IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TASH HEPTING, et al., Plaintiffs-Respondents, vs. AT&T CORPORATION, Defendant-Petitioner.	No. _____ (Northern District of California No. C-06-672 VRW)

PETITION FOR PERMISSION TO APPEAL

UNDER 28 U.S.C. § 1292(b)

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CORPORATE DISCLOSURE STATEMENT

AT&T Corp. is a New York corporation with its principal place of business in New Jersey. It is a wholly owned subsidiary of AT&T Inc., a publicly traded company. No entity owns more than 10% of AT&T Inc. stock.

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PETITION FOR PERMISSION TO APPEAL UNDER 28 U.S.C. §1292(b)

Pursuant to 28 U.S.C. § 1292(b), Rule 5 of the Federal Rules of Appellate Procedure and Circuit Rule 5.1, AT&T Corp. ("AT&T") respectfully petitions this Court for permission to appeal from the order entered on July 20, 2006 (attached hereto as Exhibit A) by the Honorable Vaughn R. Walker of the United States District Court of the Northern District of California denying motions to dismiss filed by AT&T and the United States. In denying the motions, the district court *sua sponte* certified the Order for interlocutory appeal.

INTRODUCTION

In certifying its July 20 Order for interlocutory review, the district court ruled that "the state secrets issues resolved herein represent controlling questions of law as to which there is a substantial ground for difference of opinion and that an immediate appeal may materially advance ultimate termination of the litigation." Order at 70. Based on this certification, AT&T respectfully requests that this Court exercise its jurisdiction under 28 U.S.C. § 1292(b) to grant review of the Order. In a separate petition filed today, the United States seeks review of the Order's denial of the motion to dismiss on state secrets grounds. In this petition, AT&T seeks review of a related state secrets issue decided by the Order—to wit, the Order's denial of AT&T's motion to dismiss on the ground that plaintiffs cannot prove standing in light of the restrictions of the state secrets doctrine.

This Court should permit an interlocutory appeal for the reasons stated by the district court in certifying the Order for immediate appeal under § 1292(b).

First, the "state secrets issues" raised by plaintiffs' complaint, including whether the existence of state secrets in this case prevents plaintiffs from meeting their burden of demonstrating standing, present controlling issues of law, the resolution of which could terminate this litigation. Questions of standing must be resolved prior to the merits of the case; where, as here, plaintiffs cannot establish standing, a case must be dismissed. *See generally Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

Second, the state secrets issues presented here, including the effect of the state secrets doctrine on plaintiffs' standing, are questions as to which there are substantial grounds for difference of opinion. The district court recognized this point implicitly in its lengthy treatment of the issue, Order at 5-43, and explicitly in its *sua sponte* certification of state secrets issues for interlocutory review. *Cf. Halkin v. Helms*, 598 F.2d 1, 11 (D.C. Cir. 1978) (dismissing for lack of standing claims based on the NSA's alleged acquisition of the plaintiffs' communications). Accordingly, this Court should grant review of the Order, and resolve the question whether proper application of the state secrets privilege requires dismissal of this case, including whether plaintiffs can demonstrate standing in light of the United States' assertion of the privilege.

FACTUAL BACKGROUND

On January 31, 2006, plaintiffs filed a complaint on behalf of a massive nationwide putative class of individuals who are or were subscribers to AT&T's services at any time after September 2001. Compl. ¶ 64. The original complaint was replaced by a first amended complaint ("FAC") filed February 22, 2006,

which added a subclass of California residents. FAC ¶¶ 65-68. Plaintiffs' putative class and subclass expressly exclude any foreign powers or agents of foreign powers, including anyone who knowingly engages in sabotage or international terrorism, or activities in preparation therefore. *Id.* ¶ 70.

In the FAC, plaintiffs allege that AT&T provides the National Security Agency ("NSA") with access to its telecommunications facilities and databases as part of an electronic surveillance program authorized by the President. *Id.* at ¶¶ 3-6.[1] They claim that "at all relevant times, the government instigated, directed and/or tacitly approved all of the . . . acts of AT&T Corp." *Id.* ¶ 82. Plaintiffs do not allege that AT&T carried out any actual electronic surveillance. Rather, the gravamen of the complaint is that AT&T allegedly provided access to databases and telecommunications facilities that enabled the government to do so. *Id.* ¶ 6 ("AT&T Corp. has opened its key telecommunications facilities and databases to direct access by the NSA and/or other government agencies . . ."); *see also id.* ¶ 38, 41-42, 46, 51, 61.

