10-15616, 10-15638

United States Court of Appeals
for the
Ninth Circuit

CAROLYN JEWEL, *et al.*,

Plaintiffs-Appellants,

– v. –

NATIONAL SECURITY AGENCY, *et al.*,

Defendants-Appellees.

VIRGINIA SHUBERT, *et al.*,

Plaintiffs-Appellants,

– v. –

GEORGE W. BUSH, *et al.*,

Defendants-Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
THE HONORABLE VAUGHN R. WALKER, CHIEF DISTRICT JUDGE
NO. C 08-CV-4373-VRW (JEWEL)
MDL NO. 06-1791-VRW (SHUBERT)

BRIEF OF SCHUBERT APPELLANTS

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Plaintiffs-Appellants Virginia Shubert, Noha Arafa, Sarah Dranoff, and Hilary Botein, individually and on behalf of all others similarly situated, ("Plaintiffs"), by and through their attorneys, submit this brief in support of their appeal from the January 21, 2010 order of the United States District Court for the Northern District of California (Walker, C.D.J.), dismissing with prejudice all of Plaintiffs claims against Defendant-Appellees, various current and former federal government officials. *Shubert v. Obama*, consolidated with *Jewel v. National Security Agency*, 2010 WL 235075 (ER 1:2-31) (N.D. Cal. Jan. 21, 2010) ("Order").

SUMMARY OF ARGUMENT

Without any argument or briefing on the issue, the District Court incorrectly held that Plaintiffs have no standing to challenge illegal searches of their own telephone and internet communications. Simply because millions of others suffered similar injury, the District Court transformed Plaintiffs' injuries into a nonjusticiable "generalized grievance." The Order is unsupportable and without precedent.

Plaintiffs are American citizens whose domestic and international telephone, internet, and electronic mail communications were intercepted as part of a mass surveillance program implemented and approved by Defendants, without a warrant or court order. Plaintiffs brought suit, *inter alia*, to recover damages under

the Constitution and under a specifically-enacted comprehensive statutory scheme, which provides statutory damages in just this situation.

Plaintiffs' allegations establish each of the requisite elements of standing under Article III. The interception by of their own individual, private communications is a concrete, particularized, and actual injury in fact; there is no dispute that this injury is a direct result of Defendants' conduct; and the injury can be remedied by the injunctive and compensatory relief Plaintiffs seek. *See Friends of the Earth, Inc. v. Laidlaw Enviro. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000)).

Plaintiffs' injury stems from violations of both their constitutional and statutory rights, which each independently suffice to create an injury in fact. This Court and the Supreme Court have repeatedly held that Fourth Amendment privacy violations create an injury in fact. *See, e.g.*, *Rakas v. Illinois*, 439 U.S. 128, 140 (1978); *Mayfield v. United States*, 599 F.3d 964, 970-71 (9th Cir. 2010). Additionally, Defendants' violations of the statutory rights created by the Foreign Intelligence Surveillance Act of 1979, 50 U.S.C. §§ 1810, et seq.; Stored Communications Act, 18 U.S.C. §§ 2701, et seq.; and the Wiretap Act, 18 U.S.C. §§ 2510, et seq. independently create standing under well-established precedent. *See, e.g.*, *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

The mere fact that Plaintiffs' injuries were shared by many other Americans does not make their claims a "generalized grievance." The Supreme Court has expressly stated that the fact that an injury is widely shared does not deprive a Court of jurisdiction, so long as the harm alleged is concrete. *Federal Election Commission v. Akins*, 524 U.S. 11, 24-25 (1998). This Court recently reaffirmed this principle in *Newdow v. Lefevre*, 598 F.3d 638, 642 (9th Cir. 2010). The District Court's attempts to distinguish this case from the wide range of precedent are erroneous.

In addition to finding that Plaintiffs lacked general standing under Article III, the District Court incorrectly suggested that Plaintiffs lacked standing as to each of their particular claims. In so doing, the District Court, without any foundation in case law, held that constitutional claims against government officials are subject to a heightened "strong and persuasive" standing requirement. No such heightened standard exists, and Plaintiffs have sufficiently pleaded standing to sue under the Fourth Amendment under the guiding "plausibility" standard. *See, e.g.*, *White v. United States*, 601 F.3d 545, 551-52 (6th Cir. 2010).

Likewise, no heightened pleading standard exists for claims brought under any of the three statutes under which Plaintiff seek relief. Plaintiffs have alleged facts that show they are "aggrieved persons" as that term is used under each of the statutes.

Finally, even if the District Court found Plaintiffs' complaint insufficiently detailed as to the individualized injuries they suffered, the proper action would have been dismissal with leave to amend, in light of this Court's repeated rejoinder that "[d]ismissal without leave to amend is improper unless it is 'clear' that 'the complaint could not be saved by any amendment.'" *Harris v. Amgen, Inc.*, 573 F.3d 728, 737 (9th Cir. 2009) (quoting *Lee v. City of Los Angeles*, 250 F.3d 668, 692 (9th Cir. 2001).

The Order is not only an outlier; it is unprecedented. The Order stands for the proposition that if one person is illegally searched, he or she may bring Fourth Amendment and statutory claims. But if *millions* of people are illegally searched, the massive nature of the illegality itself extinguishes their claims. This extraordinary *sua sponte* ruling gives the government incentives to violate the law on an epic scale. The Order should be reversed.

JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction over this action as it arises under the Constitution and laws of the United States, and seeks to recover damages and other relief under the Constitution and acts of Congress providing for the protection of civil rights. 28 U.S.C. §§ 1331, 1343(a). This Court has jurisdiction over this appeal, as it is from a final judgment of the District Court, which granted Defendants' motion to dismiss. 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Did the District Court err when it concluded that Plaintiffs lacked standing to pursue their claims based upon warrantless, unauthorized surveillance and interception of their private telephone, email, and internet communications, in violations of their Constitutional and statutory rights, simply because many other Americans suffered similar harms?

2. Did the District Court err in dismissing Plaintiffs' Complaint with prejudice and without leave to amend, though neither the parties nor the court had addressed the basis for dismissal in briefing or oral argument?

STATEMENT OF FACTS

When reviewing a district court's dismissal of a complaint for lack of standing, the Court "accept[s] all factual allegations of the complaint as true and draw all reasonable inferences in favor of the nonmoving party." *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 867 (9th Cir. 2002).

Plaintiffs Virginia Shubert, Noha Arafa, Sarah Dranoff, and Hilary Botein are each American citizens who reside and work in Brooklyn, New York. (ER 2:49 (Amended Complaint[1] ("Am. Compl.")) ¶¶ 5-8.) Each has a good faith

[1] In its Order, the District Court erroneously stated that the Complaint "has never been amended." (ER 1:13.) Plaintiffs filed an Amended Complaint on May 11, 2007, however. (ER 2:85). The confusion may be based on the fact that Plaintiffs' Amended Complaint only appears on the MDL docket for M:06- 01791, as Dkt. No. 284, and not on the Individual Case Docket for Case C:07-0693. *Compare* ER

basis to believe that private communications they made via telephone and/or email were surveilled without a warrant, pursuant to the unlawful and unconstitutional acts of Defendants described below (the "Spying Program"). (*Id.*) Each Plaintiff regularly makes telephone calls and sends electronic mail messages ("emails") both within the United States and outside the United States. (*Id.*) Ms. Shubert frequently calls and sends emails to the United Kingdom, France, and Italy; Ms. Arafa frequently calls and sends emails to Egypt; and Ms. Dranoff frequently calls and sends emails to the Netherlands and Norway. (*Id.*) Ms. Shubert and Ms. Arafa have been and continue to be customers of AT&T, which participated and participates in the "Spying Program" conducted by Defendants and described below. (ER 2:49, Am. Compl. ¶¶ 5-6.) Ms. Botein has been a customer of Verizon, which participated and participates in the Spying Program. (ER 2:50, Am. Compl. ¶ 8.) Ms. Dranoff has been a customer of both Verizon and AT&T. (ER 2:50, Am. Compl. ¶ 7.)

2:85 (Excerpts from "MDL Doc") *with* ER 2:36-46 ("Individual Doc")). Defendants and Plaintiffs both referenced the Amended Complaint in their briefing below. (Doc #680/38; 695/43.) The District Court's Order explicitly noted it was referring to both dockets, though. (ER 1:3 n.1) Plaintiffs adopt the same citation style for this dual docket as the District Court did. "Citations to documents in the Shubert docket will be in the following format: Doc #xxx/yy, with the first number corresponding to the MDL docket (M:06-1791) and the second corresponding to the individual docket (C:07-0693)." *Id.* In any event, none of the changes in the Amended Complaint affect the District Court's rationale for dismissing the case.

Beginning in 2001, the National Security Agency ("NSA") has engaged in a secret program ("the Spying Program") by which virtually every telephone, internet, and or email communication that has been sent from or received within the United States has been intercepted and reviewed. (ER 2:48, 60-67, Am. Compl. ¶¶ 1, 47-94.) The Spying Program was initially revealed to the American public, including Plaintiffs, in December 2005 via an article in *The New York Times*, and subsequently confirmed by other published press reports, whistleblowers, insiders within the United States government, and (after initial equivocation) then-President George W. Bush. (ER 2:60, Am. Compl. ¶ 50.) President Bush approved the Spying Program, and reauthorized it more than thirty times. (ER 2:61, Am. Compl. ¶¶ 51-52.)

Under the Spying Program, the NSA intercepts, searches and seizes, and subjects to electronic surveillance international and domestic telephone, internet, and email communications of people inside the United States, including Plaintiffs, without first obtaining warrants or other lawful authorization. (ER 2:48-50, 61-62, 65, Am. Compl. ¶¶ 1, 5-8, 56-61, 82-85.) The Spying Program includes "electronic surveillance," as that term is defined by the Foreign Intelligence Surveillance Act of 1979, 50 U.S.C. §§ 1810, *et seq*. ("FISA"); "interceptions" of both wire and electronic communications, as defined by the Wiretap Act, 18 U.S.C. § 2510, without a warrant, court order, or other authorization; and

intentional access or access beyond authorization of electronic communications maintained in "electronic storage," as that term is defined by the Stored Communications Act, 18 U.S.C. §§ 2701, *et seq.* ("the SCA"). (ER 2:61, Am. Compl. ¶¶ 53-55.) The NSA engages in such surveillance without probable cause (or any reason whatsoever) to believe that the surveillance targets have committed or are about to commit any crime or that the surveillance targets are foreign powers or agents thereof. (ER 2:62, Am. Compl. ¶¶ 62-64.) The NSA has done so without obtaining specific authorization for each interception from the President or the Attorney General of the United States. (ER 2:63, Am. Compl. ¶¶ 65-66.) The only "authorization" comes from NSA shift supervisors, who authorize lower level NSA employees' requests to intercept the communications of people within the United States. (ER 2:63, Am. Compl. ¶ 67.)

