No. 09-16676
(and consolidated cases)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE: NSA TELECOMMUNICATIONS RECORDS LITIGATION

TASH HEPTING, ET AL.,
Plaintiffs-Appellants,

v.

AT&T CORP., ET AL.,
Defendants-Appellees, and

THE UNITED STATES OF AMERICA,
Defendant-Intervenor-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES

BETH S. BRINKMANN
Acting Assistant Attorney General

DOUGLAS N. LETTER
(202)514-3602
THOMAS M. BONDY
(202)514-4825
Attorneys, Appellate Staff
Civil Division, Room 7535
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. The court entered final judgments on July 21, 2009, and July 22, 2009, and plaintiffs filed timely notices of appeal on July 31, 2009, see Fed. R. App. P. 4(a). ER 535-606. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the district court properly upheld the constitutionality of Section 802 of the FISA Amendments Act of 2008, which provides in specified circumstances for dismissal of pending or future actions against telecommunications carriers and other persons alleged to have assisted an element of the intelligence community of the United States.

STATEMENT OF THE CASE

In these consolidated lawsuits against several of the nation's telecommunications companies, plaintiffs alleged that the defendants assisted the government in various intelligence activities in the aftermath of September 11, 2001, and thereby violated the Constitution and federal and state law. Plaintiffs sought monetary damages and injunctive relief. The United States intervened in the actions, asserted the state secrets privilege, and sought dismissal on the ground that plaintiffs' claims could not be litigated without jeopardizing national security. *In re: NSA Telecomm. Records Litigation*, 633 F. Supp. 2d 949, 955-56 (N.D. Cal. 2009) [ER 1-4].

Against this backdrop, Congress enacted the FISA Amendments Act of 2008, which provides for dismissal of such actions if the Attorney General properly certifies to the district court that one or more conditions specified in the Act are satisfied. In

effecting this change in the law, Congress made a legislative policy judgment that, if litigation of this kind were permitted to proceed, firms that may have assisted the nation at a critical time would be improperly burdened, and sensitive classified information might be improperly disclosed. Congress also determined that, absent immunity from suit, the private sector might in the future be unwilling to cooperate with the intelligence community's lawful requests for assistance, to the detriment of national security. 50 U.S.C. § 1885a; S. Rep. 110-209, 110th Cong., 1st Sess. (2007) [ER 383].

After passage of the new legislation, Attorney General Mukasey submitted the requisite certification under the terms of the new statute. The district court determined that the Attorney General's submissions satisfied the statutory substantial-evidence standard, and accordingly dismissed the underlying actions, rejecting plaintiffs' arguments that the intervening Act of Congress was unconstitutional. The court explained that, under settled principles, Congress had permissibly changed the law with respect to pending litigation, and that, contrary to plaintiffs' arguments, the statutory certification framework was fully consistent with separation of powers, the nondelegation doctrine, and due process. 633 F. Supp. 2d 949 [ER 1-46]. Plaintiffs appeal.

STATEMENT OF THE FACTS

A. September 11, 2001, Plaintiffs' Lawsuits, And The Government's Assertion Of The State Secrets Privilege.

1. Following the September 11, 2001 attacks on the United States, President Bush established the Terrorist Surveillance Program ("TSP"), authorizing the National Security Agency ("NSA") to intercept international communications into and out of the United States of persons linked to al Qaeda or related terrorist organizations. To intercept a communication under the TSP, one party to the communication had to be located outside the United States, and there must have been a reasonable basis to conclude that one party to the communication was a member of or affiliated with al Qaeda. The TSP was intended as an early warning system to help prevent further attacks. ER 386.

President Bush publicly acknowledged the TSP's existence in December 2005. On January 17, 2007, Attorney General Gonzales announced that any electronic surveillance that had been occurring under the TSP would henceforth be conducted subject to the approval of the Foreign Intelligence Surveillance Court, see 50 U.S.C. § 1803, and that the President's authorization of the TSP had lapsed. ER 386. The TSP is thus no longer operative, and has been defunct for over three years.

2. In January 2006, plaintiffs filed suit in the Northern District of California in *Hepting v. AT&T Corp.*, naming AT&T as defendant and alleging unlawful assistance in connection with the NSA's intelligence activities, in violation of the Constitution and specified provisions of federal and state law. Plaintiffs alleged a communications "dragnet" far broader in scope than the publicly-acknowledged TSP. The United States intervened and moved for dismissal, formally asserting the state secrets privilege on the ground that litigation of plaintiffs' claims would risk the disclosure of sensitive and highly classified intelligence information, including intelligence sources and methods. The district court denied the government's motion to dismiss in July 2006, and certified its ruling for interlocutory appeal under 28 U.S.C. § 1292(b). This Court granted petitions for interlocutory appeal filed by the government and AT&T. 633 F. Supp. 2d at 955-56 [ER 2-3].

Following the filing of the *Hepting* case, numerous similar suits were filed in venues across the country against other telecommunications companies, including Sprint/Nextel, MCI/Verizon, BellSouth, and Cingular (cases against T-Mobile and certain other carriers were dismissed by stipulation). On August 9, 2006, the Judicial Panel on Multidistrict Litigation ordered all such cases transferred to and consolidated in the Northern District of California. In total, the consolidated

proceeding encompasses dozens of lawsuits seeking, in addition to injunctive relief, billions of dollars in monetary damages. *Ibid*.[1]

B. Congress's Change In The Law Providing For Immunity For Entities Alleged To Have Assisted An Element Of The Intelligence Community.

1. In July 2008, Congress enacted new legislation containing a general immunity provision regarding telecommunications companies and other persons who may have furnished assistance to elements of the intelligence community. FISA Amendments Act of 2008, Pub. L. 110-261, § 201,122 Stat. 2436, 2467 (July 10, 2008). It is that immunity provision – contained in a new Section 802 of the FISA (the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801, *et seq*.), and codified at 50 U.S.C. § 1885a – that is at issue in this appeal.

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[1] The consolidated multi-district proceeding included not just the above-referenced cases brought against telecommunications companies, but also two other categories of cases: (1) cases filed directly against the government; and (2) cases filed by the United States against various state officials, seeking to enjoin, on Supremacy Clause grounds, state agency investigations bearing upon alleged federal government activity. The issue in this appeal involves only the cases brought against the telecommunications companies; it does not involve the latter two categories of cases. Litigation of the cases filed directly against the government remains pending at this time; the district court to date has dismissed some but not all of those cases. See *Jewel v. NSA*, No. 08-4373 (N.D. Cal., Jan. 21, 2010), *appeal pending*, No. 10-15616 (9th Cir.); *Shubert v. Obama*, No. 07-0693 (N.D. Cal., Jan. 21, 2010), *appeal pending*, No. 10-15638 (9th Cir.). The cases brought by the United States against state officials resulted in final injunctive relief for the United States, which the states have not appealed. See *In re: NSA Telecomm. Records Litigation*, 630 F. Supp. 2d 1092 (N.D. Cal. 2009); 50 U.S.C. § 1885b.

The statute creates a new term, "covered civil action," which "means a civil action filed in a Federal or State court that – (A) alleges that an electronic communication service provider furnished assistance to an element of the intelligence community; and (B) seeks monetary or other relief from the electronic communication provider related to the provision of such assistance." 50 U.S.C. § 1885(5). Under the new Act, "electronic communication service provider" includes "a telecommunications carrier," and "assistance" means "the provision of, or the provision of access to, information (including communication contents, communications records, or other information relating to a customer or communication), facilities, or another form of assistance." 50 U.S.C. §§ 1885(1), (6).[2]

Section 802 then provides that, "[n]otwithstanding any other provision of law, a civil action may not lie or be maintained in a Federal or State court against any person for providing assistance to an element of the intelligence community, and shall be promptly dismissed, if the Attorney General certifies to the district court of the United States in which such action is pending that –

> (1) any assistance by that person was provided pursuant to an order of the court established under section 1803(a) of this title directing such assistance [*i.e.*, the Foreign Intelligence Surveillance Court];

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[2] Other terms, such as "intelligence community," are also specifically defined in the Act. The statute is reproduced in full in the addendum to this brief.

(2) any assistance by that person was provided pursuant to a certification in writing under section 2511(2)(a)(ii)(B) or 2709(b) of Title 18;[3]

(3) any assistance by that person was provided pursuant to a directive under section 1802(a)(4), 1805b(e), or 1881a(h) of this title directing such assistance;[4]

(4) in the case of a covered civil action, the assistance alleged to have been provided by the electronic communication service provider was –

(A) in connection with an intelligence activity involving communications that was –

(i) authorized by the President during the period beginning on September 11, 2001, and ending on January 17, 2007; and

(ii) designed to detect or prevent a terrorist attack, or activities in preparation for a terrorist attack, against the United States; and

(B) the subject of a written request or directive, or a series of written requests or directives, from the Attorney General * * * to the electronic communication service provider indicating that the activity was –

(i) authorized by the President, and

---

[3] Sections 2511(2)(a)(ii)(B) and 2709(b) are respectively provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 and the Stored Communications Act of 1986, authorizing the Attorney General and FBI Director in specified circumstances to obtain assistance from electronic communication service providers and others. See 18 U.S.C. §§ 2511(2)(a)(ii)(B), 2709(b).

