

CASE NO.: 06-17132, 06-17137

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

---

TASH HEPTING, GREGORY HICKS, CAROLYN JEWEL, AND ERIK KNUTZEN, ON  
BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

PLAINTIFFS-APPELLEES,

v.

AT&T CORP.,

DEFENDANT-APPELLANT, AND

THE UNITED STATES,

INTERVENOR AND APPELLANT.

---

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
THE HONORABLE VAUGHN R. WALKER, CHIEF DISTRICT JUDGE  
CIVIL No. C-06-0672-VRW

---

**DECLARATION OF MICHAEL M. MARKMAN IN SUPPORT OF  
PLAINTIFFS-APPELLEES' MOTION TO FILE AN ENLARGED BRIEF**

---

ELECTRONIC FRONTIER FOUNDATION  
CINDY COHN  
LEE TIEN  
KURT OPSAHL  
KEVIN S. BANKSTON  
JAMES S. TYRE  
454 Shotwell Street  
San Francisco, CA 94110  
Telephone: (415) 436-9333  
Facsimile: (415) 436-9993

*Additional Counsel Listed Inside Cover*

HELLER EHRMAN LLP  
ROBERT D. FRAM  
E. JOSHUA ROSENKRANZ  
MICHAEL M. MARKMAN  
ETHAN C. GLASS  
SAMUEL F. ERNST  
NATHAN E. SHAFROTH  
ELENA M. DiMUZIO  
333 Bush Street  
San Francisco, CA 94104  
Telephone: (415) 772-6000  
Facsimile: (415) 772-6268

ATTORNEYS FOR APPELLEES TASH HEPTING ET AL.

LERACH COUGHLIN STOIA  
GELLER RUDMAN & ROBBINS LLP  
ERIC ALAN ISAACSON  
655 West Broadway, Suite 1900  
San Diego, CA 92101-3301  
Telephone: (619) 231-1058  
Facsimile: (619) 231-7423

LAW OFFICE OF RICHARD R. WIEBE  
RICHARD R. WIEBE  
425 California Street  
Suite 2025  
San Francisco, CA 94104  
Telephone: (415) 433-3200  
Facsimile: (415) 433-6382

LAW OFFICE OF ARAM ANTARAMIAN  
ARAM ANTARAMIAN  
1714 Blake Street  
Berkeley, CA 94703  
Telephone: (510) 841-2369

HAGENS BERMAN SOBEL SHAPIRO LLP  
REED R. KATHREIN  
JEFFREY FRIEDMAN  
SHANA E. SCARLETT  
425 Second Street, Suite 500  
San Francisco, CA 94107  
Telephone: (415) 896-6300  
Facsimile: (415) 896-6301

I, Michael M. Markman, hereby declare:

1. I am an attorney with the law firm of Heller Ehrman LLP, counsel of record for Plaintiffs-Appellees in this case. I am admitted to appear before this Court and I have personal knowledge of the facts stated herein.

2. I submit this declaration in support of Plaintiffs-Appellees' motion to file a single brief of 19,796 words (90 pages) in response to the multiple briefs filed by the Government and AT&T Corp. ("AT&T"). Plaintiffs-Appellees' request is supported by both diligence and substantial need. *See* Circuit Rule 32-2.

3. On March 9, 2007, Intervenor the United States served a public unclassified version of its opening brief. Intervenor certified that "The public and classified versions of this brief contain no more than 14,000 words...." The public version of the brief was 47 pages in length. Plaintiffs-Appellees have no way of knowing the size of the unredacted brief that the Government has submitted for *in camera* review but for Intervenor's vague certification.

4. On the same day, AT&T separately filed an opening brief certified to be 13,751 words in length (59 pages). The combined size of the two public briefs, assuming that Intervenor's submission is approximately 14,000 words in length, is approximately 27,500 words with 106 pages.

5. Intervenor and AT&T focus on different issues in their respective submissions, which Plaintiffs must now address in their single submission. Specifically, Intervenor focused on the effect of the state secrets privilege, while AT&T focused on issues of standing. Amici also submitted four additional briefs with a total of 98 more pages.