In monitoring the communications of people inside the United States, the NSA uses NSA-controlled satellite dishes, some of which are located within the United States. (ER 2:63, Am. Compl. ¶¶ 68-69). The NSA also works with internet providers and telecommunications companies to monitor communications, including email, telephone, and internet communications, some of which pass through switches controlled by these companies and located inside the United States. (ER 2:63, Am. Compl. ¶¶ 70-71.)

NSA employees implementing the Spying Program use government computers to search for keywords and analyze patterns in millions of communications at any given time. (ER 2:64, Am. Compl. ¶ 73.) If these searches yield words or phrases in communications sent by Americans that the NSA deems to be "of interest," then the NSA targets those Americans for yet further surveillance. (ER 2:64, Am. Compl. ¶ 74.)

Each Plaintiff has been subject to the unlawful interception, search and seizure, and electronic surveillance of the contents of their phone and internet communications as part of the Spying Program. (ER 2:66, Am. Compl. ¶ 87.) As a result of this Program, Plaintiffs have sustained a shocking loss of privacy and are entitled to statutory damages. (ER 2:69, Am. Compl. ¶¶ 112.)

STATEMENT OF THE CASE

On May 17, 2006, Plaintiffs filed a putative class action in the United States District Court for the Eastern District of New York, alleging claims for violations of FISA, 50 U.S.C. §§ 1810, *et seq.*; the Wiretap Act, 18 U.S.C. §§ 2510, *et seq.*; the SCA, 18 U.S.C. §§ 2701, *et seq.*; and their rights under the Fourth Amendment, pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). (ER 2:40, Individual Doc No 1.) An Amended Complaint was filed on May 11, 2007. (ER 2:85, MDL Doc No 284.) The action was brought against then-President George W. Bush, former NSA

Director Lieutenant General Michael V. Hayden, then-NSA Director Lieutenant General Keith B. Alexander, former Attorney General John Ashcroft, then-current Attorney General Alberto Gonzales, and unnamed Does.[2] (ER 2:50-51, Am. Compl. ¶¶ 9-15.) On August 31, 2006, the Judicial Panel on Multidistrict Litigation conditionally transferred the action to the United States District Court for the Northern District of California as a "tag-along" action to actions transferred on August 9, 2006. *See* ER 2:40, Individual Doc 1; *In re Nat'l Sec. Agency Telecom. Records Litig.*, 444 F. Supp.2d 1332 (J.D.M.L. 2006) (initial transfer order).

As remedies for the violations of their constitutional and statutory rights, Plaintiffs seek declaratory and injunctive relief; liquidated, compensatory, and punitive damages; and attorneys' fees and costs, on behalf of themselves and a proposed class of other similarly situated individuals who have been or will be subject to electronic surveillance by the NSA since September 12, 2001 without a search warrant or court order. (ER 2:52, 70, Am. Compl. at ¶¶ 20-21, p. 24.)

On October 30, 2009, Defendants filed a Motion to Dismiss some claims in Plaintiffs' complaint and for Summary Judgment on the others. (Doc No 680/38.) Defendants contended that the statutory claims should be dismissed on the basis that there had been no waiver of sovereign immunity, and that summary

[2] "The current holders of the various offices held by the originally-named defendants have been substituted pursuant to FRCP 25(d)." (ER 1:14.)

judgment was appropriate on the other claims, as the evidence that would be needed to litigate Plaintiffs' standing and claims on the merits would be excluded under the "state secrets" and related statutory privileges. (*Id.*) On December 3, 2009, Plaintiffs filed a Memorandum in Opposition to Defendants' Motion addressing Defendants' arguments regarding immunity, the state secrets privilege, and the asserted statutory privileges. (Doc No 695/43.) Defendants replied (Doc No 696/44), and the Court held a hearing on the Motion on December 15, 2009 (Individual Doc No 45).

On January 21, 2010, the District Court issued the Order herein appealed from determining, *sua sponte*, that Plaintiffs had failed to allege sufficient facts to show an injury-in-fact, and thus establish constitutional standing, and dismissing all of Plaintiffs' claims. In so doing, the Court "decline[d] to rule on the sovereign immunity, SSP and other issues raised in the United States' motions." (ER 1:20.) The Court declined to grant Plaintiffs leave to amend their complaint. (*Id.*) This appeal followed.

STANDARD OF REVIEW

The Court reviews a dismissal for lack of standing *de novo*. *Mayfield v. United States*, 599 F.3d 964, 970 (9th Cir. 2010); *Thomas v. Mundell*, 572 F.3d 756, 760 (9th Cir. 2009). Where, as here, "the standing issue was raised before the district court in a motion to dismiss, [the Court] must accept as true all material

allegations of the complaint, and must construe the complaint in favor of the complaining party." *Thomas*, 572 F.3d at 760.

Although a district court's refusal to grant leave to amend is reviewed for abuse of discretion, the Court "strictly review[s] such denial in light of the strong policy permitting amendment." *Allwaste, Inc. v. Hecht*, 65 F.3d 1523, 1530 (9th Cir. 1995).

