CASE NO. 10-15616

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CAROLYN JEWEL; TASH HEPTING, GREGORY HICKS, ERIK KNUTZEN AND JOICE WALTON, on behalf of themselves and all others similarly situated

Plaintiffs and Appellants,

v.

NATIONAL SECURITY AGENCY, et al.,

Defendant and Appellees.

On Appeal from the United States District Court
for the Northern District of California
Case No. 3:08-CV-04373-VRW
The Honorable Vaughn R. Walker, Chief United States District Judge

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Defendants have illegally seized Plaintiffs' individual telephone and Internet communications and communications records. In spite of Plaintiffs' own concrete and personalized injuries, the District Court held that Plaintiffs lacked standing to pursue their statutory and constitutional claims because, in the District Court's view, they alleged only a "generalized grievance." Thus, the District Court dismissed Plaintiffs' complaint without affording Plaintiffs either an opportunity to brief the issue or any opportunity to amend. The District Court's ruling was incorrect.

Plaintiffs Carolyn Jewel, Tash Hepting, Gregory Hicks, Erik Knutzen and Joice Walton are current or former subscribers to AT&T's Internet or long-distance telephone service. They filed this action because Defendants—the United States, the National Security Agency, the Department of Justice, and various executive branch officials—have been intercepting Plaintiffs' private Internet and telephone communications over AT&T's network, and obtaining records about their communications over AT&T's network, as part of a program of mass surveillance that violates multiple federal statutes and the Constitution.

Plaintiffs' complaint spells out in detail the personal and concrete injuries they have suffered and continue to suffer. These injuries more than satisfy the Supreme Court's requirements for demonstrating standing to sue. The fact that millions of other Americans have also suffered similarly concrete harms—the reason the District Court gave for its notion of a "generalized grievance"—is irrelevant to Plaintiffs' standing to bring this action. The Supreme Court has made

clear that the fact that a harm is widely shared does not undercut a plaintiff's claim to standing: "Once it is determined that a particular plaintiff is harmed by the defendant, and that the harm will likely be redressed by a favorable decision, that plaintiff has standing—regardless of whether there are others who would also have standing to sue." *Clinton v. City of New York*, 524 U.S. 417, 435-36 (1998). To hold otherwise "would mean that the most injurious and widespread Government actions could be questioned by nobody." *Massachusetts v. EPA*, 549 U.S. 497, 526 n.24 (2007) (quoting *United States v. Students Challenging Regulatory Agency Procedures* (*SCRAP*), 412 U.S. 669, 687-88 (1973)) (italics omitted).

Moreover, by alleging that Defendants obtained their personal communications and communications records in violation of specific statutes and their constitutional rights, Plaintiffs have alleged exactly the kind of "invasion of a legally protected interest" which gives them a personal right to file suit. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Congress has expressly created causes of action for the types of harms that Plaintiffs allege here. Plaintiffs assert their rights under three longstanding, interrelated statutes—the Electronic Communications Privacy Act, the Foreign Intelligence Surveillance Act, and the Stored Communications Act—that restrict the government's electronic surveillance of private communications and acquisition of communications records from telecommunications providers such as AT&T. Where Congress has expressly created causes of action, the courts cannot abdicate their duty to decide those statutory claims, as the District Court suggested, and instead leave them to the political branches based on either the political question doctrine or any other

prudential standing barrier. Nor can courts abandon their duty to adjudicate constitutional claims.

Unless corrected, the District Court's ruling risks creating a perverse incentive for the government to violate the privacy rights of as many citizens as possible in order to avoid judicial review of its actions. Neither the Constitution nor the settled statutory structure protecting the privacy of Americans' communications allows such a result. The District Court's dismissal of Plaintiffs' claims must be reversed.

II. QUESTIONS PRESENTED

1. Plaintiffs allege that Defendants seized their personal Internet and telephone communications and communications records in violation of numerous statutory and constitutional prohibitions. Have Plaintiffs suffered a concrete and personal injury giving them standing to pursue express statutory and constitutional remedies against Defendants, even though others have suffered similar injuries?

2. Did the District Court err in denying Plaintiffs leave to amend their complaint when it dismissed Plaintiffs' complaint with prejudice on a ground that the parties and the court had never raised or addressed in either briefing or oral argument?

III. JURISDICTIONAL STATEMENT

The District Court had jurisdiction over these actions under 28 U.S.C. § 1331. This is an appeal from a final judgment entered on January 25, 2010 and is appealable under 28 U.S.C. § 1291. *See* Appellants' Excerpts of Record ("ER") 25 (Judgment). Plaintiffs' March 19, 2010 notice of appeal was timely. Fed. R. App.

P. 4(a)(1)(B); ER 76 (Notice of Appeal).

IV. STATEMENT OF FACTS

Plaintiffs, five ordinary Americans living in California, are all current or former subscribers or users of either AT&T's residential long-distance telephone service or its Internet services. ER 24-25 (Complaint ¶¶ 12, 20-24).