AT&T and the United States separately moved to dismiss the complaint. In unclassified portions of its motion to dismiss, the United States asserted the state secrets privilege. It argued that the case must be dismissed because the entire subject matter of the lawsuit—an allegedly ongoing counterterrorism surveillance

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[1] AT&T, like the district court below, must accept plaintiffs' allegations as true solely for present purposes, but nothing herein should be construed as confirmation by AT&T of any involvement in the activities alleged in the complaint, or any classified activities.

program—is a state secret, because plaintiffs cannot make a prima facie case or establish standing for their claims without classified evidence, and because the privilege effectively deprives AT&T of evidence necessary to raise valid defenses. *See* United States' Reply in Support of the Assertion of the Military and State Secrets Privilege and Motion to Dismiss or, in the Alternative, for Summary Judgment by the United States, at 3-5.

The United States specifically argued that the state secrets doctrine will prevent discovery of any information about "whether a particular individual's communications were intercepted as a result of [the NSA program]," *id.* at 18 and that "[w]ithout these facts . . . [p]laintiffs ultimately will not be able to prove injury-in-fact and causation," necessitating dismissal of the case for lack of standing. Notice of Motion and Motion to Dismiss or, in the Alternative, for Summary Judgment by the United States at 18. Further, even accepting for purposes of reviewing the Motions to Dismiss the allegation that AT&T participated in the program, the United States pointed out that plaintiffs fall outside the scope of the publicly disclosed "terrorist surveillance program" because they "do not claim to be, or to communicate with, members or affiliates of al Qaeda," and expressly exclude such persons from their class. *Id.* at 7 (citing FAC ¶ 70).

AT&T argued that the complaint should be dismissed for lack of standing, both because the plaintiffs failed to plead that they had suffered any concrete injury-in-fact and because the state secrets privilege barred plaintiff from establishing standing, even had they properly pled it. *See, e.g.*, Reply Memorandum of Defendant AT&T Corp. in Support of Motion to Dismiss

Plaintiffs' Amended Complaint at 16-20. With respect to the first argument, AT&T showed that the publicly disclosed terrorist surveillance program described by the United States, purports to review the contents only of the communications of al Qaeda-related persons, and that plaintiffs had expressly excluded all such persons from the putative class. *See* Motion of Defendant AT&T Corp. to Dismiss Plaintiffs' Amended Complaint; Supporting Memorandum at 3. Regarding allegations in the complaint about other activities that had not been publicly confirmed by the United States, plaintiffs at most alleged that AT&T provided the government with the means to intercept plaintiffs' communications or calling records but never alleged that the government had actually done so. *See id.* at 15, 24-25. With respect to the second argument, AT&T demonstrated, for example, that without information covered by the state secrets doctrine plaintiffs would not be able to show that their communications or calling records were intercepted or disclosed. *See id.* at 21-22.

The district court denied both motions to dismiss. As to the United States' motion, the court first concluded that in determining what constitutes a state secret, "the court should look only at publicly reported information that possesses substantial indicia of reliability and whose verification or substantiation possesses the potential to endanger national security." Order at 25. The court declined to bar the action or to hold that its subject matter was a state secret, concluding that "the general contours of the 'terrorist surveillance program'" and AT&T's assistance to

the United States in that program are not secrets within the meaning of the state secrets doctrine.[2] *Id.* at 31. Despite recognizing that "[p]laintiffs allege a surveillance program of far greater scope than the publicly disclosed 'terrorist surveillance'" and that the state secrets doctrine shields undisclosed details of the terrorist surveillance program, the court refused to hold that the privilege barred evidence for either plaintiffs' prima facie case or AT&T's defense. *Id.* at 35.