ARGUMENT

I. PLAINTIFFS' ALLEGATIONS ARE MORE THAN SUFFICIENT TO MEET THE GENERAL REQUIREMENTS FOR STANDING

To satisfy the standing requirements of Article III of the Constitution, "a plaintiff must prove: '(1) he has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1016 (9th Cir. 2010) ("*Newdow I*") (quoting *Friends of the Earth, Inc. v. Laidlaw Enviro. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000)). The Complaint's allegations meet these requirements. The "President of the United States authorized a secret program to spy upon millions of innocent Americans, *including the named plaintiffs*." ER 2:48, Am. Compl. ¶ 2 (emphasis added). The program "intercept[ed], search[ed], seiz[ed], and subject[ed] to surveillance the content of

[their] personal phone conversations and email." *Id.* The program has operated and continues to operate "without a warrant, court order or any other lawful authorization." *Id.* ¶ 1. The named plaintiffs have been and continue to be spied upon illegally pursuant to the program. ER 2:49-50, 66, Am. Compl. ¶¶ 5-8, 87. "Plaintiffs are 'aggrieved person[s]' as defined in 50 U.S.C. § 1810, are not foreign powers or agents of a foreign power, and were subjected to electronic surveillance conducted or authorized by defendants pursuant to the Spying Program in violation of 50 U.S.C. § 1809," ER 2:67, Am. Compl. ¶ 98, and are therefore entitled to damages under 50 U.S.C. § 1810 (FISA). Plaintiffs are also alleged to be "aggrieved persons" as defined by the Wiretap Act and the SCA, and are entitled to damages pursuant to those statutes. ER 2:67-68, Am. Compl. ¶¶ 102-08. Finally, "by conducting, authorizing, and/or participating in the electronic surveillance of plaintiffs, and by searching and seizing the contents of plaintiffs' communications without reasonable suspicion or probable cause, and failing to prevent their fellow government officers from engaging in this unconstitutional conduct, defendants deprived plaintiffs of rights, remedies, privileges, and immunities guaranteed under the Fourth Amendment of the United States Constitution." ER 2:68, Am. Compl. ¶ 110. In short, Plaintiffs alleged that they (1) were illegally spied upon and are being spied upon (2) by defendants and are (3) entitled to both damages and injunctive relief.

Nonetheless, the District Court held that Plaintiffs failed to meet the first prong of this test and "allege[] an injury that is sufficiently particular to those plaintiffs or to a distinct group to which those plaintiffs belong; rather, the harm alleged is a generalized grievance shared in substantially equal measure by all or a large class of citizens," and thus dismissed Plaintiffs' claims. ER 1:3-4. This conclusion is incorrect as a matter of law, and the District Court's judgment should thus be reversed.

A. Plaintiffs Have Alleged a Concrete, Particularized, Actual, and Imminent Injury

"A 'particularized' injury is one that 'affect[s] the plaintiff in a personal and individual way.'" *Thomas v. Mundell*, 572 F.3d 756, 760 (9th Cir. 2009) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n. 1 (1992) (alterations in original)). To satisfy Article III's standing requirements, that injury need only be an "identifiable trifle." *Council of Insurance Agents & Brokers v. Molasky-Arman*, 522 F.3d 925, 932 (9th Cir. 2008) (quoting *United States v. Students Challenging Regulatory Agency (SCRAP)*, 412 U.S. 669, 689 n. 14 (1973)). The burden on Plaintiffs is particularly low at the pleading stage, where "general factual allegations of injury resulting from the defendant's conduct may suffice." *Oregon v. Legal Services Corp.*, 552 F.3d 965, 969 (9th Cir. 2009) (quoting *Defenders of Wildlife*, 504 U.S. at 561). Plaintiffs' complaint meets this standard.

1. Plaintiffs Have Alleged Injury to their Constitutionally Protected Rights

Plaintiffs' allegations that their privacy was invaded and communications wrongfully intercepted, monitored, and mined establish an actual, concrete injury under the law of this Circuit. Plaintiffs have constitutionally-protected privacy rights, which apply to their telephone conversations, email messages, and internet communications. *Katz v. United States*, 389 U.S. 347 (1967) (Fourth Amendment applies to private telephone conversations); *United States v. Monghur*, 588 F.3d 975, 979 (9th Cir. 2009) (same); *United States v. Forester*, 512 F.3d 500, 510 (9th Cir. 2008), *cert. denied* 129 S. Ct. 249 (2008) (Fourth Amendment applies to computer surveillance); *United States v. Heckencamp*, 482 F.3d 1142, 1146-47 (9th Cir. 2007) (Fourth Amendment confers reasonable expectation of privacy in personal computer); s*ee also United States v. Lifshitz*, 369 F.3d 173, 190 (2d Cir. 2004) ("Individuals generally possess a reasonable expectation of privacy in their home computers."). An invasion of this protected interest is an actionable injury in fact. *Rakas v. Illinois*, 439 U.S. 128, 140 (1978); *see also Cooper v. F.A.A.*, 596 F.3d 538, 545-46 (9th Cir. 2010) (discussing injuries caused by violations of privacy rights).

This Court recently recognized that unlawful "surveillance, searches, and seizures" constitute actual injuries in *Mayfield v. United States*, 599 F.3d 964, 970-71 (9th Cir. 2010), where a plaintiff challenged the constitutionality of a

section of FISA.[3] The plaintiff's alleged injury in *Mayfield* was identical to that alleged here: unlawful surveillance in violation of a statute, and the holding there merely echoed previous rulings of this and other courts. *See, e.g., Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190, 1205 (9th Cir. 2007) (suggesting that unlawful surveillance, if proven, would establish injury in fact); *American Civil Liberties Union v. National Security Agency*, 493 F.3d 644, 655 (6th Cir. 2007) ("If . . . a plaintiff could demonstrate that her privacy had actually been breached (i.e., that her communications had actually been wiretapped), then she would have standing to assert a Fourth Amendment cause of action for breach of privacy."); *Halkin v. Helms*, 690 F.2d 977, 999 (D.C. Cir. 1982) ("[T]here can be little doubt that the complaint alleged facts – interception of plaintiffs' private communications – which if proved would constitute an injury in fact, permitting plaintiffs to go forward in an effort to prove the truth of those allegations and any consequent liability of the defendants.").