For years, Plaintiffs have been subjected to Defendants' ongoing illegal surveillance of their private communications over the AT&T network, and Defendants' acquisition of communications records pertaining to their use of AT&T's services. ER 24 (Complaint ¶ 13). Defendants' unlawful conduct is part of a program of mass or "dragnet" surveillance conducted by the National Security Agency and other Defendants (the "Program"), which was first authorized by the President in October 2001, and continues to this day.[1] ER 22-24, 27-28, 32, 34-35 (Complaint ¶¶ 2-3, 7-13, 39-40, 76, 92). The Program was designed, created, approved, and/or managed by the individual Defendants. ER 25-71 (Complaint ¶¶ 26-27, 29-31, 33-49, 73-84, 90-97, 110, 112, 120, 122, 129, 138, 148, 150-51, 154, 161, 163-64, 173-77, 181, 189-93, 203-07, 214, 218, 223, 237, 241, 246, 253).

[1] The surveillance conducted under the Program is much broader and much more invasive than what the government has called the "Terrorist Surveillance Program." As the Inspectors' General "Unclassified Report On The President's Surveillance Program" and many other sources make clear, the term "Terrorist Surveillance Program" was an after-the-fact label created by the Executive in January 2006 for only a portion of the unlawful surveillance activities the Executive was conducting, and the Program's scope is broader than simply monitoring terrorists. *See* IG Report at 1-2, 5-6, 36-37, *available at* <www.dni.gov/reports/report_071309.pdf>; Docket No. 30 at Ex. A pp. 50-53; *see also* FISA Amendments Act, Title III, Section 301(a)(3) (defining the President's Surveillance Program as a superset that included what is "commonly known as the Terrorist Surveillance Program.")

Although the Program involves the cooperation of a number of telecommunications companies, Plaintiffs' complaint focuses on their own telecommunications service provider, AT&T. ER 23 (Complaint ¶¶ 8, 10). Plaintiffs allege, first, that the NSA intercepted Plaintiffs' telephone and Internet communications transmitted through AT&T facilities, and second, that the NSA collected Plaintiffs' communications records from AT&T's databases. *See generally* ER 29-35 (Complaint ¶¶ 50-81 (describing interception), 82-97 (describing collection of records)).

The NSA's program of mass interception has involved the installation and operation of sophisticated communications surveillance devices at key AT&T communications facilities across the country. ER 23-24, 31-32 (Complaint ¶¶ 8-9, 13, 67-75). For example, in San Francisco around January 2003, the NSA worked with AT&T to establish a surveillance operation at AT&T's Folsom Street Facility, inside a secret room known as the "SG3 Secure Room" and accessible only to NSA-approved AT&T employees. ER 30 (Complaint ¶¶ 60-62). By early 2003, under the NSA's direction and supervision, AT&T had connected a "splitter cabinet" to the fiber-optic cables that transmit Internet communications through the Folsom Street Facility, so that copies of all communications transmitted over those cables were diverted to the SG3 Secure Room. ER 11 (Complaint ¶ 64). The SG3 Secure Room contained sophisticated computer equipment for analyzing the contents of communications, including such specific pieces of equipment as the Narus Semantic Traffic Analyzer. ER 31 (Complaint ¶¶ 63). Similar surveillance operations have been installed at AT&T facilities in locations such as Atlanta, GA,

Bridgeton, MO, Los Angeles, CA, San Diego, CA, San Jose, CA, and/or Seattle, WA. ER 31 (Complaint ¶¶ 64, 67-70).

All of these surveillance facilities are connected by a private high-speed network, through which NSA analysts communicate instructions to the equipment in the SG3 Secure Rooms and that equipment transmits captured communications to NSA personnel. ER 31 (Complaint ¶¶ 65-67, 69). This nationwide network intercepts over half of the purely domestic Internet traffic carried by AT&T in the United States, including Plaintiffs' communications. ER 31-32 (Complaint ¶¶ 70-73). Defendants use a similar nationwide network of surveillance devices, attached to AT&T's long-distance telephone switching facilities, to intercept all or most long-distance domestic and international phone calls to or from AT&T long-distance subscribers in the United States, including Plaintiffs. ER 32 (Complaint ¶¶ 74-75).

In addition, as part of the Program, the NSA continuously solicits and obtains disclosure of all information in AT&T's major databases of telephone and Internet records pertaining to AT&T subscribers, including Plaintiffs. Specifically, since October 2001, Defendants have solicited and obtained the disclosure of information from at least two databases managed by AT&T's "Daytona" database management technology. First, Defendants have obtained information from AT&T's "Hawkeye" database, which contains call detail records for nearly every telephone communication carried over AT&T's domestic network since approximately 2001, including Plaintiffs' own telephone calls. ER 34 (Complaint ¶¶ 85-86). Second, Defendants have obtained information from AT&T's "Aurora"

database, which has been used since approximately 2003 to store huge amounts of Internet traffic data related to the security of AT&T's network, including records pertaining to Internet communications of Plaintiffs. ER 33-44 (Complaint ¶¶ 82-91).