[4] Section 1802(a)(4), 1805b(e), and 1881a(h) are FISA provisions likewise authorizing the Attorney General and/or the Director of National Intelligence in specified circumstances to direct the furnishing of necessary assistance in connection with electronic surveillance. See 50 U.S.C. §§ 1802(a)(4), 1805b(e) (repealed), 1881a(h).

(ii) determined to be lawful; or

(5) the person did not provide the alleged assistance."

50 U.S.C. § 1885a(a).

Section 802 provides for judicial review of an Attorney General certification. "A certification under subsection (a) shall be given effect unless the court finds that such certification is not supported by substantial evidence provided to the court pursuant to this section." 50 U.S.C. § 1885a(b). "In its review of a certification under subsection (a), the court may examine the court order, certification, written request, or directive described in subsection (a) and any relevant court order, certification, written request, or directive submitted pursuant to subsection (d)." *Ibid*.

Subsection (d) addresses the role of the parties in the underlying litigation, specifying that "[a]ny plaintiff or defendant in a civil action may submit any relevant court order, certification, written request, or directive to the district court * * * for review and shall be permitted to participate in the briefing or argument of any legal issue in a judicial proceeding conducted pursuant to this section, but only to the extent that such participation does not require the disclosure of classified information to such party." 50 U.S.C. § 1885a(d). "To the extent that classified information is relevant to the proceeding or would be revealed in the determination of an issue, the court shall review such information *in camera* and *ex parte*, and shall issue any part

of the court's written order that would reveal classified information *in camera* and *ex parte* and maintain such part under seal." *Ibid*.

The statute contains a further provision regarding limitations on disclosure, adding that, "[i]f the Attorney General files a declaration * * * that disclosure of a certification * * * would harm the national security of the United States, the court shall –

> (1) review such certification * * * *in camera* and *ex parte*; and
>
> (2) limit any public disclosure concerning such certification * * *, including any public order * * *, to a statement as to whether the case is dismissed * * *, without disclosing the paragraph of subsection (a) that is the basis for the certification."

50 U.S.C. § 1885a(c).

The Act expressly provides that "[t]his section shall apply to a civil action pending on or filed after July 10, 2008," the date of its enactment. 50 U.S.C. § 1885a(i).

2. In the legislative history accompanying the new statute, the Senate Select Committee on Intelligence explained the basis for Congress's action: "electronic surveillance for law enforcement and intelligence purposes depends in great part on the cooperation of the private companies that operate the Nation's telecommunication system," S. Rep. 110-209 at 9 [ER 391], and, if litigation were allowed to proceed

against persons allegedly assisting in such activities, "the private sector might be unwilling to cooperate with lawful Government requests in the future," and the "possible reduction in intelligence that might result * * * is simply unacceptable for the safety of our Nation." *Id.* at 10 [ER 392].

In reaching that conclusion, the Committee found that, beginning soon after September 11, 2001, the Executive Branch provided written requests or directives to certain electronic communication service providers to obtain their assistance in connection with communications intelligence activities that had been authorized by the President. See *id.* at 9 [ER 391]. The Committee Report indicates that the letters were furnished at regular intervals and stated that the activities had been authorized by the President and determined to be lawful by the Attorney General (or, in one instance, by the Counsel to the President). *Ibid*.

The Committee emphasized that Section 802(a)(4) – which, as noted, provides for dismissal of "covered civil actions" concerning alleged assistance furnished by providers subject to written requests after the 9/11 attacks – is restricted to "discrete past activities," and is a "one-time response to an unparalleled national experience in the midst of which representations were made that assistance to the Government was authorized and lawful." See S. Rep. 110-209 at 10-11 [ER 392-93]. Under these circumstances, Congress determined that providers should not be burdened by

litigation based on allegations that they unlawfully assisted the government at this critical time. *Ibid*. Congress made no assessment of the legality of the underlying activities. *Id*. at 9 [ER 391].

The Committee also stressed that the government had intervened and sought dismissal of the consolidated actions based on the state secrets privilege, that "the future outcome of th[e] [underlying] litigation is uncertain," and that "[e]ven if these suits are ultimately dismissed on state secrets or other grounds, litigation is likely to be protracted." *Id.* at 7 [ER 389]. Congress thus enacted the new law to avoid the need to consider the government's state secrets privilege assertion, but in a manner that would not disclose classified national security information. In particular, the Committee explained that "[i]t would be inappropriate to disclose the names of the electronic communication service providers from which assistance was sought, the activities in which the Government was engaged or in which providers assisted, or the details regarding any such assistance." *Id*. at 9 [ER 391].

C. The District Court's Decision Upholding The Constitutionality Of The Statutory Amendments, And Dismissing Plaintiffs' Claims.

After passage of the new legislation, this Court remanded the pending *Hepting* matter to the district court, for further proceedings in light of the statutory amendments. Invoking the new law, the government filed a public certification of

Attorney General Mukasey stating that "I hereby certify that the claims asserted in the civil actions pending in these consolidated proceedings brought against electronic communication service providers fall within at least one provision contained in Section 802(a)." ER 432, 437. The government also submitted a classified certification for the district court's *ex parte*, *in camera* review. On the basis of these submissions, the government moved for dismissal of the consolidated cases against the telecommunications companies. Plaintiffs countered with arguments that the new governing statute was unconstitutional on a variety of grounds.

The district court granted the government's motion to dismiss, explaining in a comprehensive opinion that dismissal was statutorily compelled, and that plaintiffs' constitutional objections to the statute were without merit. Addressing plaintiffs' contentions that Congress's action was unconstitutional, the court invoked the settled "principle that a statute that amends applicable law, even if it is meant to determine the outcome of pending litigation, does not violate the separation of powers." 633 F. Supp. 2d at 963 [ER 17]. The court explained that, "[i]n enacting section 802, Congress created a new, narrowly-drawn and 'focused' immunity," thus "changing the underlying law." *Id*. at 964 [ER 19]. "The statute, moreover, provides a judicial role, albeit a limited one, in determining whether the Attorney General's certifications meet the criteria for the new immunity created by the section 802." *Ibid*.

Specifically, "[t]he court may reject the Attorney General's certification and refuse to dismiss a given case if, in the court's judgment, the certification is not supported by substantial evidence." *Ibid*. [ER 20]. "Accordingly," for all of these reasons, "the court finds that section 802 does not violate the separation of powers." *Ibid*.

The court similarly rejected plaintiffs' assertion that the statute violated the nondelegation doctrine. The court observed that the Supreme Court has invalidated congressional legislation on nondelegation grounds on only two occasions, and has not done so at all since 1935. *Id*. at 964-65 [ER 20-22]. The court continued that, "[i]n reviewing a statute against a nondelegation challenge to an Act of Congress, 'the only concern of courts is to ascertain whether the will of Congress has been obeyed,'" *id*. at 965 (quoting *Yakus v. United States*, 321 U.S. 414, 425 (1944)) [ER 23], and "the Supreme Court [has] reaffirmed [the] 'intelligible principle' test as the touchstone for determining non-delegation challenges to congressional enactments," *ibid*. Here, to the extent the nondelegation doctrine is even implicated, the court concluded that the Attorney General's discretion whether to submit a certification in a given case was informed by Congress's concern for protecting intelligence gathering ability and national security information, and that principle, embodied in the statute's text and legislative history, was sufficient to defeat a nondelegation challenge. *Id*. at 966-70 [ER 23-33]. This conclusion was buttressed, the court

explained, by the limited function allocated to the Attorney General here, "gathering and presenting facts." *Id*. at 970 [ER 33].

The court next disposed of plaintiffs' due process attack. The court rejected plaintiffs' assertions that the Attorney General was improperly biased and that Section 802's substantial evidence standard did not allow a meaningful judicial role. *Id*. at 971 [ER 34-35]. The court explained that "Congress has manifested its unequivocal intention to create an immunity that will shield * * * telecommunications company defendants from liability" where appropriate, and "[t]he Attorney General, in submitting the certifications, is acting pursuant to and in accordance with that congressional grant of authority, in effect to administer the newly-created immunity provision." *Ibid*. [ER 35].

The court also rejected plaintiffs' arguments based on the statute's secrecy provisions, explaining that "[o]ther statutes providing for *ex parte, in camera* procedures have withstood due process challenges in other contexts having national security implications." *Id*. at 972 [ER 36]. The court noted that "Section 802 evinces a clear congressional intent that parties not have access to classified information." *Ibid*. [ER 37]. Thus, "[g]iven the special balancing that must take place when classified information is involved, the court is not prepared to hold that the Constitution requires more process than section 802 provides." *Ibid*.

