged action's threat to [his or her] concrete interest").

This Court is not alone: as the Second Circuit found, "the courts of appeals have generally recognized that threatened harm in the form of an increased risk of future injury may serve as injury-in-fact for Article III standing purposes." *Baur v. Veneman*, 352 F.3d 625, 633 (2d Cir. 2003). For example, in *Village of Elk Grove Village v. Evans*, 997 F.2d 328 (7th Cir. 1993), plaintiffs were concerned that construction of a radio tower on a flood plain, "by plopping down a huge slab of concrete near the creek and thus limiting the creek's drainage area," would increase the risk of flooding. *Id.* at 329. The court acknowledged that injury was probabilistic, but reasoned that "even a small probability of injury is sufficient to create a case or controversy—to take a suit out of the category of the hypothetical—provided of course that the relief sought would, if granted, reduce the probability." *Id.*; *see also, e.g.*, *Sutton v. St. Jude Medical S.C., Inc.*, 419 F.3d 568, 575 (6th Cir. 2002) (holding the increased risk of future disease for an aortic connector implant patient—in comparison with the risks from traditional surgery—was sufficient to establish standing to sue for medical monitoring costs, even without current indication of harm); *Johnson v.*

Allsteel, Inc., 259 F.3d 885, 888 (7th Cir. 2001) (holding that "increased risk that a plan participant faces" from an ERISA plan administrator's increase in discretionary authority satisfies injury-in-fact); *Friends of the Earth, Inc. v. Gaston Copper Recycling, Corp.*, 204 F.3d 149, 160 (4th Cir. 2000) (en banc) (concluding that "[t]hreats or increased risk constitutes cognizable harm" sufficient to meet injury-in-fact); *Mountain States Legal Foundation v. Glickman*, 92 F.3d 1228, 1234-35 (D.C. Cir. 1996) (holding an incremental increase in risk of forest fire is sufficient for standing); *Dimarzo v. Cahill*, 575 F.2d 15, 18 (1st Cir. 1978) (holding that inmates have standing to challenge actions creating an increased risk of fire at the jail).

Likewise, probabilistic harm is often sufficient to establish standing prior to a criminal charge. Individuals wishing to challenge the constitutionality of statutes need not wait to be arrested or prosecuted, *Steffel v. Thompson*, 415 U.S. 452, 459 (1974); rather, they have standing for prospective relief when they intend to engage in a course of conduct and there is a "genuine threat of enforcement" of the statute at issue. *Id.* at 475. As in cases alleging increased risk of future harm, a purely "imaginary or speculative" threat of prosecution is not sufficient. *See, e.g.*, *Younger v. Harris*, 401 U.S. 37, 42 (1971). But where "there exists a credible threat of

prosecution," a plaintiff has standing to challenge the law. *United Farm Workers*, 442 U.S. at 298.

As these cases across various contexts establish, probabilistic harm is sufficient to establish standing so long as there is a *substantial* probability of actual injury—i.e., so long as the injury is not just "unadorned speculation," *Simon*, 426 U.S. at 45. The harm alleged here—that AT&T has diverted and continues to divert plaintiffs' private communications and records—is not speculative. These allegations are backed by affidavits containing personal knowledge regarding AT&T's conduct, newspaper articles detailing the NSA program, and statements by at least nineteen members of Congress confirming the existence of the program.

Plaintiffs' alleged injuries stand in sharp contrast to the speculative harms rejected by federal courts in other cases. For example, in *Whitmore v. Arkansas*, 495 U.S. 149 (1990), a death row prisoner sought appeal on behalf of Simmons, another inmate who had waived his appeal, alleging that that if he 1) obtained future habeas relief; 2) received a new trial; 3) was re-convicted; 4) was re-sentenced to death; and 5) appealed his sentence, he would be injured during Arkansas's comparative death sentence review because Simmons's heinous crimes (killing 14 family members) would not be used in the comparative review (against Whitmore's less heinous crime).

The Court rejected such an extended inferential chain as a basis for standing. Likewise in *Defenders of Wildlife*, 504 U.S. at 560, harm to plaintiffs' ability to observe endangered animals in foreign countries like Sri Lanka, with only intentions to "some day" visit those countries, was deemed too speculative. *See also Ashcroft v. Mattis*, 431 U.S. 171, 172 (1977); *Diamond v. Charles*, 476 U.S. 54 (1986). The complaint here requires no such intermediary steps.

Although the majority of probabilistic harm cases involve potential future injuries, the principle applies equally to past injuries. Indeed, it would be anomalous that a potential future harm—with all of its inherent contingencies—could establish a non-hypothetical injury, but an injury alleged to have already occurred would not.