Particularly at the motion to dismiss stage, Plaintiffs' allegations of privacy violations are sufficient to show an injury-in-fact. In *Citizens for Health v. Leavitt*, 428 F.3d 167, 176 n. 9 (3d Cir. 2005), for example, the Third Circuit rejected the Government's challenge to plaintiffs' standing to bring a claim that an

[3] In *Mayfield*, the allegation that the government continued to retain the results of its surveillance of plaintiff made the injury "continuing" and thus proper for declaratory relief. 599 F.3d at 971.

agency regulation violated their privacy rights under HIPAA. There, at the *summary judgment* stage, the Court found that plaintiffs had a sufficient injury in fact even though they failed to "recount specific instances of violations of their privacy rights traceable to the regulation" and only "complained of the regulation's general effect." *Id.* Plaintiffs here have pleded no less of an injury.

2. Plaintiffs Have Alleged Injury Via The Violation of Their Statutory Rights

Beyond the injury to their constitutional rights, the statutes that Plaintiffs bring their claims under create actionable injuries. "The injury required by Article III can exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" *Fulfillment Servs. Inc. v. United Parcel Serv.*, 528 F.3d 614, 618 (9th Cir. 2008) (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)). "Essentially, the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Id.*; *see also Defenders of Wildlife*, 504 U.S. at 578; *Edwards v. First Am. Corp.*, --- F.3d ----, Nos. 08-56536, 08-56538, 2010 WL 2471900, at *2 (9th Cir. Jun. 21, 2010).

Plaintiffs bring claims under three statutes: FISA, the Wiretap Act, and the SCA. Each of these statutes creates a cause of action for persons who have been improperly subjected to government surveillance, and provides that they may

seek judicial relief and recover damages for such surveillance. *See* 50 U.S.C. § 1810 (cause of action for anyone "who has been subjected to an electronic surveillance" under color of law in noncompliance with the procedures specified by FISA); 18 U.S.C. §§ 2520-21 (cause of action for damages and injunctive relief for "any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used" in violation of the Wiretap Act); 18 U.S.C. § 2707 (cause of action for any person "aggrieved" by a violation of the SCA). There is no dispute that Plaintiffs have alleged violations of these three statutes, each of which expressly creates a cause of action for "persons in the plaintiff's position." *Fulfillment*, 528 F.3d at 618. Thus, Plaintiffs have standing based on the injury to their statutory rights.[4]

B. That Their Injury May Be Shared by Many Americans Does Not Make Plaintiffs' Claim a "Generalized Grievance" and Deprive Them of Standing

The District Court appeared to conclude that, since the injury asserted by Plaintiffs was also suffered by many other Americans (a not-uncommon phenomenon in putative Rule 23 class actions), their injury was not sufficiently "particularized," but rather a nonjusticiable generalized grievance. This inexplicable conclusion is in direct conflict with precedent of both the Supreme

[4] The District Court's contention that Plaintiffs have failed to allege sufficient facts to demonstrate standing to bring these claims is addressed in Section II.B separately below.

Court and this Court. Moreover, such logic represents a danger to our nation's system of checks and balances, as it suggests that any executive action that affects a sufficiently large segment of the population is unreviewable by the federal courts.

A plaintiff's claim is a nonjusticiable "generalized grievance" when he "'claim[s] only harm to his and every citizen's interest in proper application of the Constitution and laws, and seek[s] relief that no more directly and tangibly benefits him than it does the public at large.'" *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (per curiam) (quoting *Defenders of Wildlife*, 504 U.S. at 573-74).[5] But a grievance will not be nonjusticiable simply because it could be asserted by large class of Americans.

In *Federal Election Commission v. Akins*, 524 U.S. 11 (1998), the Supreme Court rejected the Government's argument that voters' challenge to the FEC's determination that an organization was not a "political committee" was a nonjusticiable generalized grievance. The Court explained that the prohibition on generalized grievances "invariably appears in cases where the harm at issue is not only widely shared, but is also of an abstract and indefinite nature — for example,

[5] Whether the prohibition on generalized grievances is a limit imposed by Article III of the Constitution or a "prudential" limit on standing is unclear and oft-debated. *Compare Newdow I*, 597 F.3d at 1016-17 (treating generalized grievance as a barrier to Article III standing) *with Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1122 (9th Cir. 2009) (prohibition on generalized standing is a prudential limitation). The Supreme Court has previously refused to determine whether the doctrine is a constitutional or prudential limit on standing. *See, e.g.*, *Federal Election Comm'n v. Akins*, 524 U.S. 11, 23 (1998).

harm to the 'common concern for obedience to law.'" *Id.* at 23. The Court recognized that "[o]ften the fact that an interest is abstract and the fact that it is widely shared go hand in hand. But their association is not invariable, and where a harm is concrete, though widely shared, the Court has found 'injury in fact.'" *Id.* at 24. The Court concluded that the "informational injury" alleged by the *Akins* plaintiffs was sufficiently concrete and specific such that the fact that it was widely shared did not deprive Congress of constitutional power to authorize its vindication in the federal courts. *Id.* at 24-25; *see also Massachusetts v. EPA*, 549 U.S. 497, 522 (2007) (rejecting standing challenge, noting "That these climate-change risks are 'widely shared' does not minimize Massachusetts' interest in the outcome of this litigation."); *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 449-50 (1989) (rejecting standing challenge, noting "The fact that other citizens or groups of citizens might make the same complaint after unsuccessfully demanding disclosure under [the Federal Advisory Committee Act] does not lessen appellants' asserted injury.").