Finally, the court advised that it had "examined the Attorney General's submissions and has determined that he has met his burden under section 802(a)." *Id*. at 976 [ER 44]. The court recognized that it "is prohibited by section 802(c)(2) from opining further. The United States' motion to dismiss must therefore be, and hereby is, granted." *Ibid*. The court entered final judgment, from which plaintiffs appeal. ER 535-67.

SUMMARY OF ARGUMENT

At issue in this appeal is the constitutionality of Section 802 of the FISA Amendments Act of 2008, which provides in specified circumstances for dismissal of pending or future actions against telecommunications carriers and other persons alleged to have assisted the intelligence community of the United States. In a detailed ruling, the district court rejected plaintiffs' contentions that the challenged provision violates separation of powers, the nondelegation doctrine, and due process. The decision of the district court is correct, and should be upheld.

Section 802 changes applicable law by providing that a civil action may not lie or be maintained against any person, including electronic communication services providers, for allegedly furnishing assistance to an element of the intelligence community, and shall be promptly dismissed, if the Attorney General properly certifies that at least one of several statutorily specified circumstances exists,

including that the person did not provide the alleged assistance. A certification by the Attorney General that a statutory condition is satisfied is to be given effect unless the court finds that the certification is not supported by substantial evidence. Congress also authorized the Attorney General to submit the grounds for a certification to the district court on an in *camera, ex parte* basis, if the Attorney General determines that such protection is necessary in the interests of national security. Section 802 states that it applies to any civil action, including the multi-district litigation proceeding at issue in this case, pending on or after the date of its enactment.

The intent of the new law is clear. Congress found that electronic surveillance conducted for national intelligence purposes depends on the cooperation of private entities. In Congress's view, if litigation were allowed to proceed against persons allegedly providing assistance, those who cooperated in the past would face substantial burdens, and the private sector might be unwilling to cooperate with lawful government intelligence gathering requests in the future, thereby undermining national security. Congress also determined that such litigation would risk inappropriately disclosing national security information, including information regarding the government's intelligence activities, the identities of persons who may

have provided assistance in connection with such activities, and any details regarding such assistance.

The immunity provision is entirely faithful to the constitutional separation of powers. As the district court properly recognized, legislation that amends applicable law, even if it may determine the outcome of pending litigation, does not thereby violate the Constitution. Equally clearly, Congress does not offend the separation of powers when it bases judicial action on the submission of facts by the Executive Branch. The Attorney General's role under the challenged provision is limited to gathering and presenting specific facts identified by Congress in the terms of its enactment. The district court retains the ultimate authority to determine whether the Attorney General's certification is supported by substantial evidence; if it is, the legislation itself imposes immunity, mandating dismissal of the pending litigation against the carriers. Under settled legal principles, far from transgressing any constitutional bounds, this division of duties fully respects the distinct responsibilities of each of the three Branches.

Nor does the statute violate the nondelegation doctrine. That doctrine has been successfully invoked only exceedingly rarely, and it is not clear that the doctrine even applies here, given the narrowly circumscribed nature and scope of the Attorney General's delegated functions. Even assuming the nondelegation doctrine were

applicable, the statute, including both its text and legislative history, provides more than ample guidance for the exercise of the Attorney General's limited fact-finding and certification authority. It is also relevant that Section 802 does not exist in isolation; it builds upon other, longstanding and related immunity provisions enacted by Congress.

The statute also fully satisfies due process, as the district court properly concluded as well. In particular, there is no merit to plaintiffs' suggestion that the Attorney General was "biased," or that the statute's substantial-evidence standard of review is "meaningless." Similarly, under settled law, due process permits *in camera, ex parte* consideration of classified materials where, as here, Congress determines that such procedures are called for by national security.

Finally, plaintiffs are mistaken in urging that Congress's enactment leaves them with no proper recourse for pursuing their constitutional claims. Section 802 encompasses only cases brought against private parties allegedly assisting the government in its intelligence activities. The provision has no application to suits filed directly against the government itself. Several such suits remain pending at this time.

We also note that, in their presentation to this Court, plaintiffs misguidedly dwell upon their underlying merits allegations, including their allegations regarding

a surveillance "dragnet." As plaintiffs acknowledge, the government has denied the existence of their alleged dragnet, and the government has also demonstrated that the facts needed to address that allegation are protected by the Attorney General's certification and by the state secrets privilege. More fundamentally, the merits of plaintiffs' underlying surveillance allegations are irrelevant; this proceeding is limited to the constitutionality of § 802 of the FISA Amendments Act of 2008, the crux of which, as noted, is in specified circumstances to provide immunity for persons allegedly assisting the government regardless of the underlying merits of the claims against them.[5]

[5] Plaintiffs' resort to the Klein and Marcus declarations (Appellants' Br. 4-5), which concern an alleged secret room at an AT&T facility, is especially inapt. As the government has previously demonstrated to this Court, neither of these declarations provides competent evidence, even if the merits of the underlying surveillance allegations were relevant here. See U.S. Reply Brief, *Hepting v. AT&T*, No. 06-17137 (9th Cir.), at 10-13. Klein, a former AT&T employee, acknowledged that he was not authorized to enter the alleged secret room; he did not claim to know what was in the room; and, although he speculated as to NSA involvement with the room, he made no claim that (and had no way of knowing whether) NSA was actually utilizing the room in any particular way, much less that it was using it for surveillance, let alone domestic surveillance. See ER 322-25. Marcus's declaration, which discusses second-hand "the implications of" the Klein declaration, is even more speculative. See ER 348, 355. In any event, as noted, none of this is of any relevance to the issues in this appeal.

STANDARD OF REVIEW

The district court's decision presents legal issues reviewable *de novo.* See *United States v. Lujan*, 504 F.3d 1003, 1006 (9th Cir. 2007).

ARGUMENT

THE DISTRICT COURT PROPERLY UPHELD THE CONSTITUTIONALITY OF SECTION 802 OF THE FISA AMENDMENTS ACT OF 2008

I. THE CHALLENGED STATUTORY PROVISION PROPERLY RESPECTS THE CONSTITUTIONAL SEPARATION OF POWERS.

A. Congress Changed The Law To Preserve Intelligence Gathering Capabilities And Safeguard National Security Information.

"[J]udging the constitutionality of an Act of Congress is 'the gravest and most delicate duty' that the courts are 'called on to perform.'" *Northwest Austin Municipal Utility District v. Holder*, 129 S. Ct. 2504, 2513 (2009) (quoting *Blodgett v. Holden*, 275 U.S. 142, 147-48 (1927) (Holmes, J., concurring)). The statute at issue in this case reflects Congress's fundamental policy judgment that burdensome litigation should not proceed against persons allegedly assisting the government, in the unique historical circumstances after September 11, 2001, in detecting and preventing further attacks on the United States, and, indeed, that such litigation would risk serious harm to national security.

To that end, the statute alters applicable law, providing that a civil action "may not lie or be maintained" against any person, including electronic communication services providers, for furnishing assistance to an element of the intelligence community, and "shall be promptly dismissed," if the Attorney General properly certifies that one of several possible circumstances exists:

> – that the provider did not furnish the alleged assistance, 50 U.S.C. § 1885a(a)(5);
>
> – that the provider assisted the government subject to an order of the Foreign Intelligence Surveillance Court or other certifications or directives authorized by statute, see *id*. §§ 1885a(a)(1)-(3) ((citing 18 U.S.C. §§ 2511(2)(a)(ii)(B), 2709(b); 50 U.S.C. §§ 1802(a)(4), 1803(a), 1805b(e), 1881a(h))); or
>
> – that the alleged assistance was provided in connection with an intelligence activity that was authorized by the President between September 11, 2001 and January 17, 2007, was designed to detect or prevent a terrorist attack against the United States, and was the subject of written requests from designated government officials to a provider indicating that the activity was authorized by the President and had been determined to be lawful. See *id*. § 1885a(a)(4).

A certification by the Attorney General that at least one of these statutory conditions exists "shall be given effect unless the court finds that such certification is not supported by substantial evidence provided to the court pursuant to this section." 50 U.S.C. § 1885a(b). Congress also authorized the Attorney General to submit the grounds for a certification on an in *camera, ex parte* basis, when the

Attorney General finds that such procedures are needed in the interest of national security. See 50 U.S.C. §§ 1885a(c),(d).

As the Senate Select Committee on Intelligence explained, "electronic surveillance for law enforcement and intelligence purposes depends in great part on the cooperation of the private companies that operate the Nation's telecommunication system." S. Rep. 110-209 at 9 [ER 391]. If litigation were allowed to proceed against entities alleged to have assisted in such activities, "the private sector might be unwilling to cooperate with lawful Government requests in the future," and the "possible reduction in intelligence that might result * * * is simply unacceptable for the safety of our Nation." *Id.* at 10 [ER 392].

The legislative history also makes clear that the identity of persons from whom assistance was sought, and any intelligence activities in which the government was engaged or in which providers assisted, or the details regarding any such assistance, must not be disclosed. S. Rep. 110-209 at 9 [ER 391]. Such matters are properly protected as "sources and methods of intelligence." *Ibid.*; see also *id.* at 23 (same) [ER 405].

