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20 UNITED STATES DISTRICT COURT
 21 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 22 SAN FRANCISCO DIVISION

23 IN RE NATIONAL SECURITY AGENCY)
 24 TELECOMMUNICATIONS RECORDS)
 25 LITIGATION, MDL No. 1791)
 26)
 27 This Document Relates To:)
 28)
 ALL CASES Except: *Al-Haramain Islamic*)
Foundation, Inc. v. Bush, No. 07-0109; *Center*)
for Constitutional Rights v. Bush, No. 07-1115;)
Guzzi v. Bush, No. 06-06225; *Shubert v. Bush*,)
 No. 07-0693; *Clayton v. AT&T Commc 'ns of the*)
Southwest, No. 07-1187; *U.S. v. Adams*, No. 07-)
 1323; *U.S. v. Clayton*, No. 07-1242; *U.S. v.*)
Palermino, No. 07-1326; *U.S. v. Rabner*, No. 07-)
 1324; *U.S. v. Volz*, No. 07-1396)

MDL Docket No 06-1791 VRW
CLASS ACTION
**NOTICE OF NEW LEGAL AND
 FACTUAL AUTHORITIES IN SUPPORT
 OF PLAINTIFFS' OPPOSITION TO
 MOTION OF THE UNITED STATES
 SEEKING TO APPLY 50 U.S.C. §1885a
 TO DISMISS THESE ACTIONS**
 Courtroom: 6, 17th Floor
 Judge: The Hon. Vaughn R. Walker

1 Plaintiffs hereby submit new legal and factual authorities, published after the December 2,
2 2008 oral argument, to assist the Court in its determination of the above-referenced motion.

3 1. Attached hereto as Exhibit A is a true and correct copy of the slip opinion of the recent
4 decision of the United States Court of Appeals for the Second Circuit in *Doe v. Mukasey*, CV 07-
5 4943 (December 15, 2008).

6 2. Attached hereto as Exhibit B is a true and correct copy of a declaration filed on
7 December 10, 2008, by Carl J. Nichols in *EFF v. Office of the Director of National Intelligence, et*
8 *al.*, (3:08-cv-02997-JSW). This is a Freedom of Information Act case that the Electronic Frontier
9 Foundation brought seeking information about the lobbying campaign in favor of telecom
10 immunity.

11 3. Attached hereto as Exhibit C is a true and correct copy of two magazine articles
12 published this week revealing further information about the warrantless wiretapping that is the
13 subject of this action. Michael Isikoff, *The Fed Who Blew the Whistle*, NEWSWEEK, (December 22,
14 2008) 40-48 and an insert to that article by Daniel Klaidman, *Now We Know What the Battle Was*
15 *About*, NEWSWEEK, (December 22, 2008) 46-47.

16 4. As to Exhibit A, the *Doe v. Mukasey* decision bolsters Plaintiffs' contention that the
17 non-disclosure provisions of the Foreign Intelligence Surveillance Act of 1978 (FISA)
18 Amendments Act of 2008, (FISAAA), codified at 50 U.S.C. § 1885a, violate the First Amendment.
19 See MDL Plaintiffs Memorandum of Points and Authorities in Opposition to the Government's
20 Motion to Dismiss under 50 U.S.C. §1885a (Docket 483) at pages 31-36; MDL Plaintiffs' Reply
21 (Docket 524) at 22-25. *Doe* concerned a First Amendment challenge to 18 U.S.C. §§ 2709 and
22 3511, which respectively bar the recipient from disclosing that he has received a National Security
23 Letter (NSL) and establish a mechanism for the recipient to challenge that non-disclosure order in
24 court.

25 5. Section 3511(b) allows the NSL recipient to challenge the executive's non-disclosure
26 order, but provides that if a government official designated in the statute certifies that the
27 disclosure "may endanger the national security of the United States, or interfere with diplomatic
28 relations" "such certification shall be treated as *conclusive* unless the court finds the certification

1 was made in bad faith.” *Id.* (emphasis added). The Second Circuit held that the statute violated the
2 First Amendment by compelling the courts to defer to the executive’s determination of harm,
3 thereby eliminating “meaningful judicial review of the Executive Branch decision” and making it
4 impossible for a court to apply “either traditional strict scrutiny or a less exacting application of
5 that standard.” Slip op. at 47.¹ “To accept deference to that extraordinary degree would be to
6 reduce strict scrutiny to no scrutiny, save only in the rarest of situations where bad faith could be
7 shown.” *Id.* In the words of the Second Circuit: “The fiat of a governmental official, though
8 senior in rank and doubtless honorable in the execution of official duties, cannot displace the
9 judicial obligation to enforce constitutional requirements.” *Id.* at 47-48.

