	Case M:06-cv-01791-VRW Document 632	Filed 05/26/2009 Page 1 of 4	
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11	UNITED STATES DISTRICT COURT		
12	FOR THE NORTHERN DISTRICT OF CALIFORNIA		
13	SAN FRANCISCO DIVISION		
14	IN RE NATIONAL SECURITY AGENCY) MDL Docket No. 06-1791 VRW	
15	TELECOMMUNICATIONS RECORDS LITIGATION, MDL No. 1791)) MDL PLAINTIFFS'	
16	This Document Relates To: All Cases Except:) STATEMENT OF RECENT DECISION RE MOTION BY THE UNITED STATES	
17	Al-Haramain Islamic Foundation, Inc. v. Bush, No. 07-0109; Center for Constitutional Rights v.) SEEKING TO APPLY 50 U.S.C. § 1885a TO DISMISS THESE ACTIONS	
18	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;	\	
19	U.S. v. Adams, No. 07-1323; U.S. v. Clayton, No. 07-1242; U.S. v. Palermino, No. 07-1326; U.S. v.)	
20	Rabner, No. 07-1324; U.S. v. Volz, No. 07-1396))	
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	No. M-06-01791-VRW MDL PLAINTIFFS' STATEMENT	OF RECENT DECISION	

6-01791-VRW MDL PLAINTIFFS' STATEMENT OF RECENT DECISION RE MOTION BY THE UNITED STATES SEEKING TO APPLY 50 U.S.C. § 1885A TO DISMISS THESE ACTIONS

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The recent decision of the Ninth Circuit in <i>Ileto v. Glock</i> , No. 06-56872 (9th Cir. May 11,
2009) (attached hereto as Exhibit A) bears on two aspects of the government's pending motion to
apply section 802 of the Foreign Intelligence Surveillance Act of 1978 ("FISA"), 50 U.S.C.
§ 1885a, to dismiss the pending MDL actions against the telecommunications carriers. <i>Ileto</i>
addressed the same statute prohibiting lawsuits against gun manufacturers (15 U.S.C. § 7902) that
the Second Circuit addressed in City of New York v. Beretta, 524 F.3d 384, 395 (2d Cir. 2008) and
which the government and the carriers rely on here. Consistent with plaintiffs' position (Pltffs.
Reply [MDL Dkt No. 524] at 11), the Ninth Circuit held that the gun manufacturers' immunity
statute did not violate the separation of powers because Congress left no discretion in the statute's
application but "set[] forth a new legal standard to be applied to all cases." This is unlike
section 802's abdication of unlimited and standardless discretion to the Executive. Slip op. at 5571;
see also ibid. (gun statute "applies generally to all cases, both pending and future").
Ileto also held the following, consistent with plaintiffs' position (Pltffs. Opp. [MDL Dkt
No. 483] at 22-31; Pltffs. Reply at 16-22): First, a cause of action is a protected property interest
for purposes of procedural due process. Slip op. at 5575-76. Second, any change in the law
depriving the plaintiff of a cause of action requires a "'legislative'" determination, something that
has not occurred here because it is the Executive, not Congress, that has decided to take away

ıt has not occurred here because it is the Executive, not Congress, that has decided to take away plaintiffs' causes of action. *Id.* at 5576-77 (emphasis original). *Third*, even where Congress makes such a decision to change the governing law and deprive a plaintiff of a cause of action, procedural due process requires that the plaintiff be afforded an adequate opportunity to be heard fully as to whether the law properly applies to his or her case. Id. at 5575-77. Plaintiffs here have been denied the procedures that due process guarantees both because plaintiffs have not been afforded adequate notice, discovery, and an evidentiary hearing and because this Court may only review the Attorney General's certification under the substantial evidence standard and cannot decide de novo whether subsections (a)(1) through (a)(5) of section 802 have been satisfied.

Respectfully submitted, DATED: May 26, 2009 /s/Cindy A. Cohn Cindy A. Cohn

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