B. Congress May Constitutionally Amend Applicable Law With Respect To Specific, Pending Litigation.

The district court correctly invoked "the principle that a statute that amends applicable law, even if it is meant to determine the outcome of pending litigation, does not violate the separation-of-powers principle." 633 F. Supp. 2d at 963 [ER 17]. As the Supreme Court explained in *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992), when Congress amends the law, it may constitutionally do so with respect to pending cases, and Congress does not offend the separation of powers in such a setting even if the change in the law is meant to affect specific, pending litigation. *Id*. at 437-41.

Indeed, as this Court has recognized, "[i]t is of no constitutional consequence that [legislation] affects, or is even directed at, a specific judicial ruling so long as the legislation modifies the law." *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1569 (9th Cir. 1993). "Congress clearly has the power to amend a statute and to make that change applicable to pending cases," *id*. at 1570, and "the fact that Congress direct[s] [legislation] at a specific case pending before a district court does not render it an abuse of the separation of powers." *Ecology Center v. Castaneda*, 426 F.3d 1144, 1150 (9th Cir. 2005).

Nor are these precepts called into question by the Supreme Court's holding in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995), that Congress cannot "overturn[] * * * the judicial department with regard to a particular case or controversy." As this Court has observed, "that rule applies [only] to *final* decisions by the judiciary, not to pending cases." *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1139 (9th Cir. 2009), *pet'n for cert. filed*, No. 09-812 (Dec. 24, 2009). Thus, a statute that "applies only to pending and future cases, and does not purport to undo final judgments of the judiciary," "does not violate the constitutional separation of powers." *Id.* at 1139-40.

These rules are directly applicable here. There is no question that, in enacting Section 802, Congress changed the law. Under the new statute, covered lawsuits are subject to dismissal if the Attorney General certifies that any of the statutory preconditions is met, and if the court determines that the Attorney General's certification is supported by substantial evidence. 50 U.S.C. §§ 1885a(a),(b). Congress also made explicit that the provision applies to pending cases, including the consolidated multi-district proceeding at issue here. See 50 U.S.C. § 1885a(i) ("[t]his section shall apply to a civil action pending on or filed after" the date of its enactment); see also S. Rep. 110-209 at 7 [ER 389]. Under *Robertson* and its progeny, Congress's action was wholly in keeping with the separation of powers.

C. Congress Does Not Offend The Separation Of Powers When It Makes Action Contingent Upon Executive Branch Fact-Finding.

Plaintiffs do not directly dispute that *Robertson* permits what Congress has done here. Plaintiffs instead seize upon *Clinton v. City of New York*, 524 U.S. 417 (1998), and assert that Section 802 is inconsistent with the Supreme Court's holding there that the line item veto device was unconstitutional. See Appellants' Br. 14. As the district court properly understood, however, this case and *City of New York* are fundamentally distinguishable.

The differences between Section 802 and the Line Item Veto Act are manifest. The line item veto legislation gave the President "unilateral power" in effect to cancel provisions of statutory law already passed by Congress, without adherence to the process required under the Constitution, approval by the House and Senate and presentment to the President. See *City of New York*, 524 U.S. at 446-47. Indeed, as the Supreme Court explained, the President's veto of a provision of law, after the provision had become law, would thoroughly circumvent constitutional requirements governing the enactment of legislation. See *ibid*.

Section 802 of the FISA Amendments of 2008 is not remotely similar. The Attorney General's role under this statute is limited in any particular case to certifying to the district court whether any of five factual conditions specified by Congress

exists. See 50 U.S.C. §§ 1885a(a)(1)-(5). The limited factual circumstances that may be the subject of an Attorney General certification were fixed by Congress and are set forth in the terms of the statute. *Ibid*. The Attorney General has no power to alter the statutory prerequisites that may properly trigger certification. *Ibid*.

Nor does the Attorney General's certification carry any binding force. The Attorney General has no ability under Section 802 to compel dismissal of *any* case against *any* party. Rather, the Attorney General submits his certification to the district court, and it is the court, and not the Attorney General, that ultimately determines whether dismissal of an action is required under the terms of the new legislation. See 50 U.S.C. § 1885a(b) ("A certification under subsection (a) shall be given effect unless the court finds that such certification is not supported by substantial evidence provided to the court pursuant to this section.").

There is nothing constitutionally suspect in Congress's allocating to the Attorney General this kind of subsidiary role as part of the operation of a duly enacted statutory scheme. To the contrary, as the Supreme Court recognized more than a century ago, "[t]he legislature cannot delegate its power to make a law, but it can * * * delegate * * * power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend." *Field v. Clark*, 143 U.S. 649, 694 (1892). See 633 F. Supp. 2d at 967 [ER 25].

As the Supreme Court has elaborated, "[t]here are many things upon which wise and useful legislation must depend which cannot be known to the law-making powers," *Field*, 143 U.S. at 694, and the Constitution "does not require that Congress find for itself every fact upon which it desires to base legislative action, or that it make for itself detailed determinations which it has declared to be prerequisite to the application of [its] legislative policy." *Yakus v. United States*, 321 U.S. 414, 424 (1944). Here, for example, the facts that form the basis for an Attorney General certification – facts pertaining to U.S. Government intelligence matters, the details of which are likely to be classified – reflect evidence that is peculiarly within the knowledge of the Executive Branch. See 50 U.S.C. §§ 1885a(a)(1)-(5). Congress thus delineated the circumstances in which dismissal of underlying litigation would be warranted, but left it to the Attorney General to gather and present the relevant facts regarding the presence or absence of those circumstances in any particular suit.

As this case illustrates, statutes making certain consequences contingent upon the submission of facts by the Executive Branch are not uncommon. As the D.C. Circuit has recently noted, such statutes may be found in various provisions of the United States Code (see, *e.g.*, 28 U.S.C. § 2679(d) (Attorney General may certify government employee's scope of employment in tort case, thereby triggering substitution of the United States as the defendant); 28 U.S.C. § 1605(g)(1)(A)

(Attorney General may certify that discovery in suit against foreign state would interfere with a criminal case or national security operation, thereby triggering discovery stay); 18 U.S.C. § 5032 (Attorney General may certify that one or more statutory conditions exists regarding a juvenile offender, thereby triggering district court jurisdiction)), and the Supreme Court has consistently rejected constitutional attacks on Acts of Congress "that predicate the operation of a statute upon some Executive Branch factfinding." *Owens v. Republic of Sudan*, 531 F.3d 884, 891 (D.C. Cir. 2008). See, *e.g.*, *Touby v. United States*, 500 U.S. 160, 162-64 (1991); *United States v. Grimaud*, 220 U.S. 506, 515-22 (1911).

Plaintiffs place substantial focus on the fact that, under Section 802, the Attorney General is authorized, but not required, to make the requisite certification to the district court. See Appellants' Br. 12. As the above-cited statutes show, however, and as the Supreme Court has made clear, that a legislative provision may leave the Executive with some discretion in this regard is the norm, not the exception. See, *e.g.*, *Loving v. United States*, 517 U.S. 748, 758-71 (1996) (discretion to prescribe aggravating factors for capital sentencing purposes); *Touby*, 500 U.S. at 162-67 (discretion to add new drugs to criminal drug schedule); *Yakus*, 321 U.S. at 424-27 (discretion to set commodity prices); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 312, 320-21 (1936) (discretion to declare an arms embargo

against foreign countries). As the Supreme Court has explained, "half the statutes on our books * * * depend[] on the discretion of some person to whom is confided the duty of determining whether the proper occasion exists for executing them," and "[t]o deny this would be to stop the wheels of government." *Field*, 143 U.S. at 694. See *Owens*, 531 F.3d at 891.

Thus, while plaintiffs point out (see Appellants' Br. 23-24) that the Supreme Court in *City of New York*, in striking down the Line Item Veto Act, cited among other things its conferral of discretion upon the President, see *City of New York*, 524 U.S. at 443-44, what was crucial was that the line item veto mechanism, in both legal and practical effect, would have enabled the President, acting purely on the basis of his own policy preferences, to repeal provisions of legislation passed by the House and Senate and properly signed into law. See *id*. at 438. The cabined powers granted to the Attorney General here under Section 802, to certify the existence or nonexistence of certain designated facts, are in no meaningful sense analogous.

In enacting Section 802, Congress made the overriding policy judgment that, in prescribed circumstances, suits against private parties alleged to have assisted an element of the intelligence community should be dismissed. The Attorney General is limited to gathering specified facts and certifying them to the court. In turn, the ultimate authority to determine whether the Attorney General's certification is

supported by substantial evidence is vested in the judiciary; if substantial evidence exists, then the statute itself mandates immunity and dismissal, in light of the policy judgments Congress made in enacting this legislation. 50 U.S.C. §§ 1885a(a),(b). Under this carefully calibrated scheme, the separate spheres of each of the Branches are in all respects preserved. See *Loving*, 517 U.S. at 773 ("Separation-of-powers principles are vindicated, not disserved, by measured cooperation between the two political branches of the Government, each contributing to a lawful objective through its own processes.").