Both aspects of the Program as applied to AT&T—the NSA's mass interception of Internet and telephone communications on AT&T's network, and its mass collection of Internet and telephone records from AT&T's databases—have been and are directly performed and/or aided, abetted, counseled, commanded, induced, or procured by Defendants including the NSA (ER 33-35 (Complaint ¶¶ 80-81, 96-97)), and have been and are conducted without judicial, statutory, or other lawful authorization. ER 32, 34-35 (Complaint ¶¶ 76, 92).

V. STATEMENT OF THE CASE

Plaintiffs' complaint alleged the facts recounted above, and named three categories of Defendants: federal government agencies (the United States of America, the National Security Agency, and the Department of Justice), government officials sued in their official capacities, and government officials sued in their personal capacities. ER 25-27 (Complaint ¶¶ 25-38).[2]

Plaintiffs stated seventeen claims in their complaint, alleging that Defendants' surveillance and seizure of their personal communications and communications records violated the following constitutional and statutory

[2] Government officials who have since left office remain defendants only if they were sued in their personal capacities; for those officials sued in their official capacities, the new holders of their offices have been automatically substituted in as defendants pursuant to Fed. R. Civ. P. 25(d). *See* ER 11 (Order at 11).

provisions:

- The Fourth Amendment (Counts I-II);
- The First Amendment (Counts III-IV);
- The Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. §§ 1801 *et seq*. (Counts V-VI);
- Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Electronic Communications Privacy Act of 1986 ("ECPA"), 18 U.S.C. §§ 2510 *et seq*. (Counts VII-IX);
- The Stored Communications Act portion of the ECPA ("SCA"), 18 U.S.C. §§ 2701 *et seq*. (Counts X-XV);
- The Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq.*; and
- The Separation of Powers provisions of the Constitution (Count XVII).

ER 38-74 (Complaint ¶¶ 108-265).

To redress these constitutional and statutory violations, Plaintiffs seek damages for themselves and equitable relief both for themselves and a proposed class of other similarly situated AT&T customers. Specifically, Plaintiffs seek equitable relief in the form of a declaration that the Program was and is unlawful and unconstitutional, an injunction halting surveillance of Plaintiffs and class members under the Program, an order requiring Defendants to provide an inventory of Plaintiffs' and class members' communications and records that were

seized in violation of the Fourth Amendment, and an order requiring that Defendants destroy all copies of such communications and records. ER 74 (Prayer for Relief).

The government responded to the complaint by moving to dismiss the complaint, or in the alternative for summary judgment. Docket No. 18. The government asserted that Plaintiffs' statutory claims against the government agency Defendants should be dismissed on the ground of sovereign immunity, and that all of Plaintiffs' other claims should be dismissed as to all Defendants based on the state secrets privilege. Docket No. 18 at 2. Although the government questioned Plaintiffs' ability to prove their claims in light of the state secrets privilege, the government did not dispute that Plaintiffs had adequately alleged standing.

Plaintiffs filed an opposition addressing the government's sovereign immunity and state secrets arguments (Docket Nos. 29 & 30), the government replied (Docket No. 31), and the District Court heard oral argument (Docket No. 36 (minute entry reflecting argument); Docket No. 37 (transcript of argument)). Both Plaintiffs and the government submitted supplemental briefing after the hearing (Docket Nos. 40 & 46), on issues related to the government's assertion of the state secrets privilege.

The District Court thereafter dismissed the action with prejudice—but not on any of the grounds raised by the government and argued between the parties. Rather, without ruling on the grounds raised by the United States, and without benefit of any briefing on the issue, the District Court dismissed the complaint and

the action as to all Defendants on the ground that Plaintiffs lacked standing. The District Court held that Plaintiffs had not alleged any injury-in-fact, but instead had alleged only a generalized grievance insufficient to establish standing. ER at 2-3, 19 (Order at 2-3, 19).[3] The district court further denied Plaintiffs leave to amend their complaint. ER at 19 (Order at 19).[4]

VI. STANDARD OF REVIEW

"Standing is a question of law reviewed de novo. [¶] Because the district court sua sponte dismissed [plaintiffs'] complaint on its face, we will review [their] standing as if raised in a motion to dismiss. When reviewing motions to dismiss, we must accept all factual allegations of the complaint as true and draw all reasonable inferences in favor of the nonmoving party . . . . We consider only the facts alleged in the complaint and in any documents appended thereto. A plaintiff needs only to plead general factual allegations of injury in order to survive a motion to dismiss, for we presume that general allegations embrace those specific facts that are necessary to support the claim." *Bernhardt v. County of L.A.*, 279 F.3d 862, 867 (9th Cir. 2002) (internal quotation marks, citations, brackets, and ellipses omitted).

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[3] The District Court also held that its dismissal of the action for lack of standing rendered moot Plaintiffs' substitution of two former government officials in place of Doe Defendants 1 and 2. *See* Docket No. 56; ER at 19 (Order at 19).