The court also denied AT&T's motion to dismiss for lack of standing. Initially, without addressing plaintiffs' exclusion of al Qaeda-related persons from the class, the court construed the allegations of the complaint to allege "dragnet surveillance" that entailed disclosure of plaintiffs' call records and call contents to the government (along with all subscribers') and found this sufficient to allege injury-in-fact, causation, and redressability. *Id.* at 48. But the district court went further, concluding that "the state secrets privilege will not prevent plaintiffs from receiving at least some evidence tending to establish the factual predicate for the injury-in-fact underlying their claims directed at AT&T's alleged involvement in the monitoring of communication content." *Id.* at 50. The court did not attempt to reconcile this holding with its previous acknowledgement that those aspects of the terrorist surveillance program that had not been confirmed by the government or AT&T remained protected from disclosure by the state secrets privilege. As discussed below, AT&T has never confirmed or denied anything about its alleged

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[2] As discussed below, AT&T has never confirmed or denied its participation in any such program. *Infra*. pp. 15-16.

participation in any aspect of the alleged NSA surveillance activities. Nor has the government ever done so. And although the government has denied engaging in dragnet content surveillance of the kind alleged by the plaintiffs, it has never confirmed or denied the identity of any individual target of surveillance or object of alleged content collection.

QUESTION PRESENTED

Does the United States' assertion of the state secrets privilege bar plaintiffs from establishing standing and therefore require dismissal of their complaint?

RELIEF SOUGHT

AT&T seeks reversal of the district court's order denying AT&T's motion to dismiss, with directions to dismiss this action because plaintiffs cannot establish standing due to the assertion of the state secrets privilege.

REASONS WHY AN APPEAL SHOULD BE PERMITTED

Under 28 U.S.C. § 1292(b) , there are three requirements for certification of an order for immediate appeal:

- The order involves a controlling question of law;
- There is a substantial ground for difference of opinion as to that question; and
- An immediate appeal from the order may materially advance the ultimate determination of the litigation.

28 U.S.C. § 1292(b) . Here, the district court found that all three requirements are met with respect to the state secrets issues raised by the government's motion to dismiss. The district court's determination is deserving of "careful consideration"

by this Court. *U.S. v. Woodbury*, 263 F.2d 784, 786 (9th Cir. 1959). As set forth below, the government's state secrets assertions are inextricably intertwined with one ground for dismissal asserted by AT&T in its motion to dismiss: plaintiffs' inability to establish that they have been concretely injured by the surveillance program they allege.

1. Controlling Question of Law.

This Court has stated that "all that must be shown in order for a question to be 'controlling' is that resolution of the issue on appeal could materially affect the outcome of litigation in the district court." *In re Cement Antitrust Litigation*, 673 F.2d 1020, 1026 (9th Cir. 1982). "[I]t is clear that a question of law is 'controlling' if reversal of the district court's order would terminate the action." *Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 24 (2d Cir. 1990).

Here, if the United States properly invoked the state secrets privilege, then plaintiffs cannot establish standing, because, notwithstanding any acknowledgment of the general contours of a Terrorist Surveillance Program, there is no reliable public information concerning whose communication content or records have been obtained or reviewed by the government. If the named plaintiffs cannot prove that their information has been divulged to the government, they cannot establish that they have suffered any injury whatsoever from the alleged surveillance program, and their complaint must be dismissed. *See Halkin v. Helms*, 598 F.2d 1 (D.C. Cir. 1978). The question presented is thus a controlling question of law as the district court certified.

2. **Substantial Ground for Difference of Opinion.**

The district court acknowledged that "the state secrets issues resolved herein represent controlling questions of law as to which there is a substantial ground for difference of opinion." Order at 70. The "state secrets issues" necessarily include the question presented by this Petition—whether the United States' assertion of the states secrets privilege bars plaintiffs from establishing standing and requires dismissal of their complaint.

In order to show standing, the named plaintiffs would need to prove that their communications actually have been intercepted and disclosed by AT&T to the government. If the state secrets privilege was properly invoked by the United States, then plaintiffs cannot prove that they were injured by the government's intelligence activities or AT&T's alleged involvement in those activities, because they would be unable to obtain any information concerning the identities of government surveillance targets. *See Halkin v. Helms*, 598 F.2d 1 (D.C. Cir. 1978) (affirming dismissal of the plaintiffs' surveillance claims where, because of the state secrets privilege, the plaintiffs could not prove that their communications had actually been intercepted); *United Presbyterian Church v. Reagan*, 738 F.2d 1375, 1380-81 (D.C. Cir. 1984) (same).