II. THE STATUTE DOES NOT IMPLICATE THE NON-DELEGATION DOCTRINE.

A. The Nondelegation Doctrine Has Been Invoked Successfully Only Twice In Seventy-Five Years, And It Is Unclear That The Doctrine Even Applies Here.

Plaintiffs maintain that Section 802 violates the nonedelegation doctrine because the statute authorizes but does not require the Attorney General to submit certifications to the court. See Appellants' Br. 26. In a nondelegation challenge, "the constitutional question is whether the statute has delegated legislative power to the agency." *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457, 472 (2001). The Supreme Court "repeatedly ha[s] said that when Congress confers decisionmaking authority upon agencies," it "must 'lay down by legislative act an

intelligible principle to which the person or body authorized to [act] is directed to conform.'" *Ibid*. (quoting *J.W. Hampton Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928)).

The "intelligible principle" standard "has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta v. United States*, 488 U.S. 361, 372 (1989). Thus, the Constitution's vesting of legislative powers in Congress "do[es] not prevent Congress from obtaining the assistance of its coordinate Branches." *Ibid*.

The nondelegation doctrine is a very rarely invoked basis for striking down a statute. For many decades, nondelegation claims have been universally rejected by the Supreme Court and the courts of appeals; the Supreme Court has invalidated only two Acts of Congress on nondelegation grounds, and has not done so in 75 years. As the Court itself has noted, "[i]n the history of the Court we have found the requisite 'intelligible principle' lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy[.]" *Whitman*, 531 U.S. at 474. See *Panama Refining Co.*

v. Ryan, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

Indeed, as the district court properly observed, notwithstanding the nondelegation doctrine, "congressional delegations of law-making authority to administrative agencies are commonplace and those agencies create enormous bodies of law including, but not limited to, the entire Code of Federal Regulations." 633 F. Supp. 2d at 964 [ER 21]. See *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1396 n.3 (9th Cir. 1995) (noting that the very "vitality of the nondelegation doctrine is questionable"). Plaintiffs nevertheless ask this Court to strike down an Act of Congress on nondelegation grounds for the first time in 75 years.

It is entirely unclear that the nondelegation doctrine even applies to this case. The usual nondelegation challenge features a congressional conferral of authority upon an executive agency to promulgate regulations having the force and effect of law. See, *e.g.*, *Whitman*, 531 U.S. at 462 (air quality standards under the Clean Air Act). This case presents no such scenario. The statute at issue does not grant the Attorney General any authority to issue binding rules or determinations of any kind. The Attorney General is authorized only to make certain narrowly circumscribed determinations as specified by Congress, and to certify those facts to the district court. 50 U.S.C. §§ 1885a(a)(1)-(5). At a minimum, for nondelegation purposes,

"the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred," *Whitman*, 531 U.S. at 475, and here, as the district court recognized, it is at least highly relevant, if not dispositive, that the Attorney General's function consists of gathering and presenting specified facts, and that "no form of rulemaking" or other conclusive action "is at issue." 633 F. Supp. 2d at 970 [ER 33].

B. The Statute In Any Event Satisfies The Undemanding "Intelligible Principle" Test.

Even assuming the nondelegation doctrine were implicated, Section 802 in any event passes constitutional muster. Plaintiffs contend that the statutory terms evince no principles guiding the exercise of the Attorney General's authority, but that is plainly not the case. Congress provided in listed circumstances for immunity for persons allegedly assisting the government's intelligence community, and Section 802 and its legislative history make clear that Congress acted to preserve current and future intelligence gathering capability and to safeguard national security information. See 50 U.S.C. §§ 1885a(a)-(d); S. Rep. 110-209 at 9-10 [ER 391-92]. Congress thus sought to protect intelligence gathering ability and national security information, and the exercise of the Attorney General's authority under the Act is properly guided by those congressional policy objectives.

Especially when considered in conjunction with the constricted role that the statute assigns to the Attorney General, protecting intelligence gathering and national security information is unquestionably an "intelligible principle" for nondelegation purposes. Indeed, over the years, the Supreme Court and this Court have upheld against nondelegation attack statutes guiding Executive discretion under such elastic standards as setting "fair and equitable prices" (*Yakus*, 321 U.S. at 426-27); preventing "excessive profits" (*Lichter v. United States*, 334 U.S. 742, 785-86 (1948)); regulating as required by "public interest, convenience, or necessity" (*National Broadcasting Co. v. United States*, 319 U.S. 190, 225-26 (1943)); and protecting "the national interest of the United States" (*Freedom To Travel Campaign v. Newcomb*, 82 F.3d 1431, 1437-38 (9th Cir. 1996)). See *Touby*, 500 U.S. at 165.

That nondelegation review is satisfied is further underscored by the context presented. As the D.C. Circuit has noted, in the course of rejecting a nondelegation challenge to a provision of the Foreign Sovereign Immunity Act, 28 U.S.C. § 1605, "the shared responsibilities of the Legislative and Executive Branches in foreign relations may permit a wider range of delegations than in other areas." *Owens*, 531 F.3d at 893 (citing *Zemel v. Rusk*, 381 U.S. 1, 17 (1965); *Curtiss-Wright Export Corp.*, 299 U.S. at 321-22). As the district court concluded, "[t]he same can be said

of the roles of these two branches in the instant case, where matters pertaining to national security are concerned." 633 F. Supp. 2d at 970 [ER 33].

Plaintiffs are ultimately relegated to arguing that there can be no "intelligible principle" here because any such principle must be drawn from the text of a statute and may not be informed by the statute's underlying purposes and legislative history. See Appellants' Br. 31. It is not clear why anything in this case would turn on that proposition, but, in any event, the proposition is legally incorrect. As the Supreme Court noted in *Mistretta*, in upholding the constitutionality of the functions of the U.S. Sentencing Commission, the "legislative history, together with Congress' directive that the Commission begin its consideration of the sentencing ranges by ascertaining the average sentence imposed in each category in the past, and Congress' explicit requirement that the Commission consult with authorities in the field of criminal sentencing, provide a factual background and statutory context that give content to the mandate of the Commission." *Mistretta*, 488 U.S. at 376 n.10. Accord, *e.g.*, *Lichter*, 334 U.S. at 785; *National Broadcasting Co.*, 319 U.S. at 225-26.

Similarly, the D.C. Circuit in *Owens* explained that, "[w]hen we review statutes for an intelligible principle that limits the authority delegated to a branch outside the legislature, we do not confine ourselves to the isolated phrase in question." *Owens*,

531 F.3d at 890. Rather, "[we] utilize all the tools of statutory construction, including statutory context and, when appropriate, the factual background of the statute." *Ibid*.

Here, the legislative history explicitly reiterates what is already fully apparent in the terms of Congress's enactments. "Electronic surveillance for law enforcement and intelligence purposes depends in great part on the cooperation of the private companies that operate the Nation's telecommunication system," S. Rep. 110-209 at 9 [ER 391], and, if litigation were allowed to proceed against persons allegedly assisting in such activities, it would be inappropriately burdensome to persons who may have cooperated in the past, and "the private sector might [also] be unwilling to cooperate with lawful Government requests in the future." *Id.* at 10 [ER 392]; see also *id*. at 9 ("It would be inappropriate to disclose the names of the electronic communication service providers from which assistance was sought, the activities in which the Government was engaged or in which providers assisted, or the details regarding any such assistance.") [ER 391]. Even assuming the nondelegation doctrine applies, these principles – along with Section 802's explicit and constrained criteria for a statutory certification – provide ample guidance for the exercise of the Attorney General's authority, over and above the fully sufficient contours of the statutory text itself. See *Humphrey v. Baker*, 848 F.2d 211, 217 (D.C. Cir. 1988) ("Only the most extravagant delegations of authority, those providing *no* standards

to constrain administrative discretion, have been condemned by the Supreme Court as unconstitutional.") (emphasis added).

C. Section 802 Builds Upon Other, Longstanding And Related Immunity Statutes.

Section 802 is also consistent with multiple, longstanding immunity provisions in which Congress has recognized that assistance by telecommunication providers and others should be subject to protection from legal claims. See, *e.g.*, 18 U.S.C. §§ 2511(2)(a)(ii)(B), 2703(e); 50 U.S.C. §§ 1805(h), 1881a(h)(3). Section 802 is merely the most recent addition to such provisions, and it both creates a new statutory protection in additional circumstances for the unique post-9/11 period, and establishes procedures for implementing existing immunity provisions where disclosure of whether or not a particular entity may have assisted in alleged activities would in and of itself reveal national security information. See 50 U.S.C. § 1885a ("Procedures for implementing statutory defenses").