[4] The Court's Order dismissed both this case (*Jewel*, Ninth Cir. No. 10-15616) and *Shubert, et al. v. Obama, et al.* (Ninth Cir. No. 10-15638), although the District Court had not consolidated or related the two cases. (*Shubert* was part of an MDL proceeding pending before the District Court (MDL No. 06-1791-VRW); *Jewel* was not part of the MDL proceeding). Although this Court has consolidated the *Jewel* and *Shubert* appeals for calendaring purposes only, this brief pertains only to the *Jewel* appeal; the *Shubert* plaintiffs-appellants are filing a separate brief.

The District Court's decision denying leave to amend is reviewed to determine if it is clear, after *de novo* review, that the complaint could not be saved by any amendment. *See Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

VII. ARGUMENT

The District Court erred in dismissing Plaintiffs' claims for lack of standing. Plaintiffs satisfy each of the three required elements for Article III standing, and no prudential barriers to standing exist.

Plaintiffs have alleged concrete and particularized injuries-in-fact, arising out of Defendants' unlawful surveillance and seizure of Plaintiffs' personal telephone and Internet communications and related records. Under well-established principles of standing law, these concrete and individualized injuries are injuries-in-fact sufficient to support standing—not a mere generalized grievance, as the District Court erroneously found.

In addition, longstanding statutory and constitutional authority—which the District Court entirely failed to consider—further confirms Plaintiffs' standing to raise each of the specific claims they assert, under both the governing surveillance statutes (ECPA, FISA, and the SCA) and the relevant constitutional provisions (the Fourth Amendment, the First Amendment, and Separation of Powers). The District Court's contrary ruling lacks merit, and none of the rationales the court suggested support its decision.

Finally, the District Court erred by dismissing Plaintiffs' claims on a ground that it raised *sua sponte*, without providing Plaintiffs any opportunity to brief

standing-related issues, and without granting leave to amend.

A. Plaintiffs have standing to pursue their claims.

In order to establish standing under Article III of the Constitution, a plaintiff must allege the following three familiar elements:

1) A plaintiff must allege an "injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical" (a "particularized" injury is one that "affect[s] the plaintiff in a personal and individual way");

2) "[T]here must be a causal connection between the injury and the conduct" of which the plaintiff has complained; and

3) It must be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 & n.1 (1992) (internal citations and quotation marks omitted).

By meeting this three-part test, a plaintiff "allege[s] such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Flast v. Cohen*, 392 U.S. 83, 99 (1968) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). In particular, the "injury in fact" requirement "helps assure that courts will not 'pass upon…abstract, intellectual problems,' but adjudicate 'concrete, living contest[s] between adversaries.'" *Federal Election Comm'n v. Akins*, 524 U.S. 11, 20 (1998) ("*Akins*") (quoting *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J.,

dissenting)).

Here, only the first element of standing—the question of whether Plaintiffs have adequately alleged injury-in-fact—is at issue. There is no dispute that Plaintiffs, as the victims of statutory and constitutional violations committed by Defendants, have adequately alleged the second and third elements of standing, causation and redressability. *See Lujan*, 504 U.S. at 561-62. As the Supreme Court explained in *Lujan*, "[w]hen the suit is one challenging the legality of government action . . . [, if] the plaintiff is himself an object of the action . . . at issue . . . , there is ordinarily little question that the action . . . has caused him injury, and that a judgment preventing or requiring the action will redress it." *Id.*

As explained in detail below, Plaintiffs have adequately alleged injury-in-fact because the facts alleged in the Complaint show that Defendants unlawfully obtained Plaintiffs' personal communications, together with AT&T's records about those personal communications. That gives Plaintiffs a personal stake in the dispute and ensures that they will vigorously seek to remedy the personal harm inflicted upon them. Moreover, Congress has created express statutory causes of action to remedy Plaintiffs' injuries. Because Plaintiffs have alleged distinct personal injuries, and because Congress has directed that persons in Plaintiffs' position shall have a statutory remedy, the Judiciary must adjudicate the case.

1. Plaintiffs have suffered concrete and particularized injuries-in-fact, and do not present a "generalized grievance."

a. Plaintiffs have alleged injuries-in-fact.

Plaintiffs satisfy Article III's requirement of injury-in-fact for both their statutory and their constitutional claims. Plaintiffs have a personal and

individualized stake in adjudicating the legality of the surveillance for which Defendants are responsible, because that surveillance has captured Plaintiffs' own communications transmitted over AT&T's network—their phone calls, emails, instant messages, web browsing activity and more—and has obtained detailed communications records about Plaintiffs from AT&T, whose communications services they all subscribe to or have subscribed to. This is no "abstract, intellectual problem" but a "concrete, living contest between adversaries" whereby Plaintiffs are attempting to vindicate their rights and to protect the privacy of their own communications against government acquisition. *Akins*, 524 U.S. at 20 (internal quotation marks omitted). Because of Defendants' direct invasion of Plaintiffs' privacy, in violation of statutes and the Constitution, Plaintiffs have suffered concrete and particular injuries entitling them to bring this case and challenge the lawfulness of the surveillance that has injured them.