Finally, that plaintiffs need only establish a substantial probability of injury aligns with the requirements for the other two elements of standing, which require a reasonable or substantial probability of causation and redressability. The causation element simply necessitates that plaintiffs establish a reasonable probability that the injury-in-fact was caused by the defendant's actions. *See, e.g.*, *Warth*, 422 U.S. at 504 (requiring plaintiffs to "allege facts from which it reasonably could be inferred that, absent the [challenged] zoning practices, there is a substantial probability that they

would have been able to purchase or lease" property in the community); *Hall*, 266 F.3d at 977 (requiring a "reasonable probability" of causation). Likewise, redressability requires only that "a court must determine that there is an available remedy which will have a 'substantial probability' of redressing the plaintiff's injury." *Lyons*, 461 U.S. at 129 n.20. Indeed, it would be peculiar if an injury that was probably caused by a defendant created a "case or controversy," but a probabilistic injury that was definitely caused by a defendant would not.

B. Requests for Prospective Relief To Halt Probable Future Injury Are Sufficient to Establish Article III Standing

Even if this Court decides that plaintiffs have only alleged a probabilistic injury and even if it decides probabilistic injury is not sufficient to establish standing based on past AT&T actions, plaintiffs Hepting, Hicks, and Jewel—as current subscribers to AT&T's services—still maintain standing to sue for prospective relief to prevent future injury. Plaintiffs have alleged facts—and have gone further by providing evidence via affidavits—supporting a substantial probability of future injury based on the strong likelihood that AT&T will continue to turn over their own private communications and data to the government. As discussed above, it is well established in this Court, the other courts of appeal, and the Supreme Court

that a probabilistic future injury is sufficient to establish standing. *See, e.g.*, *Central Delta Water Agency*, 306 F.3d at 947-48. Thus, at a minimum, this Court should find the factual allegations sufficient to support plaintiffs' action for prospective relief.

III. THE STATE SECRETS PRIVILEGE IS A NARROW EVIDENTIARY PRIVILEGE THAT ORDINARILY, AS HERE, DOES NOT PREVENT THE ADJUDICATION OF STANDING

Even if the allegations in the complaint implicate some conduct that might be found later to be protected by the state secrets privilege, adjudication of standing is not precluded as AT&T and the government assert. *See* AT&T Br. at 22-59; Gov't Br. at 26-36. A court faced with such a privilege claim must determine whether "the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect." *United States v. Reynolds*, 345 U.S. 1, 8 (1983). Although review where state secrets privilege is asserted requires some judicial deference, no such privilege may be found unless "there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security should not be divulged." *Id.* at 10; *see also In re United States*, 872 F.2d 472, 476 (D.C. Cir. 1989). But where, as here, evidence implicating military or government secrets can be segregated and excluded from discovery,

unclassified evidence remains available for the plaintiffs to use in establishing standing.

A. The State Secrets Privilege Permits Litigation To Proceed Beyond the Pleadings Stage Where Standing Is Otherwise Established and the Government's Interests Can Be Adequately Protected During Discovery

When the government invokes the state secrets privilege over specific evidence and a court accepts that claim, the evidence is removed from the case. *See Reynolds*, 345 U.S. at 11. If the plaintiff cannot prove the *prima facie* case without the privileged evidence, the court can *then* dismiss the claim. Some courts of appeals have also held that "if the privilege deprives the defendant of information that would otherwise give the defendant a valid defense to the claim, then the court may grant summary judgment to the defendant." *Bareford v. General Dynamics Corp.*, 973 F.2d 1138, 1141 (5th Cir. 1992); *see also Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998); *Molerio v. FBI*, 749 F.2d 815, 825 (D.C. Cir. 1984).

Dismissal is inappropriate upon the invocation of the state secrets privilege, however, unless efforts to safeguard privileged material have been explored. With "creativity and care," loss of evidence from a proper assertion of the state secrets privilege may be minimized "through the use of procedures which will protect the privilege yet allow the merits of the

controversy to be decided in some form." *Fitzgerald v. Penthouse International, Ltd.*, 776 F.2d 1236, 1238 n.3 (4th Cir. 1985). Dismissal is warranted "[o]nly when no amount of effort and care on the part of the court and the parties will safeguard privileged material." *Id.* at 1244.

Even when a party asserts that it cannot fairly defend itself without privileged information, a court can satisfy itself that such a case can go forward. In *DTM Research, L.L.C. v. AT&T Corp.*, 245 F.3d 327 (4th Cir. 2001), for example, AT&T was defending against an allegation of trade secret misappropriation regarding a data mining technique. One of its primary defenses was that DTM had actually misappropriated the techniques from the United States, and AT&T accordingly subpoenaed government agencies to provide that evidence. The United States invoked the state secrets doctrine to quash the subpoenas. *Id.* at 329. AT&T then moved for summary judgment arguing that the state secrets doctrine "completely prevents AT&T from developing its defenses" and asserting that "dismissal is mandated." *Id.* at 334. The Fourth Circuit rejected that argument, finding that at that stage of the litigation, the record did not foreclose the possibility of a fair trial, even if some relevant evidence was not available.