In invoking the state secrets privilege, the United States has asserted that plaintiffs will be unable to prove that they have standing without state secrets

information.[3] The United States has invoked the state secrets privilege with respect to "any information tending to confirm or deny (a) the alleged intelligence activities, (b) whether AT&T was involved with any such activity, and (c) whether a particular individual's communications were intercepted as a result of any such activity."[4] The district court rejected the government's invocation of the privilege only with respect to the first two of these categories. Yet the third category is the *sine qua non* of establishing that the named plaintiffs have standing. The United States has correctly explained that "[w]ithout these facts – which should be removed from the case as a result of the state secrets assertion – Plaintiffs cannot establish any alleged injury that is fairly traceable to AT&T."[5] Thus, although the standing issue raised in this petition is closely related to this Court's consideration of the state secrets issues certified by the district court—reversal of the district

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[3] Notice of Motion and Motion to Dismiss or, in the Alternative, for Summary Judgment by the United States, pp. 16-20.

[4] *Id.* at 17-18.

[5] *Id.* at 18. Plaintiffs' opposition to AT&T's motion to dismiss underscored the validity of the government's point by making a number of assertions that implicate information that is at the core of the state secrets privilege. Plaintiffs asserted, for example, that "AT&T is indiscriminately surveilling the communications of all its customers," that there is an NSA surveillance program which "'intercepts millions of communications,'" and that AT&T is "intercepting and disclosing to NSA" the communications transmitted via its facilities and is "disclosing the contents of its entire database of phone call and Internet records." *See* Plaintiffs' Opposition to Motion to Dismiss Amended Complaint by Defendant AT&T Corp., at 2, 4 n.4. No such allegations have ever been publicly confirmed by any source deemed reliable under the district court's ruling. Plaintiffs thus cannot prove any of these assertions without information covered by the state secrets privilege.

court's decision with respect to either of the first two categories of privileged information the government has sought to protect would also mean that plaintiffs could not establish standing—it also provides a separate basis for reversal and dismissal of the case even under the district court's own reasoning.

The decisions of the D.C. Circuit in the *Halkin* cases are precisely on point. *See Halkin v. Helms* ("*Halkin I*"), 598 F.2d 1, 11 (D.C. Cir. 1978); *Halkin v. Helms* ("*Halkin II*"), 690 F.2d 977, 997 (D.C. Cir. 1982). Two separate NSA operations were at issue. 598 F.2d at 4. One was Operation "MINARET," conducted by NSA "as a part of its regular signals intelligence activity in which foreign electronic signals were monitored." *Id.* The district court held that the state secrets privilege covered Operation MINARET. *Id.* at 5. It dismissed the plaintiffs' claims because they were predicated upon the acquisition by NSA of plaintiffs' communications: because of the state secrets privilege, "the ultimate issue, the fact of acquisition, could neither be admitted nor denied." *Id.* at 5. In *Halkin I*, the Court of Appeals affirmed.[6] *Id.* at 5, 11. In *Halkin II*, it said:

> On a prior appeal, this court upheld a claim of the state secrets privilege by the Secretary of Defense and held that NSA was not required to disclose in discovery whether it had intercepted any of plaintiffs' communications. As a result of that ruling, plaintiffs' claims against the NSA and several individual officials connected

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[6] In the course of its analysis, the Court of Appeals observed: "In the case before us the acquisition of the plaintiffs' communications is a fact vital to their claim. No amount of ingenuity in putting questions on discovery can outflank the government's objection that disclosure of this fact is protected by privilege." *Halkin I*, 598 F.2d at 7.

> with that agency's monitoring activities could not be proved, and the complaint as to those defendants was dismissed.