In particular, Plaintiffs allege the following in their Complaint:

- Plaintiffs "are current and former subscribers to AT&T's telephone and/or Internet services." ER 24-25 (Complaint ¶¶ 12, 20-24).
- Defendants have intercepted "phone calls, emails, instant messages, text messages, web communications and other communications, both international and domestic, of . . . Plaintiffs" (ER 23(Complaint ¶ 9)) using a "nationwide network of sophisticated communications surveillance devices, attached to the key facilities of telecommunications companies such as AT&T that carry Americans'

Internet and telephone communications." (ER 23 (Complaint ¶ 8)).

- Defendants have also "unlawfully solicited and obtained . . . the complete and ongoing disclosure of the private telephone and Internet transactional records of . . . Plaintiffs." (ER 23 (Complaint ¶10)).
- "Communications of Plaintiffs . . . have been and continue to be illegally acquired by Defendants using surveillance devices attached to AT&T's network, and Defendants have illegally solicited and obtained from AT&T the continuing disclosure of private communications records pertaining to Plaintiffs . . . . Plaintiffs' communications or activities have been and continue to be subject to electronic surveillance." (ER 24 (Complaint ¶ 13)).
- "Through this network of Surveillance Configurations and/or by other means, Defendants have acquired and continue to acquire the contents of domestic and international wire and/or electronic communications sent and/or received by Plaintiffs . . . ." (ER 32 (Complaint ¶ 73).
- "The contents of communications to which Plaintiffs . . . were a party, and dialing, routing, addressing, and/or signaling information pertaining to those communications, were and are acquired by Defendants in cooperation with AT&T by using the nationwide network of Surveillance Configurations, and/or by other means." (ER 32 (Complaint ¶ 75)).

- "Defendants have solicited and obtained from AT&T records concerning communications to which Plaintiffs . . . were a party, and continue to do so." (ER 33 (Complaint ¶ 83)).

See also ER 23, 32-35, 38-39 (Complaint ¶¶ 7, 73, 76-81, 83, 89-97, 110) (*e.g.*, "Defendants have directly performed, or aided, abetted, counseled, commanded, induced, procured, encouraged, promoted, instigated, advised, willfully caused, participated in, enabled, contributed to, facilitated, directed, controlled, assisted in, or conspired in the commission of the above-described acts of acquisition, interception, disclosure, divulgence and/or use of Plaintiffs' . . . communications, contents of communications, and records pertaining to their communications transmitted, collected, and/or stored by AT&T"); ER 39-42, 44, 46-47, 49-50, 52-53, 55-56, 58-61, 63, 65, 67, 69-73 (Complaint ¶¶111, 120-21, 129-30, 138, 148-53, 161-64, 173-78, 189-94, 203-08, 214-15, 223-24, 230-31, 237-38, 246-47, 253-54, 260, 264).

These allegations are more than sufficient to set forth concrete, particularized, and personal injuries that Plaintiffs have suffered. Plaintiffs therefore satisfy the requirement that they allege an "injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan,* 504 U.S. at 560 (internal citations and quotations omitted).

b. Plaintiffs have not alleged a "generalized grievance."

Despite the concrete and individualized injuries-in-fact set forth in the Complaint, the District Court incorrectly concluded that Plaintiffs alleged only the

kind of generalized grievance that a federal court has no power to redress. ER 15-17 (Order at 15-17). It justified this conclusion on the sole ground that many other Americans have suffered similar injuries from the Program. *Id.* Yet the Supreme Court and this Circuit have repeatedly emphasized that it is the absence of any concrete, individualized harm that causes the plaintiff in a generalized grievance case to lack standing, not the mere fact that many others have suffered similar injuries to their own interests.

The District Court's contrary analysis began with the unfounded assertion that Plaintiffs allege only "interference with their telephone and/or broadband internet subscription and/or use." ER 17 (Order at 17). Plaintiffs, however, are not complaining about dropped calls (though even that could constitute an injury-in-fact). As explained in detail in the preceding section, Plaintiffs' complaint alleges something quite different: that Defendants have intercepted and acquired Plaintiffs' individual communications and communication records. The District Court ignored these allegations.

The District Court erred in basing its standing decision on the number of other people who have suffered injuries similar to Plaintiffs'. "Once it is determined that a particular plaintiff is harmed by the defendant, and that the harm will likely be redressed by a favorable decision, that plaintiff has standing—regardless of whether there are others who would also have standing to sue." *Clinton v. City of New York*, 524 U.S. 417, 435-36 (1998). Indeed, "'it does not matter how many persons have been injured by the challenged action' so long as 'the party bringing suit . . . show[s] that the action injures him in a concrete and

personal way.'" *Massachusetts v. EPA*, 549 U.S. at 517 (quoting *Lujan*, 504 U.S. at 581 (Kennedy, J., concurring in part and concurring in judgment)). As the Supreme Court has explained, this rule is necessary to prevent grave injustice, because otherwise the most widespread and harmful government misconduct would be immune from judicial remedies:

> "[S]tanding is not to be denied simply because many people suffer the same injury . . . . To deny standing to persons who are in fact injured simply because many others are also injured, *would mean that the most injurious and widespread Government actions could be questioned by nobody*. We cannot accept that conclusion."