6. Plaintiffs-Appellees' proposed response brief is 90 pages, or 19,796 words, shorter than Intervenor's and AT&T's briefs combined. Pursuant to Circuit Rule 32-2, a sealed copy of Plaintiffs-Appellees' proposed brief accompanies the motion for leave to file an extended brief.

7. The issues raised by this case are complex, relating to weighty constitutional questions and to a complex statutory regime. Plaintiffs-Appellees allege that AT&T has engaged in a massive program of dragnet surveillance of electronic mail and telephone communications of its customers, in violation of multiple federal statutes governing electronic surveillance and the First and Fourth Amendments to the United States Constitution. On this appeal, the Government and AT&T have asked this Court to determine whether the Executive may invoke the state secrets privilege to have this case dismissed at its very inception, prior to any discovery or any hearing on the merits. Plaintiffs-Appellees request additional

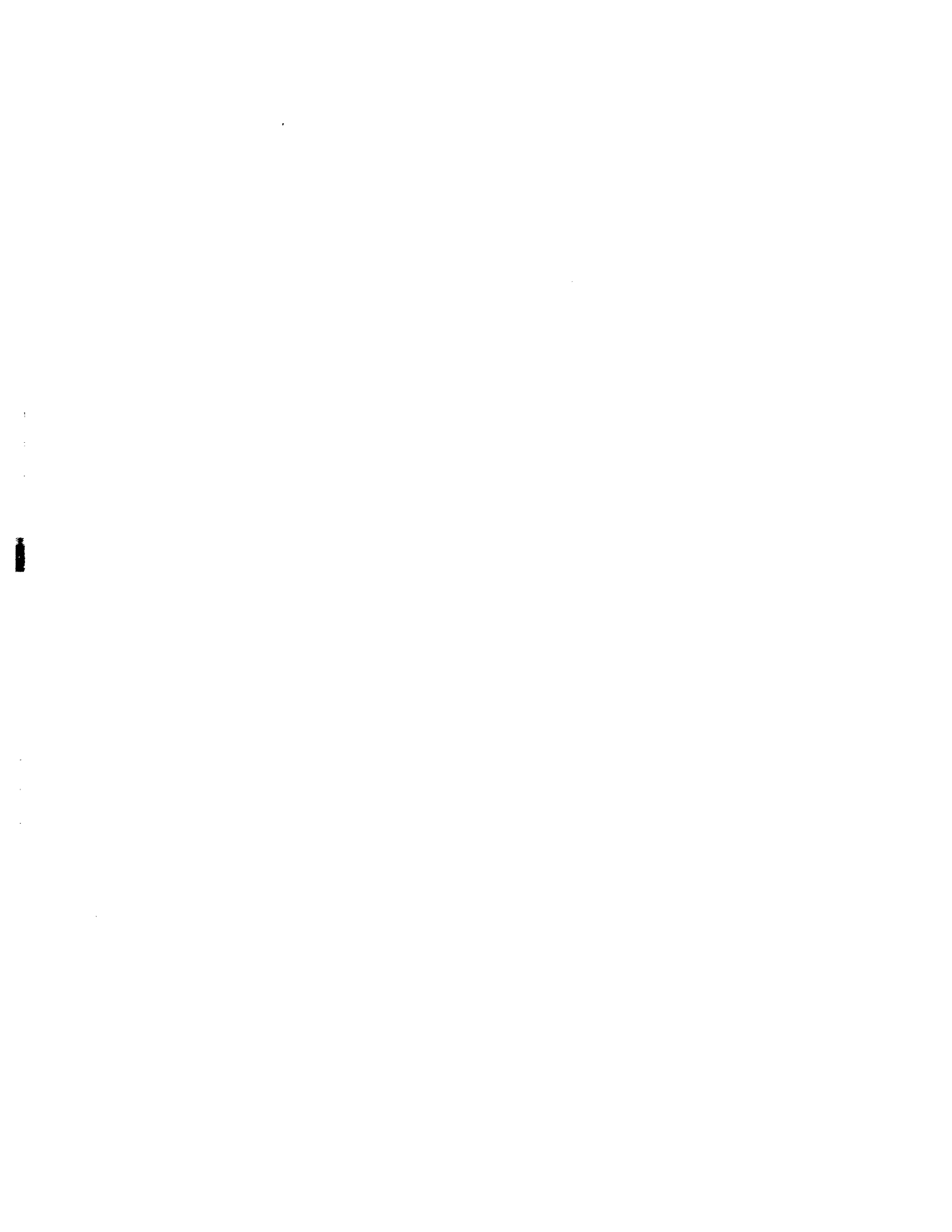
space in order to adequately address the legal arguments presented by the  
Government and AT&T.