10 6. The nondisclosure requirements of FISAAA’s section 802 similarly violate the First
11 Amendment by eliminating judicial review and compelling the Court to defer to the Executive’s
12 unreviewable determination that disclosure would harm national security and that there is no less
13 restrictive alternative to nondisclosure. The nondisclosure requirements of section 802 of FISAAA
14 are even more clearly unconstitutional than section 3511(b) because section 802 requires even
15 greater deference to the executive than does section 3511(b) in two key areas. First, unlike section
16 3511, section 802 provides no mechanism whatsoever for an affected person to challenge the
17 validity of the non-disclosure requirement. Second, section 3511 permits the court to override the
18 government’s certification in limited circumstances, i.e., if it finds that the certification was in bad
19 faith. By contrast, under section 802(c), once the Attorney General certifies that disclosure will
20 harm the national security, the court is powerless to permit any disclosure, even if it concludes the
21 Attorney General made his certification in bad faith. Section 802(d) goes even further than section
22 802(c), in that section 802(d) mandates permanent non-disclosure without any declaration asserting
23 harm by the government. Thus, unlike section 3511(b), to which the Second Circuit gave an
24 extensive a saving construction, the unambiguous language of sections 802(c) and 802(d) does not
25 permit any finding other than facial unconstitutionality.

26 7. *Mukasey* also supports Plaintiffs’ First Amendment argument that the non-disclosure
27

28 ¹ As Plaintiffs explained on pages 32-33 of their opposition and pages 24, 25-26 n.29 of their reply,
strict scrutiny applies to the non-disclosure provisions of section 802.

1 provisions of section 802 violate the First Amendment because they require nondisclosure for all
2 time, without any mechanism for an affected party to seek disclosure on the ground that the
3 government's justifications for disclosure are no longer valid. The Second Circuit noted the
4 potential validity of such an argument, but rejected it only because Section 3511 allowed an
5 affected party annually to petition the court to set aside the non-disclosure requirement. Slip op. at
6 50 n.16. Section 802 provides no such mechanism.

7 8. Exhibit B, the Nichols Declaration, was executed after the date of the hearing on this
8 matter and supports Plaintiffs' assertion that the Attorney General is a biased decisionmaker who
9 has not acted impartially in submitting his certification to this Court. Of particular note is
10 paragraph 22, in which Mr. Nichols, counsel to party-intervenor the United States who argued this
11 motion on behalf of the government on December 2, 2008, describes a meeting that took place in
12 February 2006 in which the United States and Defendant AT&T determined that they had a
13 sufficient "common interest" so that they might assert a common interest privilege against
14 production of documents that they shared. "The United States has always understood that it shares
15 common interests with the telecommunications carriers in the various [MDL] cases described
16 above and has acted accordingly." *Id.* at paragraph 21. Mr. Nichols also states that the
17 telecommunications carrier defendants and the Government share a common interest in "legislation
18 that would protect telecommunications carriers from litigation alleging they had provided
19 assistance to the Government following the attacks of September 11, 2001," *i.e.*, a common interest
20 in using section 802 to protect the telecommunication carrier defendants from liability. *Id.* at
21 paragraph 23."

22 9. Exhibit C, the *Newsweek* articles, provide the identity of a previously unidentified
23 whistleblower, Thomas M. Tamm, who provided information to the *New York Times* about the
24 warrantless surveillance of communications and their records. *Newsweek* also provides a more
25 detailed description of the surveillance that supports Plaintiffs' claims in this action and should be
26 considered as part of this Court's evaluation of whether the government has met its burden under
27 either the motion to dismiss or the motion for summary judgment standards. For instance, the
28 article by Mr. Klaidman explains:

1 . . . the clash [in Mr. Ashcroft’s hospital room] erupted over a part of Bush’s
2 espionage program that had nothing to do with the wiretapping of *individual*
3 suspects. Rather, Comey and others threatened to resign because of the vast and
4 indiscriminate collection of communications data. . . . the National Security
Agency, with cooperation from some of the country’s largest telecommunications
companies, was able to vacuum up the records of calls and e-mails of tens of
millions of average Americans between September 2001 and March 2004.

5 Plaintiffs request that these articles be considered along with the evidence submitted in support of
6 its Plaintiffs Evidence Rule 1006 Summary of Voluminous Evidence Filed In Support of Plaintiffs’
7 Opposition to Motion of the United States Seeking to Apply FISAAA §802 (50 U.S. C. §1885a) to
8 Dismiss These Actions (Docket 479). Plaintiffs note that while the information provided by the
9 whistleblower only extends to the resolution of the specific dispute in 2004, the magazine adds:
10 “It’s unclear whether the administration has since found new legal justification to return to at least
11 some of these activities.” Thus the discovery could address both past and current actions.

12 10. Additionally, these articles provide further support for plaintiffs’ request under Federal
13 Rule of Civil Procedure 56(f) (Docket 478) for the opportunity to conduct discovery to obtain facts
14 essential to justify plaintiffs’ opposition to the governments’ motion to terminate these cases. The
15 articles reference documents that plaintiffs would seek in discovery and also identify additional
16 individuals who could be deposed.

17 11. While some of the information sought here and in Plaintiffs earlier filing may be
18 classified, Executive Order 13292 issued by President Bush expressly bars the government from
19 designating materials as classified in order to, *inter alia*, “conceal violations of law,” or to “prevent
20 embarrassment to a person, organization, or agency.” Exec. Order No. 13292 (2003) (amending
21 Exec. Order No. 12958).

22 DATED: December 19, 2008

Respectfully submitted,

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/s/ Cindy A. Cohn

24 Cindy A. Cohn

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