Massachusetts v. EPA, 549 U.S. at 526 n.24 (emphasis altered) (quoting *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 687-88 (1973)). Thus, the fact that many others have also had their communications and communications records seized by Defendants does nothing to diminish Plaintiffs' standing.[5]

Indeed, the Supreme Court has consistently held that the defining

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[5] Notably, Congress was aware when enacting FISA of the past practice of mass unlawful surveillance by the Executive. FISA was enacted after the revelations of the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, better known as the "Church Committee," which was formed to investigate intelligence-gathering abuses by the Executive. The Church Committee's in-depth investigation revealed that the government had been spying on many American citizens, without warrants or other legal authorization, for decades. Church Committee Reports, Book II: *Intelligence Activities and the Rights of Americans* ("Book II"), S. Rep. No. 94-755 at 12 (1976). Most notably, the Church Committee uncovered a massive communications interception program operated by the NSA, known as SHAMROCK, under which "about 150,000 telegrams per month were reviewed by NSA analysts." Church Committee Reports, Book III: *Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans* ("Book III") at 765 (*available at* http://www.aarclibrary.org/publib/church/reports/book3/pdf/ChurchB3_10_NSA.pdf). The Committee concluded SHAMROCK likely violated the Fourth

characteristic of a non-justiciable generalized grievance is not that it is widely shared but that it is abstract and indefinite. "[A] generally available grievance about government" is one "claiming *only* harm to [the plaintiff's] and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large." *Lujan*, 504 U.S. at 573-74 (emphasis added). Thus, a finding of a generalized grievance "invariably appears in cases where the harm at issue is *not only* widely shared, but is *also* of an abstract and indefinite nature—for example, harm to the 'common concern for obedience to law.'" *Akins*, 524 U.S. at 23 (emphasis added). "Often the fact that an interest is abstract and the fact that it is widely shared go hand in hand. But their association is not invariable, and where a harm is concrete, though widely shared, the Court has found 'injury in fact.'"[6] *Id.* at 24.

Accordingly, this Court has found a generalized grievance only where plaintiffs have "fail[ed] to identify *any* personal injury suffered by them . . . other than the psychological consequence presumably produced by . . . conduct with which one disagrees," *Caldwell v. Caldwell*, 545 F.3d 1126, 1131 (9th Cir. 2008) (emphasis added), or where "the source of [the plaintiffs'] complaint . . . is just

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Amendment as well as the 1934 Communications Act. *Id.* at 755-66.

[6] The sentence from *Seegars v. Ashcroft*, 396 F.3d 1248, 1253 (D.C. Cir. 2005), that the District Court quoted in part as authority for its contrary ruling (ER 38 (Order at 3)) is in fact fully consistent with the rule explained above: "Although injuries that are shared and generalized—such as the right to have the government act in accordance with the law—are not sufficient to support standing, 'where a harm is concrete, though widely shared, the Court has found injury in fact.'" *Seegars*, 396 F.3d at 1253 (citation and emphasis omitted.)

abstract outrage at the enactment of an unconstitutional law." *City of S. Lake Tahoe v. Cal. Tahoe Reg'l Planning Agency*, 625 F.2d 231, 237 (9th Cir. 1980). That is not the case here.

Rather, these long-established standing principles apply here just as they did in this Court's decision in *Chadha v. Immigration & Naturalization Service*, 634 F.2d 408 (9th Cir. 1980), *aff'd sub nom. I.N.S. v. Chadha*, 462 U.S. 919 (1983). In that case, the plaintiff—a native of Kenya whose suspension of deportation had been vetoed by one house of Congress—challenged the statutory provision allowing for one-house disapproval of the suspension of a deportation order, on separation-of-powers grounds. *Id.* at 411. Because Chadha's own deportation was at issue, this Court had little trouble disposing of the argument that Chadha's complaint was only a generalized grievance:

> While it may be true that Chadha asserts a claim common to all citizens interested in separation of powers, it is true only in a trivial sense. He also has the added motive, crucial to a sharp presentation of the issues, of being injured by the operation of the statute he challenges . . . . It is immaterial that his claim of [the statute's] unconstitutionality is shared by many; he presents a specific instance of injury flowing directly from the statute's operation.

Id. at 418 (internal citations and quotations omitted). As in *Chadha*, while Plaintiffs share with all citizens a general interest in ensuring that the government conducts only surveillance that comports with statutory law and the Constitution, they also have "the added motive" of actually having their own communications and communications records seized. *Id.* The "added motive" arising from that injury-in-fact gives Plaintiffs standing.