The *Akins* principle that plaintiffs do not lack standing simply because their cognizable injury is shared by many has been repeatedly endorsed by this Court. For example, earlier this year in *Newdow v. Lefevre*, 598 F.3d 638 (9th Cir. 2010) ("*Newdow II*"), in addressing a challenge to the placement of "In God We Trust" on the nation's currency, the Court found that the plaintiff had standing.

The Court noted that the fact that his "encounters with the motto are common to all Americans does not defeat his standing, because Newdow has alleged a concrete, particularized, and personal injury resulting from his frequent, unwelcome contact with the motto." *See also Desert Citizens against Pollution v. Bisson*, 231 F.3d 1172, 1177 n. 5 (9th Cir. 2000) (quoting *Akins*, "[t]he Supreme Court has reiterated that 'where a harm is concrete, though widely shared, the Court has found 'injury in fact.'"); *Covington v. Jefferson County*, 358 F.3d 626, 651 (9th Cir. 2004) (Gould, J., concurring) ("A concrete actual injury, even though shared by others generally is sufficient to provide injury in fact. It appears to be abstractness, not wide dispersal, of an injury that may prevent the injury from being sufficient to confer standing."). The principle has also been repeatedly adopted by other Courts of Appeals. [6]

There is nothing abstract about the harm resulting from an illegal search. As *Akins* and its progeny make clear, as long as plaintiffs allege concrete, actual injury, no matter how many other Americans may have suffered the same

[6] *See, e.g., Toll Bros., Inc. v. Township of Readington*, 555 F.3d 131, 138 (3d Cir. 2009); *Bishop v. Bartlett*, 575 F.3d 419, 424-25 (4th Cir. 2009); *Public Citizen, Inc. v. National Hwy Traffic Safety Admin.*, 489 F.3d 1279, 1282 (D.C. Cir. 2007); *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 422 F.3d 490, 496 (7th Cir. 2005); *Baur v. Veneman*, 352 F.3d 625, 635 n. 9 (2d Cir. 2004); *American Canoe Ass'n, Inc. v. City of Louisa Water & Sewer Comm.*, 389 F.3d 536, 545 (6th Cir. 2004); *Doe v. Beaumont Ind. Sch. Dist.*, 240 F.3d 462, 466 (5th Cir. 2001); *Pye v. United States*, 269 F.3d 459, 469 (4th Cir. 2001).

injury, they are sufficiently injured to have standing to sue. Here, as described above, Plaintiffs have alleged just such an injury.

The District Court attempted to differentiate this case on the basis that Plaintiffs' suit is an "effort by citizens seeking to redress alleged misfeasance by the executive branch of the United States government." (ER 1:16.)[7] The fact that a case seeks to challenge executive action has no bearing on whether the plaintiffs have alleged an injury, though. The District Court's suggestion that plaintiffs face a higher burden in establishing standing when they seek "to employ judicial remedies to punish and bring to heel high-level government officials" for wrongful acts" (ER 1:16-17) imposes a novel standing requirement with no precedential support.

The majority of the cases cited above, including *Akins*, *Massachusetts v. EPA*, and *Newdow II*, involved challenges to actions or inaction by "high-level government officials." Nowhere did the Supreme Court or this Court suggest in any of those cases that heightened standing requirements applied based upon the nature of the claims and defendants. The District Court erred in imposing such requirements in this case.

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[7] The District Court also incorrectly labeled this suit a "citizen suit," referencing cases where plaintiffs asserted injury based solely on their status as taxpayers. As explained in detail above, Plaintiffs' injuries arise out of concrete harm to them as individuals, and they are *not* proceeding on the basis of taxpayer standing.

Putting aside the scope and brazen nature of Defendants' outrageous conduct, there is nothing unusual about Plaintiffs' action here, which includes claims, on behalf of a class, alleging that actions of government officials caused each and every one of them harm. To the contrary, actions like this one lie at the heart of public rights adjudication, in the individual and the class action context. *See generally Cobell v. Salazar*, 573 F.3d 808 (D.C. Cir. 2009) (class action on behalf of several hundred thousand plaintiffs alleging mismanagement of accounts by Secretaries of Interior and Treasury); *In re Katrina Canal Breaches Litig.*, 351 Fed. App'x 935, 2009 WL 3614537 (5th Cir. 2009) (class action on behalf of several hundred thousand plaintiffs alleging negligence of United States Army Corps); *Pigford v. Veneman*, 292 F.3d 918 (D.C. Cir. 2002) (class action on behalf of over 20,000 plaintiffs charging the United States Department of Agriculture with racial discrimination). As in each of those cases, Plaintiffs have standing to sue, despite the fact that the injuries they suffered at the hands of government officials affected a large segment of the population.

II. PLAINTIFFS HAVE ALLEGED FACTS TO MEET THE REQUISITE STANDING REQUIREMENT FOR EACH OF THEIR PARTICULAR CLAIMS

In addition to its conclusion that Plaintiffs' generally lacked standing to sue Defendants for their unlawful and unconstitutional conduct, the District Court suggested that the Plaintiffs lacked standing to bring each of their specific

claims. (ER 1:18-19.) The court concluded that since Plaintiffs lacked "strong and persuasive claims to Article III standing," they could not bring their constitutional claim. Additionally, since the Plaintiffs failed to "allege facts [or] proffer evidence sufficient to establish a prima facie case that would differentiate them from the mass of telephone and internet users in the United States," the court dismissed Plaintiffs' statutory claims. (ER 1:19.) Both these conclusions were factually and legally incorrect.