For example, Title III of the Omnibus Crime Control and Safe Streets Act of 1968 provides that electronic communication service providers and others may provide assistance to persons authorized to intercept communications, either under the terms of a court order, or pursuant to a certification in writing by the Attorney General or other designated official that no warrant or court order is required by law,

that all statutory requirements have been met, and that the specified assistance is required. 18 U.S.C. § 2511(2)(a)(ii)(B). The provision adds that "No cause of action shall lie in any court against any provider of wire or electronic communication service, its officers, employees, or agents, landlord, custodian, or other specified person for providing information, facilities, or assistance in accordance with the terms of a court order, statutory authorization, or certification under this chapter." *Ibid*.

Similarly, the Stored Communications Act of 1986 provides among other things that the FBI Director may obtain certain information from communication service providers where such information is relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, 18 U.S.C. § 2709(b), and that "No cause of action shall lie in any court against any provider of wire or electronic communication service, its officers, employees, agents, or other specified persons for providing information, facilities, or assistance in accordance with the terms of a court order, warrant, subpoena, statutory authorization, or certification under this chapter." 18 U.S.C. § 2703(e). See also 18 U.S.C. §§ 2520(d), 2707(e).

Likewise, the FISA provides in several places that the FISA Court, and the Attorney General or the Director of National Intelligence, may in specified circumstances direct the furnishing of assistance for electronic surveillance purposes,

see, *e.g.*, 50 U.S.C. §§ 1802(a)(4), 1803(a), 1881a(h)(1), and then states that "No cause of action shall lie in any court against any provider of a wire or electronic communication service, landlord, custodian, or other person (including any officer, employee, agent, or other specified person thereof) that furnishes any information, facilities, or technical assistance in accordance with a court order or request for emergency assistance under this chapter," 50 U.S.C. § 1805(h), and "No cause of action shall lie in any court against any electronic communication service provider for providing any information, facilities, or assistance in accordance with a directive issued pursuant to [this statute]." 50 U.S.C. § 1881a(h)(3).

Congress also recognized, with respect to the consolidated multi-district litigation here, that the United States has formally asserted the state secrets privilege, and that the privilege assertion, if ultimately successful, would itself necessitate dismissal of the pending cases. See S. Rep. 110-209 at 7 [ER 389]. In Section 802, Congress expressly left intact the state secrets privilege and applicable statutory defenses and immunities, directing that "[n]othing in this section shall be construed to limit any otherwise available immunity, privilege, or defense under any other provision of law." 50 U.S.C. § 1885a(h). All of these legislative provisions form part of the backdrop against which Section 802 must be considered, and, as Congress explained, Section 802 provides, in part, a mechanism for invoking existing

provisions without improperly divulging underlying national security information. See 50 U.S.C. §§ 1885a(a)(1)-(3); S. Rep. 110-209 at 11-12 [ER 393-94].

III. THE STATUTE FULLY COMPORTS WITH DUE PROCESS.

A. The Attorney General Was Not "Biased" And The Substantial Evidence Standard Is Not "Meaningless."

Under a due process banner, plaintiffs assail the statute on the ground that Attorney General Mukasey was "biased" because, in public statements made in connection with the Act's passage, he suggested that he was in favor of legislation providing immunity for private parties who may have furnished assistance to the government's intelligence community. See Appellants' Br. 40. This bias charge is wrong, and has no legal significance in any event in light of the statutory scheme put in place by Congress.

At the outset, plaintiffs are mistaken to the extent they suggest that they have cognizable property rights in pending litigation. "[A] party's property right in any cause of action does not vest until a final unreviewable judgment is obtained." *Fields v. Legacy Health System*, 413 F.3d 943, 956 (9th Cir. 2005). See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982); see also, *e.g.*, *Lyon v. Agusta,* 252 F.3d 1078, 1086 (9th Cir. 2001) ("We have squarely held that although a cause of action is a 'species of property, a party's property right in any cause of action does

not vest until a final unreviewable judgment is obtained.'"); *Grimesy v. Huff*, 876 F.2d 738, 743-44 (9th Cir. 1989) (same).

In any event, in suggesting that the Attorney General must be deemed presumptively biased (Appellants' Br. 40), plaintiffs get matters exactly backwards. As the Supreme Court has explained, a "presumption of regularity" attaches to the acts of public officers, *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926), and government officials acting in the performance of their official functions generally enjoy a "presumption of honesty and integrity." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

Nor are plaintiffs' assertions of actual bias any more coherent. Congress made a legislative policy judgment, reflected in the terms of the statute it enacted, that, in specified circumstances, civil actions against persons who may have assisted the government's intelligence community should be dismissed. See 50 U.S.C. § 1885a; S. Rep. 110-209 [ER 383]. Upon enactment, that statute became the law of the land. As the district court recognized, the Attorney General's agreement or disagreement with Congress's underlying policy determination is legally irrelevant and reflects no improper "bias" of any kind. See 633 F. Supp. 2d at 971 [ER 34-35]; see also *Hortonville Joint School District v. Hortonville Educ. Ass'n*, 426 U.S. 482, 493 (1976) (an official will not be "disqualified simply because he has taken a position,

even in public, on a policy issue related to the dispute, in the absence of a showing that he is not 'capable of judging a particular controversy fairly on the basis of its own circumstances'") (quoting *United States v. Morgan*, 313 U.S. 409, 421 (1941)).

Plaintiffs also (again) misapprehend the Attorney General's role under the governing statute. As noted, the Attorney General has no authority to dismiss any cases. Instead, the Attorney General's role is limited to making a factual determination whether a particular defendant meets one or more of the criteria set forth by Congress in Section 802, and, if so, to submitting a certification to the court to that effect. See 50 U.S.C. §§ 1885a(a)(1)-(5). Upon the submission of such a certification, the question whether dismissal of a suit is warranted is within the authority and responsibility of the district court, applying the clear terms of the applicable legislation. See 50 U.S.C. §§ 1885a(a),(b). Specifically, the court is charged with deciding if a certification is supported by substantial evidence; if it is, as we have emphasized, it is the legislation that then mandates immunity and dismissal. *Ibid.*; see 633 F. Supp. 2d at 964 [ER 19-20].

Plaintiffs insist that the court's role is illusory, because the statute provides that a certification is subject to judicial review under the substantial evidence standard. See 50 U.S.C. § 1885a(b)(1) ("A certification under subsection (a) shall be given effect unless the court finds that such certification is not supported by substantial

evidence provided to the court pursuant to this section."). According to plaintiffs, the substantial evidence standard is "meaningless," and allows for no effective court review. See Appellants' Br. 54, 56-57.

This argument is puzzling, considering that this standard is well-established in governing judicial review in a variety of contexts. As the district court noted, the substantial evidence formulation has been a staple in our law for almost a century, and has a well-defined meaning. "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); accord, *e.g.*, *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (same); *McCarthy v. Apfel*, 221 F.3d 1119, 1125 (9th Cir. 2000) (same).

Indeed, the substantial evidence rubric is incorporated in the terms of the Administrative Procedure Act, and is routinely employed by the federal courts to review a wide range of administrative agency determinations. See 5 U.S.C. § 706(2)(E) ("The reviewing court shall * * * hold unlawful and set aside agency action, findings, and conclusions found to be * * * unsupported by substantial evidence"); see also, *e.g.*, 8 U.S.C. § 1228(c)(2)(C) (immigration proceedings); 29 U.S.C. § 160(e) (labor relations proceedings); 42 U.S.C. § 405(g) (social security proceedings). Especially against this backdrop, plaintiffs' contention that substantial

evidence review is somehow "meaningless" is plainly wrong. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490 (1951) (judicial review is "not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed on the record as a whole").

Concrete Pipe & Products v. Construction Laborers Pension Trust, 508 U.S. 602 (1993), cited by plaintiffs, in no way resuscitates their argument. See Appellants' Br. 41. At issue there was whether, under statutory provisions that the Supreme Court described as "strange," "incoherent," and "incomprehensib[le]," financially interested pension plan trustees could properly make a determination in the first instance regarding the payment obligations of a company withdrawing from a pension fund. *Id*. at 622-25. The Court did not require *de novo* review of the trustees' initial determination, concluding simply that the confusing statute was best construed to allow an arbitrator to review any challenged factual findings under a preponderance of the evidence standard. *Id*. at 629-30. That ruling concerning an altogether different statute and issue has no bearing on the present case.