As in any mass tort case, Plaintiffs and a large number of other individuals

have each suffered a similar but distinct, concrete and particularized injury, *i.e.*, the seizure of each individual's own communications and own communications records. That fact does not diminish any individual plaintiff's ability to seek redress. *See Akins*, 524 U.S. at 24 (explaining that standing "seems particularly obvious where (to use a hypothetical example) large numbers of individuals suffer the same common-law injury (say, a widespread mass tort), or where large numbers of voters suffer interference with voting rights conferred by law"); *Massachusetts v. EPA*, 549 U.S. at 552 (finding that Massachusetts had standing to challenge EPA's refusal to regulate climate change even though alleged harm was worldwide in scope; the fact that the threat of harm was "widely shared" did not mean the case involved only a generalized grievance); *Newdow v. Lefevre*, 598 F.3d 638, 642 (9th Cir. 2010) (finding that plaintiff had standing to challenge ubiquitous "In God We Trust" motto that every American encounters on currency and coins, even though his "encounters with the motto are common to all Americans," because he had "alleged a concrete, particularized, and personal injury resulting from his frequent, unwelcome contact with the motto").

Thus, no basis exists in the law for the District Court's notion that Plaintiffs must "differentiate them[selves] from the mass of telephone and internet users in the United States" to avoid dismissal of their allegations as a mere generalized grievance. ER 18 (Order at 18). On the contrary, it defies controlling law and invents a novel standing requirement with no basis in Article III to require Plaintiffs suffering the concrete injury of having Defendants seize their personal communications and records to differentiate themselves from other individuals

who have suffered similar injuries.

2. Plaintiffs have standing for each claim they assert.

A claim-by-claim analysis of Plaintiffs' Complaint (which the District Court did not perform) further confirms that Plaintiffs have standing here. For Plaintiffs' statutory claims, it is well settled that "the injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Lujan*, 504 U.S. at 578 (internal quotation marks and ellipsis omitted). Similarly, Plaintiffs' constitutional claims assert rights that the courts have long recognized as personal and sufficient to support standing.

Plaintiffs' standing for their statutory claims (Counts V-XVI) is premised on the express terms of the remedies Congress authorized for the statutory violations that Defendants have committed. "That authorization is of critical importance to the standing inquiry: 'Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.'" *Massachusetts v. EPA,* 549 U.S. at 516 (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J. concurring in part and concurring in judgment)); *accord*, *Warth v. Seldin*, 422 U.S. 490, 500 (1975) ("[T]he standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief."). Thus, Plaintiffs have standing for their statutory causes of action because the statutes grant them individually enforceable legal rights that they allege Defendants have violated.[7]

[7] The Article III standing question is distinct from whether Plaintiffs have stated a

Plaintiffs' Complaint alleges claims under three interrelated federal surveillance statutes—ECPA, FISA, and the SCA—in which Congress created legal rights against unauthorized government surveillance and affirmatively provided standing and causes of action to individuals who are personally subjected to unlawful surveillance. ER 44-72 (Complaint ¶¶ 168-211 (ECPA—Counts VII-IX), 143-67 (FISA—Counts V & VI), 212-57 (SCA—Counts X-XV)). ECPA prohibits interception of communications by law enforcement unless it complies with statutory procedures. *See* 18 U.S.C. § 2510 *et seq*. FISA prohibits electronic surveillance under color of law unless it complies with statutory procedures. *See* 50 U.S.C. § 1801 *et seq*. The SCA protects the privacy of customer communications and customer records stored by communications providers by prohibiting the government from obtaining those communications and records except in compliance with statutory procedures. *See* 18 U.S.C. § 2701 *et seq*.

Together, these statutes comprise a comprehensive legislative scheme governing electronic surveillance. Indeed, Congress has commanded that the procedures of these statutes are the "*exclusive means* by which electronic surveillance . . . and the interception of domestic . . . communications may be

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claim under these statutes, for "standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal." *Warth*, 422 U.S. at 500; *see also Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998) (explaining that "the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case" (emphasis original)); *id.* at 91 (explaining that "the failure of a cause of action does not automatically produce a failure of jurisdiction"). Thus, the District Court's statement that to establish standing Plaintiffs must "allege facts []or proffer evidence sufficient to establish a prima facie case" is wrong. ER 18 (Order at 18).

conducted." 18 U.S.C. § 2511(2)(f) (emphasis added). By so commanding, Congress reduced any inherent power that the President might have as Commander-in-Chief in the realm of national security surveillance to its "lowest ebb." *See* H.R. Conf. Report No. 95-1720 at 35, *reprinted in* 1978 U.S.C.C.A.N. 4084, 4064 (quoting *Youngstown Sheet and Tube v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)); *see also* S. Report No. 95-604 at 64, *reprinted in* 1978 U.S.C.C.A.N. 3904, 3966.

Congress gave the statutes' exclusive procedures teeth by creating causes of action authorizing anyone who has been subjected to government surveillance outside of those procedures to bring lawsuits like this one. *See* 18 U.S.C. § 2520 (providing cause of action for persons whose communications have been intercepted in violation of ECPA); 50 U.S.C. § 1810 (same for persons whose communications have been subjected to electronic surveillance under color of law in violation of FISA); 18 U.S.C. § 2707 (same for communications service subscribers whose communications or records the government has obtained from their communications service provider in violation of the SCA); *see also* 18 U.S.C. § 2712 (same against the United States for any person aggrieved by the government's violation of ECPA or the SCA). Plaintiffs have standing to assert their claims under each of the three surveillance statutes.

a. Plaintiffs have standing for their ECPA claims.