690 F.2d at 984 (internal citation omitted). In *Halkin II*, the Court of Appeals also considered whether the plaintiffs could bring a claim against the CIA for submitting "watchlists" to NSA, which presumably resulted in interception of communications by persons named on the watchlists. *Id.* at 984, 997. The Court of Appeals held that in light of the state secrets privilege, the plaintiffs could not demonstrate standing in this context either: "[T]he absence of proof of actual acquisition of [the plaintiffs'] communications is fatal to their watchlisting claims." *Id.* at 999-1000; *see also Laird v. Tatum*, 408 U.S. 1, 13-14 (1972) (no standing to challenge government surveillance activities based on mere alleged chilling effect); *United Presbyterian*, 738 F.2d at 1380-81 (individuals likely to be surveilled have no standing to sue absent evidence of actual surveillance).

These aspects of *Halkin* dictate the proper outcome here. Plaintiffs cannot succeed without proof that their communications have been intercepted and disclosed by AT&T to NSA. But the state secrets privilege, even under the district court's narrow reading of it, bars plaintiffs from proving any such thing. The district court's ruling should therefore be reversed, and the complaint dismissed.

At the very least, there is substantial ground for difference of opinion on this point. Even if the district court's ruling were correct on its own terms—and it is not—the district court rejected AT&T's argument that the state secrets privilege bars plaintiffs from establishing standing only by rejecting the government's assertion of the state secrets privilege in connection with the government's

monitoring of "communication content," including allegations of dragnet content surveillance that the government had publicly denied. *See* Order at 38-42. But the district court's rejection of the government's invocation of the state secrets privilege itself raises a controlling question of law as to which there is a substantial ground for difference of opinion, as the district court recognized.

For example, the district court reasoned that "the government has opened the door for judicial inquiry by publicly confirming and denying material information about its monitoring of communication content." Order at 40. However, the courts have consistently held that public disclosure of some aspects of a government intelligence program—short of official confirmation of the information for which state secrets protection is sought—provides no basis to deny a dismissal based on the state secrets doctrine. As one court recently explained:

> [a]ny argument that government officials' public affirmation of the existence of a rendition program undercuts the claim of privilege misses the critical distinction between a general admission that a rendition program exists, and the admission or denial of the specific facts at issue in this case. A general admission provides no details as to the means and methods employed in these renditions, or the persons, companies or governments involved . . . the government seeks to protect from disclosure the operational details of the extraordinary rendition program, and these details are validly claimed as state secrets.

El-Masri v. Tenet, 2006 U.S. Dist. LEXIS 34577 (E.D. Va. May 12, 2006), *appeal filed*, June 5, 2006 (4th Cir.).

Moreover, with respect to plaintiffs' allegations concerning the alleged divulgence of databases of communications "records," there is plainly a substantial

difference of opinion whether the state secrets privilege bars plaintiffs from establishing standing to assert their claims. One district court recently held that there is no standing to assert such claims:

> [T]he Court is persuaded that requiring AT&T to confirm or deny whether it has disclosed large quantities of telephone records to the federal government could give adversaries of this country valuable insight into the government's intelligence activities. Because requiring such disclosures would therefore adversely affect our national security, such disclosures are barred by the state secrets privilege.

Memorandum Opinion and Order at 32, *Terkel v. AT&T Corp.*, Case No. 06-C-2837 (N.D. Ill. July 25, 2006). Thus, the court dismissed the complaint: "[T]he state secrets doctrine bars the disclosure of matters that would enable the *Terkel* plaintiffs to establish standing in this manner, specifically whether or not AT&T discloses or has disclosed *all* of its customer records to the government, or whether or not it discloses or has disclosed the named plaintiffs' records specifically. *See Halkin II*, 690 F. 2d at 998-1003." *Terkel* Memorandum Op. at 38. "[R]equiring AT&T to admit or deny the core allegations necessary for the plaintiffs to prove standing – whether their information is being disclosed – implicates matters whose public discussion, be it an admission or a denial, could impair national security." *Id.* at 36.

In holding that AT&T's alleged participation in the alleged surveillance program was not a state secret, the district court in this case also pointed to inapposite statements by, and general characteristics of, AT&T. However, the law is clear: "[T]he privilege belongs to the Government and must be asserted by it; it

can neither be claimed nor *waived by a private party*." *United States v. Reynolds*, 345 U.S. 1, 7 (1953) (emphasis added). Setting aside the law and assuming that a private party's public confirmation or denial of its participation in alleged government intelligence activities could effectively waive the government's state secrets privilege, there was no basis for any such finding here. AT&T has consistently refused to confirm or deny any fact relating to its alleged participation in any program of the sort alleged by the plaintiffs. *See, e.g.,* Motion of Defendant AT&T Corp. to Dismiss Plaintiffs' Amended Complaint; Supporting Memorandum, at 2, n.2.