B. Due Process Permits *In Camera, Ex Parte* Consideration Of Classified Information.

Plaintiffs also assert that the statute violates due process because of its provisions protecting against the disclosure of national security information. See

Appellants' Br. 46-47. As noted, "[i]f the Attorney General files a declaration * * * that disclosure of a certification * * * would harm the national security of the United States, the court shall * * * review such certification * * * *in camera* and *ex parte*." 50 U.S.C. § 1885a(c). Similarly, "[t]o the extent that classified information is relevant to the proceeding or would be revealed in the determination of an issue, the court shall review such information *in camera* and *ex parte*, and shall issue any part of the court's written order that would reveal classified information *in camera* and *ex parte* and maintain such part under seal." 50 U.S.C. § 1885a(d).[6]

Congress deemed these provisions vital. The legislative history reveals that Section 802 was enacted in significant part to avoid the need to consider the government's state secrets privilege assertion in the pending cases, but in a manner that would not divulge the identity of any providers who may have assisted the government, or any information concerning alleged intelligence gathering activities. With respect to covered civil actions, the Senate Select Committee on Intelligence expressly noted that the "details" of the underlying intelligence activities "are highly classified," and that, as with other intelligence matters, "the identities of persons or

[6] The *in camera, ex parte* certification submitted to and reviewed by the district court in this case is available for this Court's review in the form of classified excerpts of record that the United States has lodged with the court security officer in conjunction with this appeal.

entities who provide assistance to the U.S. Government are protected as vital sources and methods of intelligence." See S. Rep. 110-209 at 9 [ER 391]. The Committee thus reiterated that "[i]t would be inappropriate to disclose the names of the electronic communication service providers from which assistance was sought, the activities in which the Government was engaged or in which providers assisted, or the details regarding any such assistance." *Ibid*.; see also *id*. at 11 ("identities of persons or entities who provide assistance to the intelligence community are properly protected as sources and methods of intelligence") [ER 393]; *id*. at 23 (same) [ER 405].

As the district court explained, it is well-understood in this setting, where national security and classified information are at stake, that Congress may properly provide for *in camera*, *ex parte* review. See 633 F. Supp. 2d at 971-72 [ER 35-37]. For example, in *Holy Land Foundation v. Ashcroft*, 333 F.3d 156 (D.C. Cir. 2003), the court of appeals upheld the constitutionality of the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. § 1701, *et seq.*, which provides that, in specified circumstances presenting a threat to national security, the President may block the assets of particular persons, and "[i]n an judicial review of" such action, "if the determination was based on classified information," "such information may be submitted to the reviewing court *ex parte* and *in camera*." 50 U.S.C. § 1702(c). In rejecting a due process attack on this provision, the D.C. Circuit emphasized that due

process is a flexible concept, see *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972), the IEEPA "expressly authorizes *ex parte* and *in camera* review of classified information," and there was no basis to override Congress's assessment of the procedures warranted under the circumstances. See *Holy Land Foundation*, 333 F.3d at 164.

The Seventh Circuit came to the same conclusion in *Global Relief Foundation v. O'Neill*, 315 F.3d 748 (7th Cir. 2002), holding that "[a]dministration of the IEEPA is not rendered unconstitutional because that statute authorizes the use of classified information that may be considered *ex parte* by the district court." *Id*. at 754. "Agree[ing]" with the D.C. Circuit's analysis, the court observed that "[t]he Constitution would indeed be a suicide pact * * * if the only way to curtail enemies' access to assets [was] to reveal [classified] information." *Ibid*.

Holy Land Foundation and *Global Relief Foundation* in turn relied on earlier D.C. Circuit decisions upholding the constitutionality of a similar provision under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 8 U.S.C. § 1189. See *People's Mojahedin Organization v. Department of State*, 327 F.3d 1238 (D.C. Cir. 2003); *National Council of Resistance v. Department of State*, 251 F.3d 192 (D.C. Cir. 2001).

That statute provides for the Secretary of State's designation of persons as "foreign terrorist organizations," and "expressly states that the Secretary is to consider classified information in making a designation and that classified information is not subject to disclosure under the Act except to a reviewing court *ex parte* and *in camera*." *People's Mojahedin*, 327 F.3d at 1240; see 8 U.S.C. § 1189(a)(3)(B). In rejecting a due process attack on this provision, the D.C. Circuit stressed that its analysis was "informed by the historically recognized proposition that under the separation of powers created by the United States Constitution, the Executive Branch has control and responsibility over access to classified information and has a 'compelling interest' in withholding national security information from unauthorized persons." *People's Mojahedin*, 327 F.3d at 1242 (quoting *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988)); see *National Council of Resistance*, 251 F.3d at 207-09.

These same considerations apply here, as the district court properly concluded. See 633 F. Supp. 2d at 971-72 [ER 36-37]. Like the IEEPA and the AEDPA, Section 802 of the FISA Amendments Act of 2008 expressly provides for *in camera, ex parte* review of classified information, based on a congressional determination that such procedures are called for by national security. See 50 U.S.C. §§ 1885a(c),(d); S. Rep. 110-209 at 9 [ER 391]. In this context, no less than under the IEEPA and the

AEDPA, "no governmental interest is more compelling than the security of the Nation," *Haig v. Agee*, 453 U.S. 280, 307 (1981), and the courts have their own "inherent authority to review classified material *ex parte*, *in camera* as part of [their] judicial review function." *Jifry v. FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004). As in *Global Relief Foundation*, *Holy Land Foundation*, and the cases they rely upon, the government "need not disclose the classified information to be presented *ex parte* and *in camera* to the court under the statute." *National Council of Resistance*, 251 F.3d at 208.

Plaintiffs give short shrift to the above-cited authorities, even though they formed the basis for the district court's analysis. Plaintiffs rely instead on *American-Arab Anti-Discrimination Committee v. Reno*, 70 F.3d 1045 (9th Cir. 1995), but that case is inapposite. See Appellants' Br. 51. In *American-Arab Anti-Discrimination Committee*, this Court held that no applicable statutory or regulatory basis existed for *in camera, ex parte* review of classified information in challenged immigration proceedings. 70 F.3d at 1067-68. This case is plainly different; Section 802 expressly authorizes the Attorney General to submit and the district court to consider classified information on an *in camera, ex parte* basis. 50 U.S.C. §§ 1885a(c),(d).

This Court also concluded in *American-Arab Anti-Discrimination Committee* that the government there had presented no evidence of any threat to national security

that would warrant *in camera, ex parte* treatment of classified information. 70 F.3d at 1069-70. In contrast, the United States in the course of this litigation has presented extensive evidence of the national security interests at stake, and, indeed, has formally invoked the state secrets privilege to protect those interests. The statute's *in camera, ex parte* procedures embody Congress's explicit recognition of the national security concerns implicated, and provide a mechanism for safeguarding classified information as part of the court's determination of whether the requirements of the immunity provision have properly been satisfied. See 50 U.S.C. §§ 1885a(c),(d); S. Rep. 110-209 at 9-10 [ER 391-92].[7]

IV. THE STATUTE LEAVES ENTIRELY UNAFFECTED PLAINTIFFS' CLAIMS FOR RELIEF AGAINST THE GOVERNMENT.

Plaintiffs posit that the statute must be struck down because dismissal of their cases precludes any injunctive relief on their constitutional claims against the telecommunications company defendants. See Appellants' Br. 57-62. The district

[7] The Supreme Court eventually ruled in *American-Arab Anti-Discrimination Committee* that legislation enacted subsequent to this Court's above-cited decision deprived the courts of jurisdiction over the case. See *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 472-92 (1999).

court properly rejected this argument as well. See 633 F. Supp. 2d at 960 [ER 11-12].[8]

As an initial matter, to the extent plaintiffs seek to call into question the TSP – and plaintiffs here do not appear to do so – the TSP no longer exists, and ceased to exist more than three years ago, on January 17, 2007. Thus, there is no basis on which prospective relief would now be available with respect to that program. See *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983); *Gest v. Bradbury*, 443 F.3d 1177, 1181 (9th Cir. 2006); *Scott v. Pasadena Unified School District*, 306 F.3d 646, 658 (9th Cir. 2002).

Indeed, the term "covered civil action" under the statute refers to activity "authorized by the President during the period beginning on September 11, 2001, and ending on January 17, 2007." 50 U.S.C. § 1885a(a)(4). Thus, to the extent any of consolidated cases here might encompass a "covered civil action," it would implicate conduct the Presidential authorization for which lapsed more than three years ago, and which is no longer ongoing. See 633 F. Supp. 2d at 961 ("the immunity for

[8] As the Supreme Court has held, the implied damages remedy against individual federal officers under *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971), which does not extend to the government itself, also does not extend to private corporations operating in conjunction with the government. See *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001); *FDIC v. Meyer*, 510 U.S. 471 (1994).

warrantless electronic surveillance under section 802(a)(4) is not available for actions authorized by the President after January 17, 2007.") [ER 13].

More fundamentally, insofar as alleged ongoing conduct is at issue, Section 802 provides in specified circumstances for the dismissal of civil actions only with respect to private persons who may have assisted the government. 50 U.S.C. § 1885a. In contrast, the statute does not provide for dismissal of any suits against the government itself. See S. Rep. 110-209 at 8 ("Only civil lawsuits against electronic communication service providers alleged to have assisted the Government are covered under the provision. The Committee does not intend for this section to apply to, or in any way affect, pending or future suits against the Government.") [ER 390].

To the extent that plaintiffs wish to continue to pursue their underlying constitutional claims against the government, Section 802 thus does not preclude them from doing so. Plaintiffs' constitutional claims against the telecommunications companies necessarily allege underlying illegality in which the government itself was involved, see, *e.g.*, *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 295 (2001) (discussing "state action" requirement for constitutional violations), and Section 802 does not foreclose plaintiffs from seeking to raise such claims directly against the government.