Among other techniques, *in camera* review of possibly sensitive information can protect the public interest in keeping secrets pertaining to

national security out of the public eye. Documents argued to be privileged can be examined *in camera* to determine whether the parties' need for the information is outweighed by the government's claim of privilege. *See Kerr v. U.S. District Court for the Northern District of California*, 426 U.S. 394, 405-06 (1976). *In camera* review of affidavits asserting state secrets privilege ensures that a court does not "merely unthinkingly ratify the executive's assertion of absolute privilege, lest it inappropriately abandon its important judicial role." *In re United States*, 872 F.2d at 475. *In camera* review of an affidavit will not always be "sufficient to determine the validity of a claim of privilege for state secrets," and "the extent to which a district court may properly rely on affidavits and similar sources will vary from case to case." *Molerio*, 749 F.2d at 822 n.2. But dismissal of a claim without such inquiry is inappropriate.

As an additional safeguard against disclosure of secret government information, section 1806(f) of FISA sets forth a procedure for dealing with privileged information where the legality of electronic surveillance is challenged. FISA's procedure applies to all motions "to discover or obtain applications or orders or other materials relating to electronic surveillance." 50 U.S.C. § 1806(f).

Section 1806(f) lays out a five-step protocol for dealing with sensitive evidence: First, the court receives a motion from "an aggrieved person . . . to discover or obtain . . . materials relating to electronic surveillance." *Id.* The Attorney General may then file "an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States." *Id.* Upon receiving such an affidavit, the court then "*shall* review in camera and ex parte the application, order, and other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted." *Id.* (emphasis added). The court may decide to "disclose to the aggrieved person . . . portions of the application, order and other materials relating to the surveillance only where such disclosure is necessary to make an accurate determination of the legality of the surveillance." *Id.* Such disclosures ought to be made to the aggrieved persons "under appropriate security procedures and protective orders." *Id.*

The very existence of these detailed statutory procedures makes clear that, contrary to AT&T's and the government's arguments, an assertion of states secrets privilege is not the death knell of a suit involving electronic surveillance. Congress made the judgment that there ought to be a procedure for examining evidence of illegal wiretapping even in the face of

a claimed need for government secrecy. The fact that such a procedure exists suggests that courts have latitude to balance government need for secrecy against individual claims of injury from an electronic surveillance program. Indeed, the existence of these detailed statutory provisions suggest that the executive's claim of authority to invoke a mere common law privilege here arises in an area where its power is at its "lowest ebb." *Youngstown Sheet & Tube v. Sawyer*, 342 U.S. 939, 637 (1952).

B. Where State Secrets Are Entangled with Nonsensitive Information, Materials Not Protected by the Privilege Should be Separated from Privileged Information

Where government secrets can be disentangled from non-sensitive information, the latter is discoverable. *See Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983). AT&T and the government cite the *Halkin* litigation as limiting the adjudication of standing, but those cases do not in fact undermine the court's duty under *Ellsberg* to preserve nonsensitive information for litigation here.

In *Halkin I*, Vietnam war protestors alleged that the government had intercepted their telephone conversations. *Halkin v. Helms*, 598 F.2d 1, 3 (D.C. Cir. 1978). The protestors sought discovery about specific wiretaps from the government, and discovery was denied on the basis of the state secrets privilege. The information sought would have confirmed the identity

of individuals whose communications were intercepted by the NSA, the content of the disclosures and the methods and technology by which the communications were acquired. *Id.* at 4-5. In *Halkin I*, the court recognized that "the business of foreign intelligence in this age of computer technology is more akin to the construction of a mosaic than it is to the management of a cloak and dagger affair. Thousands of bits of seemingly innocuous information can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate." *Id.* at 8.

Both AT&T and the government cite to *Halkin v. Helms (Halkin II)*, 690 F.2d 977 (D.C. Cir. 1982), to support their claim that the plaintiffs' claims should be dismissed because a demonstration of standing would implicate state secrets. In *Halkin II*, the plaintiffs' claims were dismissed because the only evidence they could produce was the fact that their names were on government watch lists. *Id.* Because they could not show that the individual plaintiffs had been wiretapped simply from the fact that they were on a watch list, the court determined that the plaintiffs could not adequately allege standing under Article III.

The data mining dragnet alleged here, however, differs considerably from the targeted surveillance program in *Halkin*. Where such a vast amount of information as here is at issue, the "mosaic" of intelligence

gathering is considerably more far-reaching, and also more likely to become publicly known. Where a "watch list" is the customer list of the largest telecommunications company in the nation, and the plaintiffs have alleged facts that indicate that their communications were mishandled, adjudication of standing is proper.

In any event, both *Halkin* decisions predate FISA's five-step protocol for assessing a claim of state secrets privilege Thus the *Halkin* mosaic principle should not defeat standing here, where alternatives to dismissal may protect sensitive information.

CONCLUSION

The judgment below should be affirmed as to justiciability.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1, that the foregoing brief is proportionately spaced, has a typeface of 14 points, and contains 6,960 words.

May 2, 2007

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