The district court nonetheless concluded that "AT&T and the government have for all practical purposes already disclosed that AT&T assists the government in monitoring communication content." Order at 29. The court reasoned that: (i) the communications content program admitted by government officials could not exist "without the acquiescence and cooperation of *some* telecommunications provider," *id.* at 29 (emphasis added), (ii) because AT&T is a large telecommunications carrier, its "assistance would help the government implement this program" and, indeed, it is "unclear" whether the program "could even exist" without AT&T's participation, *id.* at 29-30, and, (iii) AT&T has admitted that it has *some* classified government contracts and that "if and when" it is asked to help the government, it does so "strictly within the law," *Id.* at 30-31.

This is all speculation and unsupported inference. None of the factors relied on by the district court can reasonably be regarded as confirmation of AT&T's participation in any specific classified intelligence activity, much less the

particular surveillance programs that are alleged in this lawsuit and are the subject of the government's assertion of the state secrets privilege. Indeed, the district court elsewhere in its opinion appeared to acknowledge as much. The district court noted that "a remaining question is whether, in implementing the 'terrorist surveillance program'" that the government has disclosed "the government ever requested the assistance of AT&T." *Id.* at 31. The court went on to comment that the very "existence" of the far broader communications content surveillance alleged in the FAC "and AT&T's involvement, if any, remains far from clear." *Id.* at 35.

Certainly, neither AT&T's size nor its unremarkable assertions that it operates within the law and responds appropriately to lawful government requests for assistance, nor the fact that it, like many companies, has some classified contracts, provides any basis to *presume* that AT&T received such a request in this instance or was involved in the intelligence activities alleged in this lawsuit. With no public information about the nature, purposes, targets, methods, or other operational details of any NSA intelligence activities, there is no possible basis to conclude that AT&T was asked to participate in such activities or that any such activities could not exist without AT&T's participation. In any event, even where some public information suggests a fact that the government seeks to protect from disclosure, that provides no basis for a court to presume the fact and then rely upon that presumption to deny the government's request for a state secrets dismissal. *See, e.g., Totten v. United States*, 92 U.S. 105 (1876) (dismissing a suit alleging a

secret espionage agreement between William Lloyd and the United States government where Lloyd's estate itself asserted the relationship existed).[7]

In *Hayden* v. *NSA*, 608 F.2d 1381 (D.C. Cir. 1979), the D.C. Circuit rejected the plaintiff's argument that "some channels monitored by NSA are well known to be closely watched, and that no foreign government would send sensitive material over them; hence NSA can safely disclose material" regarding those channels. *Id.* at 1388. Instead, it correctly ruled that "[t]he Agency states that to reveal which channels it monitors would impair its mission" and that "[t]his is precisely the sort

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[7] *See also, e.g.*, *Halkin* v. *Helms*, 598 F.2d 1, 11 (D.C. Cir. 1978) (rejecting claim that case should not be dismissed on state secrets grounds because the fact that plaintiffs communications were intercepted could be presumed from the presence of their names on publicly disclosed "watchlists"); *Military Audit Project* v. *Casey*, 656 F.2d 724, 745 (D.C. Cir. 1981) (the "key premise on which the appellants base their argument that 'the cat is already out of the bag' is unsupported by the record and contrary to the government's affidavits. The government's affidavits are entitled to substantial weight") *Salisbury v. United States*, 690 F.2d 966, 971 (D.C. Cir. 1982) (upholding NSA's refusal to comply with FOIA request in part because despite agency's prior disclosure of related information, "owing to the mosiac-like nature of intelligence gathering, and to our desire to avoid discouraging the agency from disclosing such information about its intelligence function as it feels it can without endangering its performance of that function, we will not hold in this case that such limited disclosures as have been made require the agency to make the disclosures sought here." (internal quotation and citation omitted)); *National Lawyers Guild v. Attorney General*, 96 F.R.D. 390, 402 (S.D.N.Y. 1982) ("[D]isclosure of a type of information *similar* to that presently sought will not vitiate the state secrets privilege."); *Edmonds* v. *United States Dep't of Justice*, 323 F. Supp. 2d 65, 76 (D.D.C. 2004) ("That privileged information has already been released to the press or provided in briefings to Congress does not alter the Court's conclusion" that government's invocation of state secrets privilege requires dismissal), *aff'd*, 161 Fed. Appx. 6 (D.C. Cir.), *cert. denied*, 126 S. Ct. 734 (2005).