Indeed, as the district court properly pointed out, "the same plaintiffs who brought the *Hepting v. AT&T* lawsuit * * * are now actively prosecuting those claims in a separate suit filed in September 2008 against government defendants," seeking injunctive, declaratory and monetary relief with respect to the government and government officials named in both their official and personal capacities. See 633 F. Supp. 2d at 960 (citing *Jewel v. NSA*, No. 08-4373 (N.D. Cal.)) [ER 12]. "Plaintiffs' argument that section 802 violates constitutional principles by leaving plaintiffs no recourse for alleged violations of their constitutional rights is therefore without merit." *Ibid*. See *Anniston Manufacturing Co. v. Davis*, 301 U.S. 337, 343 (1937).[9]

[9] Of course, plaintiffs in the cases brought against the government, no less than plaintiffs in any other federal civil suit, have the burden of demonstrating that they have standing to bring their claims. The district court recently ruled that the plaintiffs in the *Jewel* action, as well as the plaintiffs in another, related case against government defendants (*Shubert v. Obama*, No. 07-0693 (N.D. Cal.)), did not meet that burden, and that their claims were therefore subject to dismissal on standing grounds. See *Jewel v. NSA*, No. 08-4373 (N.D. Cal., Jan. 21, 2010). As noted, both of those cases are currently pending on appeal in this Court. See 9th Cir. Nos. 10-15616, 10-15638.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

BETH S. BRINKMANN
Acting Assistant Attorney General

DOUGLAS N. LETTER
(202)514-3602
THOMAS M. BONDY
(202)514-4825
Attorneys, Appellate Staff
Civil Division, Room 7535
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

/s/ Thomas M. Bondy

MAY 2010

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is in compliance with Rule 32(a)(7) of the Federal Rules of Appellate Procedure. The brief contains 12,026 words, and was prepared in 14-point Times New Roman font using Corel WordPerfect 12.0.

/s/ Thomas M. Bondy
THOMAS M. BONDY
Attorney for the United States
(202)514-4825

CERTIFICATE OF RELATED CASES

Counsel for the United States are aware of the following related cases within the meaning of this Court's Rules: *McMurray v. Verizon Communications, Inc., et al.*, 9th Cir. No. 09-17133; *Jewel v. NSA*, 9th Cir. No. 10-15616; *Shubert v. Obama*, 9th Cir. No. 10-15638.

/s/ Thomas M. Bondy

THOMAS M. BONDY
Attorney for the United States
(202)514-4825

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 19, 2010.

Participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Thomas M. Bondy
THOMAS M. BONDY
Attorney for the United States
(202)514-4825

A D D E N D U M

1. 50 U.S.C. § 1885

2. 50 U.S.C. § 1885a

C

Effective: July 10, 2008

United States Code Annotated Currentness
Title 50. War and National Defense (Refs & Annos)
Chapter 36. Foreign Intelligence Surveillance (Refs & Annos)
Subchapter VII. Protection of Persons Assisting the Government
§ 1885. Definitions

In this subchapter:

(1) Assistance

The term "assistance" means the provision of, or the provision of access to, information (including communication contents, communications records, or other information relating to a customer or communication), facilities, or another form of assistance.

(2) Civil action

The term "civil action" includes a covered civil action.

(3) Congressional intelligence committees

The term "congressional intelligence committees" means--

(A) the Select Committee on Intelligence of the Senate; and

(B) the Permanent Select Committee on Intelligence of the House of Representatives.

(4) Contents

The term "contents" has the meaning given that term in section 1801(n) of this title.

(5) Covered civil action

The term "covered civil action" means a civil action filed in a Federal or State court that--

(A) alleges that an electronic communication service provider furnished assistance to an element of the intelligence community; and

(B) seeks monetary or other relief from the electronic communication service provider related to the provision of such assistance.

(6) Electronic communication service provider

The term "electronic communication service provider" means--

(A) a telecommunications carrier, as that term is defined in section 153 of Title 47;

(B) a provider of electronic communication service, as that term is defined in section 2510 of Title 18;

(C) a provider of a remote computing service, as that term is defined in section 2711 of Title 18;

(D) any other communication service provider who has access to wire or electronic communications either as such communications are transmitted or as such communications are stored;

(E) a parent, subsidiary, affiliate, successor, or assignee of an entity described in subparagraph (A), (B), (C), or (D); or

(F) an officer, employee, or agent of an entity described in subparagraph (A), (B), (C), (D), or (E).

(7) Intelligence community

The term "intelligence community" has the meaning given the term in section 401a(4) of this title.

(8) Person

The term "person" means--

(A) an electronic communication service provider; or

(B) a landlord, custodian, or other person who may be authorized or required to furnish assistance pursuant to--

(i) an order of the court established under section 1803(a) of this title directing such assistance;

(ii) a certification in writing under section 2511(2)(a)(ii)(B) or 2709(b) of Title 18; or

(iii) a directive under section 1802(a)(4), 1805b(e), or 1881a(h) of this title.

(9) State

The term "State" means any State, political subdivision of a State, the Commonwealth of Puerto Rico, the District of Columbia, and any territory or possession of the United States, and includes any officer, public utility commission, or other body authorized to regulate an electronic communication service provider.

C

Effective: July 10, 2008

United States Code Annotated Currentness
Title 50. War and National Defense (Refs & Annos)
Chapter 36. Foreign Intelligence Surveillance (Refs & Annos)
Subchapter VII. Protection of Persons Assisting the Government
§ 1885a. Procedures for implementing statutory defenses

(a) Requirement for certification

Notwithstanding any other provision of law, a civil action may not lie or be maintained in a Federal or State court against any person for providing assistance to an element of the intelligence community, and shall be promptly dismissed, if the Attorney General certifies to the district court of the United States in which such action is pending that--

(1) any assistance by that person was provided pursuant to an order of the court established under section 1803(a) of this title directing such assistance;

(2) any assistance by that person was provided pursuant to a certification in writing under section 2511(2)(a)(ii)(B) or 2709(b) of Title 18;

(3) any assistance by that person was provided pursuant to a directive under section 1802(a)(4), 1805b(e), or 1881a(h) of this title directing such assistance;

(4) in the case of a covered civil action, the assistance alleged to have been provided by the electronic communication service provider was--

(A) in connection with an intelligence activity involving communications that was--

(i) authorized by the President during the period beginning on September 11, 2001, and ending on January 17, 2007; and

(ii) designed to detect or prevent a terrorist attack, or activities in preparation for a terrorist attack, against the United States; and

(B) the subject of a written request or directive, or a series of written requests or directives, from the Attorney General or the head of an element of the intelligence community (or the deputy of such person) to the electronic communication service provider indicating that the activity was--

(i) authorized by the President; and

(ii) determined to be lawful; or

(5) the person did not provide the alleged assistance.

(b) Judicial review

(1) Review of certifications

A certification under subsection (a) shall be given effect unless the court finds that such certification is not supported by substantial evidence provided to the court pursuant to this section.

(2) Supplemental materials

In its review of a certification under subsection (a), the court may examine the court order, certification, written request, or directive described in subsection (a) and any relevant court order, certification, written request, or directive submitted pursuant to subsection (d).

(c) Limitations on disclosure

If the Attorney General files a declaration under section 1746 of Title 28, that disclosure of a certification made pursuant to subsection (a) or the supplemental materials provided pursuant to subsection (b) or (d) would harm the national security of the United States, the court shall--

(1) review such certification and the supplemental materials in camera and ex parte; and

(2) limit any public disclosure concerning such certification and the supplemental materials, including any public order following such in camera and ex parte review, to a statement as to whether the case is dismissed and a description of the legal standards that govern the order, without disclosing the paragraph of subsection (a) that is the basis for the certification.

(d) Role of the parties

Any plaintiff or defendant in a civil action may submit any relevant court order, certification, written request, or directive to the district court referred to in subsection (a) for review and shall be permitted to participate in the briefing or argument of any legal issue in a judicial proceeding conducted pursuant to this section, but only to the extent that such participation does not require the disclosure of classified information to such party. To the extent that classified information is relevant to the proceeding or would be revealed in the determination of an issue, the court shall review such information in camera and ex parte, and shall issue any part of the court's written order that would reveal classified information in camera and ex parte and maintain such part under seal.

(e) Nondelegation

The authority and duties of the Attorney General under this section shall be performed by the Attorney General (or Acting Attorney General) or the Deputy Attorney General.

(f) Appeal

The courts of appeals shall have jurisdiction of appeals from interlocutory orders of the district courts of the United States granting or denying a motion to dismiss or for summary judgment under this section.

(g) Removal

A civil action against a person for providing assistance to an element of the intelligence community that is brought in a State court shall be deemed to arise under the Constitution and laws of the United States and shall be removable under section 1441 of Title 28.

(h) Relationship to other laws

Nothing in this section shall be construed to limit any otherwise available immunity, privilege, or defense under any other provision of law.

(i) Applicability

This section shall apply to a civil action pending on or filed after July 10, 2008.