A. There is No Special Heightened Standing Requirement for Plaintiffs' Constitutional Claim

The District Court held that, in constitutional claims seeking "judicial involvement in the affairs of the executive branch and national security concerns appear to undergird the challenged actions . . . only plaintiffs with strong and persuasive claims to Article III standing may proceed." (ER 1:20.) This novel requirement lacks any support at law, and runs counter to the general principles that apply to a standing challenge via a motion to dismiss.

"[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Defenders of Wildlife*, 504 U.S. at 560. Courts have thus consistently refused to read Article III as imposing greater or lesser standards in certain cases based solely on the nature of the claims brought. *See, e.g., Ross v. Bank of Am., N.A. (USA)*, 524 F.3d 217, 225 (2d Cir. 2008); *Doe v. County of Montgomery, Ill.*, 41 F.3d 1156, 1160 n.2 (7th

Cir. 1994). *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974), relied upon by the District Court, does not suggest otherwise, as it merely mentioned in dicta the importance of and policy rationale behind the general "concrete injury" requirement of Article III.

As in the case of any claim, to survive a challenge based on standing "at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume 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 (marks omitted)). *See also Levine v. Vilsack*, 587 F.3d 986, 997 (9th Cir. 2009); *Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 968 (9th Cir. 2009); *Williams v. Boeing Co.*, 517 F.3d 1120, 1127 (9th Cir. 2008). The District Court's conclusion that the allegations must be "strong and persuasive" is incorrect; even post-*Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), a complaint need only contain allegations demonstrating the plausibility of standing. *See White v. United States*, 601 F.3d 545, 551-52 (6th Cir. 2010) (applying plausibility standard to standing analysis); *Ramirez-Lebron v. International Shipping Agency, Inc.*, 593 F.3d 124, 127-28 (1st Cir. 2010) (same); *Cornerstone Christian Schools v. University Intersch. League*, 563 F.3d 127, 133 (5th Cir. 2009) (same). Plaintiffs have alleged that their private telephone, email, and internet communications were intercepted

and mined for information. This is a sufficiently-pleaded concrete injury, and grants them standing to bring their Fourth Amendment claim.

B. Plaintiffs Have Sufficiently Alleged That They are "Aggrieved" to Bring Their Statutory Claims

Citing its own decisions on remand from this Court in *Al-Haramain Islamic Foundation, Inc. v. Bush*, 564 F. Supp.2d 1109 (N.D. Cal. 2008) and 595 F. Supp.2d 1077 (N.D. Cal. 2009), the District Court held that, in order to have *standing* to bring their claims under FISA, the SCA, and the Wiretap Act, Plaintiffs must "allege facts" or "proffer evidence sufficient to establish a prima facie case that would differentiate them from the mass of telephone and internet users in the United States." (ER 1:19.)

It is unclear whether the District Court was simply reasserting its contention that injuries shared by large segments of the American public are non-redressable judicially, or applying a heightened pleading standard for standing to bring claims under FISA, the SCA, and the Wiretap Act. Although either ruling would be incorrect, Plaintiffs do not address the former in detail here, in light of the extensive discussion of this issue above. *See* Section I.B, *supra*. To the extent the District Court concluded that Plaintiffs' allegations were insufficient to establish standing under the three statutes, that conclusion is factually and legally flawed for the reasons below.

1. No Heightened Standard Applies in Determining Standing Under Each of the Three Statutes

There is no indication in either the text of any of the three related statutes under which Plaintiffs bring claims, or the case law interpreting them, that any heightened standard, in pleading or substance, applies to such claims.

The Wiretap Act, 18 U.S.C. § 2520(a), creates a cause of action for "any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter." FISA creates a cause of action for "an aggrieved person" who has been "subjected to an electronic surveillance or about whom information obtained by electronic surveillance of such person has been disclosed or used in violation of [50 U.S.C. § 1809]. 50 U.S.C. § 1810. The SCA, 18 U.S.C. § 2707(a), also creates a cause of action for "aggrieved" persons, defined as "a person who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed," 18 U.S.C. § 2510(11).

No case law supports the idea that any of these statutes impose a heightened injury requirement. In the context of a separate provision of the Wiretap Act, the Supreme Court has specifically held that the term "aggrieved person" "should be construed in accordance with existent standing rules." *Alderman v. United States*, 394 U.S. 165, 176 n. 9 (1969); *see also United States v. Faulkner*, 439 F.3d 1221, 1223 (10th Cir. 2006); *United States v. Flores*, No. 1:05-

cr-558-WSD-JFK, 2007 WL 2904109, at *16 (N.D. Ga. Sept. 27, 2007). Since courts are to "presume that Congress expects its statutes to be read in conformity with th[e Supreme] Court's precedents," *United States v. Wells*, 519 U.S. 482, 495 (1997), there is no basis to conclude that the inclusion of the "aggrieved persons" language in FISA or the SCA imposes a heightened standing requirement.

No heightened pleading standard applies to claims brought under these statutes either. Pre-*Twombly*, the Fourth Circuit noted in *United States v. Apple*, 915 F.2d 899, 905 (4th Cir. 1990), that "[a] cognizable 'claim' [under the Wiretap Act] need be no more than a 'mere assertion,' provided that it is a positive statement that illegal surveillance has taken place." While *Iqbal* and *Twombly* have increased the general pleading standard to suggest a "mere assertion" is no longer sufficient, the basic principle that no heightened pleading standard applies to Wiretap Act claims remains. As the District Court itself noted in one of the cases it cited, which is part of the same multidistrict litigation:

> To quote the Ninth Circuit in *Alter*, '[t]he [plaintiff] does not have to plead and prove his entire case to establish standing and to trigger the government's responsibility to affirm or deny.' Contrary to defendants' assertions, proof of plaintiffs' claims is not necessary at this stage.