of situation where Congress intended reviewing courts to respect the expertise of the agency; for us to insist that the agency's rationale here is implausible would be to overstep the proper limits of the judicial role." *Id.* Here, the district court's ruling, which evinces no similar restraint, raises a substantial legal question, because as the court acknowledged, it "is not in a position to estimate a terrorist's risk preferences, which might depend upon facts not before the court." Order at 41.[8] Thus, as the district court recognized, there are substantial grounds for a difference of opinion as to whether the district court properly resolved the state

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[8] As this Court has cautioned, even "seemingly innocuous information" could be "part of a classified mosiac," *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998), and "what may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context." *C.I.A. v. Sims*, 471 U.S. 159 (1985). "Only the Director [of the intelligence agency] has the expertise to attest – and he has – to this larger view." *Sterling* v. *Tenet*, 416 F.3d 338, 347 (4th Cir. 2005). *See also Ellsberg* v. *Mitchell*, 709 F.2d 51, 58 (D.C. Cir. 1983) ("the probability that a particular disclosure will have an adverse effect on national security is difficult to assess, particularly for a judge with little expertise in this area"); *Halkin* v. *Helms*, 598 F.2d 1, 8 (D.C. Cir. 1978) ("It requires little reflection to understand that the business of foreign intelligence gathering in this age of computer technology is more akin to the construction of a mosiac than it is to the management of a cloak and dagger affair. Thousands of bits and pieces of seemingly innocuous information can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate"); *United States* v. *Marchetti*, 466 F.2d 1309, 1318 (4th Cir. 1972) ("The significance of one item of information may frequently depend upon knowledge of many other items of information. What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context. The courts, of course, are ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications in that area").

secrets issues in this case, including whether the United States' assertion of the state secrets privilege bars plaintiffs from establishing standing and requires dismissal of their complaint.

3. An Immediate Appeal May Materially Advance the Ultimate Termination of Litigation.

Finally, an immediate appeal may materially advance the ultimate termination of the litigation. If AT&T prevails in an immediate appeal, either because this Court reverses the district court's state secrets rulings generally or because it recognizes that those rulings independently prevent the plaintiffs from establishing standing under the governing legal standards, the litigation would be ended. Moreover, an immediate appeal is essential to safeguard the information covered by the invocation of the state secrets privilege by the United States. The United States, through the Director of National Intelligence, represented to the district court that this case should be dismissed because "any attempt to proceed in this case will substantially risk the disclosure of" privileged state secrets and "cause especially grave damage to the national security of the United States."[9] Without an immediate appeal, AT&T might be compelled to disclose, or at the very least engage in protracted discovery disputes about whether it can be compelled to disclose, precisely the information covered by the United States' assertion of the state secrets privilege.

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[9] Public Declaration of John D. Negroponte, Director of National Intelligence, ¶¶ 3, 9.

CONCLUSION

For the reasons stated above, Petitioner AT&T respectfully requests that this Court permit an appeal under 28 U.S.C. § 1292(b) .

Dated: July 31, 2006.

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STATEMENT OF RELATED CASES

Defendant-petitioner AT&T Corp. is not aware of any related cases pending in this Court, pursuant to Ninth Circuit Rule 28-2.6.

CERTIFICATION OF COMPLIANCE PURSUANT TO FED. R. APP. 32(a)(7)(C) AND CIRCUIT RULE 32-1

I certify that the attached petition is not subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this petition complies with the page limitation established by Fed. R. App. 5(c).

Dated: July 31, 2006.

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