I declare under penalty of perjury under the laws of the United States that  
foregoing is true and correct.

Executed this 23rd day of April, 2007, at San Francisco, California.

A handwritten signature in black ink, appearing to read "Michael M. Markman", written over a horizontal line.

Michael M. Markman



## CERTIFICATE OF SERVICE

I, Victor M. Gonzales, declare that I am over the age of eighteen years and I am not a party to this action. My business address is 333 Bush Street, San Francisco, California 94104-2878.

On April 23, 2007, I served the following document(s):

### **DECLARATION OF MICHAEL M. MARKMAN IN SUPPORT OF PLAINTIFFS-APPELLEES MOTION TO FILE AN ENLARGED BRIEF**

ON THE COUNSEL OF RECORD IN THIS ACTION:

Peter D. Keisler  
Carl J. Nichols  
Anthony J. Coppolino  
Andrew H. Tannenbaum  
Joseph Hunt  
U.S. Department of Justice  
Civil Division, Federal Programs Branch  
20 Massachusetts Avenue N.W.  
Room 6102  
Washington, D.C. 20001  
(202) 514-4782 (tel.)  
(202) 616-8470 (fax)

Douglas N. Letter  
Thomas M. Bondy  
Anthony A. Yang  
United States Department of Justice  
Civil Division, Appellate Statt  
950 Pennsylvania Avenue N.W.  
Room 7513  
Washington, D.C. 20530-0001  
(202) 514-3602 (tel.)  
(202) 514-8151 (fax)

Paul D. Clement  
Gregory G. Garre  
Daryl Joseffer  
Office of the Solicitor General  
950 Pennsylvania Avenue NW  
Suite 5143  
Washington, D.C. 20530-2201  
(202) 514-2201 (tel.)  
(202) 514-3648 (fax)

Bruce A. Ericson  
Kevin M. Fong  
Marc H. Axelbaum  
Jacob R. Sorenson  
Pillsbury Winthrop Shaw Pittman LLP  
50 Fremont Street  
San Francisco, CA 94105  
(415) 983-1000 (tel.)  
(415) 983-1200 (fax)

Michael K. Kellogg  
Sean A. Lev  
Kellogg, Huber, Hansen, Todd, Evans &  
Figel, P.L.L.C. |  
1615 M. Street, N.W., Suite 400  
Washington, D.C. 20036  
(202) 326-7900 (tel.)  
(202) 326-7999 (fax)

Bradford Berensen  
David Lawson  
Edward R. McNicholas  
Sidley Austin LLP  
1501 K. Street, NW  
Washington D.C. 20005  
(202) 736-8000 (tel.)  
(202) 736-8711 (fax)

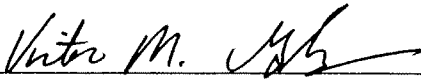
**BY EXPRESS MAIL:** I am readily familiar with the business' practice for collection and processing correspondence for mailing with the United States Postal Service via Express Mail. I know that the correspondence was deposited with the United States Postal Service via Express Mail on the same day this declaration was executed in the ordinary course of business. I know that the envelopes were sealed, and with postage thereon fully prepaid, placed for collection and mailing on this date, following ordinary business practices, in the United States mail at San Francisco, California.

**BY FACSIMILE TRANSMISSION:** I transmitted such documents by facsimile as indicated above.

**BY PERSONAL SERVICE:** I caused the document(s) to be delivered by hand as indicated above.

**BY OVERNIGHT DELIVERY:** I caused such envelopes to be delivered on the following business day by FEDERAL EXPRESS service as indicated above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, that this declaration is executed on April 23, 2007, at San Francisco, California; and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

  
\_\_\_\_\_  
Victor M. Gonzales