Al-Haramain Islamic Fdn. v. Bush, 595 F. Supp.2d 1077, 1085 (N.D. Cal. 2009) (VRW) (quoting *United States v. Alter*, 482 F.2d 1016, 26 (9th Cir. 1973)

(alterations in original). The general plausibility standard of *Twombly* and *Iqbal* governs.

Thus, if Plaintiffs have sufficiently alleged that illegal surveillance has taken place, they have sufficiently alleged standing under each of the three statutes.

2. Plaintiffs have Plead Sufficient Allegations to Establish Standing under Each of the Three Statutes

Applying the general standards discussed above, Plaintiffs have sufficiently pleaded facts to allow them to fall within the class of protected individuals for each of their three statutory claims.

a. Plaintiffs Have Standing for Their FISA Claim

Plaintiffs have specifically alleged that they were "aggrieved person[s] defined in 50 U.S.C. § 1810 . . . and were subjected to electronic surveillance conducted or authorized by defendants pursuant to the Spying Program in violation of 50 U.S.C. § 1809." (ER 2:67, Am. Compl. ¶ 98.) The District Court acknowledged that Plaintiffs have alleged they were aggrieved, but suggested that there were insufficient facts to support this allegation. But this Court has previously held that, to be an "aggrieved person" under FISA, it is sufficient for a plaintiff to be a "party to an intercepted communication." *United States v. Cavanagh*, 807 F.2d 787, 789 (9th Cir. 1987). Plaintiffs have made allegations of just this. *See, e.g.*, ER 2:49-50, 52, 66, 67, Am. Compl. ¶¶ 5-8, 21, 87, 98 (allegations that Plaintiffs were subjected to warrantless electronic

surveillance). Accordingly, they plainly fall into the class of persons protected by FISA.

b. Plaintiffs Have Standing for Their Wiretap Act Claim

The section of the Wiretap Act under which Plaintiffs bring their claim confers standing upon "any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter." 18 U.S.C. § 2520(a). Plaintiffs have alleged that their electronic and wire communications have been intercepted, pursuant to the Spying Program, in violation of 18 U.S.C. § 2511, ER 2:49-50, 52, 66, 68, Am. Compl. ¶¶ 5-8, 21, 87, 103. These allegations sufficiently allege that Plaintiffs are members of the class protected by the Wiretap Act.

c. Plaintiffs Have Standing for their SCA Claim

Any "person who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed," 18 U.S.C. § 2510(11), has standing to bring a claim under the SCA. As with Plaintiffs' other two statutory claims, Plaintiffs have alleged exactly this in alleging that their electronic communications were intercepted without a warrant, ER 2:49-50, 52, 66, Am. Compl. ¶¶ 5-8, 21, 87; and that their "stored communications were accessed or authorized to be accessed by defendants pursuant to the Spying Program in violation of 18 U.S.C. § 2701," ER 2:68, Am.

Compl. ¶ 107. Plaintiffs thus fall into the category of persons protected by the SCA.

III. EVEN IF THE COMPLAINT WERE DEFICIENT, THE DISTRICT COURT SHOULD HAVE GRANTED PLAINTIFFS LEAVE TO AMEND

Plaintiffs maintain that they have adequately alleged all required elements of standing on each of their four claims. But even if, as the District Court suggested, the allegations of injury in the Complaint were not sufficiently specific, the District Court should have granted Plaintiffs leave to amend their complaint to address the purported deficiency.

"Dismissal without leave to amend is improper unless it is 'clear' that 'the complaint could not be saved by any amendment.'" *Harris v. Amgen, Inc.*, 573 F.3d 728, 737 (9th Cir. 2009) (quoting *Lee v. City of Los Angeles*, 250 F.3d 668, 692 (9th Cir. 2001)). Where a court finds a complaint to be deficient due to lack of specific details as to the plaintiffs' injury, as the District Court did here, plaintiffs should be given the opportunity to plead such details. Since the District Court did not give Plaintiffs the opportunity to even brief this issue, it cannot be said that it is "clear" the complaint could not be saved. *Cf. Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1034 (9th Cir. 2008) (leave to amend particularly appropriate where dismissal of complaint with prejudice was not raised

at hearing). Thus, the District Court abused its discretion in dismissing Plaintiffs' claims without leave to amend.

CONCLUSION

For the foregoing reasons, the Order should be reversed.

Dated: August 13, 2010
New York, New York

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,373 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point Times New Roman.

Dated: August 13, 2010
New York, New York

s/ Ilann M. Maazel
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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Plaintiffs-Appellants Virginia Shubert, Noha Arafa, Sarah Dranoff, and Hilary Botein, by and through their counsel of record, hereby certify that they are aware of the following related cases pending in this Court:

10-15616 Jewel, et al., v. National Security Agency, et al., (Consolidated with this Action)

09-16676 Hepting, et al., v. AT&T Corporation, et al. (Consolidated with 09-16677, 09-16679, 09-16682, 09-16683, 09-16684, 09-16685, 09-16686, 09-16687, 09-16688, 09-16690, 09-16691, 09-16692, 09-16693, 09-16694, 09-16696, 09-16697, 09-16698, 09-16700, 09-16701, 09-16702, 09-16704, 09-16706, 09-16707, 09-16708, 09-16709, 09-16710, 09-16712, 09-16713, 09-16717, 09-16719, 09-16720, 09-16723).

Dated: August 13, 2010
New York, New York

/s Ilann M. Maazel
Ilann M. Maazel

9th Circuit Case Number(s) 10-15616, 10-15638

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