Plaintiffs' statutory causes of action in Counts VII-IX arise under ECPA. ER 51-59 (Complaint ¶¶ 168-211). ECPA "provides a cause of action to 'any person *whose* . . . communication is intercepted, disclosed, or intentionally used'"

in violation of the statute. *Noel v. Hall*, 568 F.3d 743, 748 (9th Cir. 2009) (quoting 18 U.S.C. § 2520) (emphasis and ellipses in original). In other words, persons who are a party to a seized communication have standing to sue when that communication is unlawfully intercepted, disclosed, or used.[8] *See id.*

In particular, ECPA provides a cause of action under 18 U.S.C. § 2520 for damages and equitable relief against the Defendant government officials. ECPA also provides a separate damages cause of action under 18 U.S.C. § 2712 against the government agency Defendants for violations of ECPA, while 5 U.S.C. § 702 provides a cause of action for equitable relief against the government agency Defendants for their ECPA violations.

Plaintiffs have standing to bring their ECPA claims, because they allege the invasion of legal rights granted by ECPA. *See Massachusetts v. EPA*, 549 U.S. at 516; *Lujan*, 504 U.S. at 578. Specifically, Plaintiffs allege that their own personal communications—phone calls, emails and other communications to which they were a party—have been and are being unlawfully intercepted, used, and disclosed by Defendants in violation of ECPA. ER 23, 32, 52, 55-56, 58 (Complaint ¶¶ 9, 11, 13, 73, 75, 173-176, 189-192, 203-206.).

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[8] ECPA defines "intercept" as "the aural or other acquisition of the contents of any . . . communication through the use of any electronic, mechanical, or other device," 18 U.S.C. § 2510(4). "Such acquisition occurs 'when the contents of a wire communication are captured or redirected in any way.'" *Noel*, 568 F.3d at 749 (quoting *United States v. Rodriguez*, 968 F.2d 130, 136 (2d Cir. 1992)). While 18 U.S.C. 2511(1)(a) generally prohibits any intentional interception of a communication, the subsequent use of such a captured communication is governed by 18 U.S.C. § 2511(c) and (d)'s prohibitions on the "use" and "disclos[ure]" of intercepted communications. *Id.*

b. Plaintiffs have standing for their FISA claims.

Plaintiffs' statutory claims in Counts V and VI arise under FISA. ER 44-50 (Complaint ¶¶ 143-67). FISA prohibits any electronic surveillance that is not affirmatively authorized by statute, and prohibits the disclosure or use of information acquired from unlawful surveillance. 50 U.S.C. § 1809.[9] FISA also expressly provides a damages cause of action to anyone whose communications have been unlawfully acquired, or disclosed or used after unlawful acquisition, whether or not that person was an intended target of surveillance. 50 U.S.C. § 1810;[10] *see also United States v. Cavanagh*, 807 F.2d 787, 789 (9th Cir. 1987) (citing *United States v. Belfield*, 692 F.2d 141, 143 & 146 n.21 (D.C. Cir. 1982) (party "incidentally overheard during the course of surveillance of another target" is an aggrieved party)). In addition, FISA violations can give rise to claims for equitable relief under 5 U.S.C. § 702, which provides a cause of action for

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[9] Section 1809 provides that "[a] person is guilty of an offense if he intentionally . . . engages in electronic surveillance under color of law" or "discloses or uses information obtained under color of law by electronic surveillance," where the surveillance was not authorized by statute. 50 U.S.C. § 1809(a)(1)-(2). In relevant part, FISA defines "electronic surveillance" as "the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs in the United States . . ." 50 U.S.C. § 1801(f)(2).

[10] Section 1810 provides that "[a]n aggrieved person . . . who has been subjected to an electronic surveillance or about whom information obtained by electronic surveillance of such person has been disclosed or used in violation of section 1809 of this title shall have a cause of action against any person who committed such violation . . . ." FISA defines an "aggrieved person" who may bring such an action as "a person who is the target of an electronic surveillance *or* any other person whose communications or activities were subject to electronic surveillance." 50 U.S.C. § 1801(k) (emphasis added). Thus, it does not matter whether a plaintiff was an intended target of surveillance, as long as his or her communications were

equitable relief to persons adversely affected by government action.

Here, Plaintiffs allege that Defendants have violated FISA by conducting electronic surveillance of Plaintiffs' own communications without statutory authorization, and by unlawfully disclosing or using information obtained from the surveillance of Plaintiffs' communications. ER 46-47, 49-50 (Complaint ¶¶ 148-51, 161-64). Because they allege the invasion of legal rights granted them by FISA, Plaintiffs have standing to pursue their FISA claims. *See Massachusetts v. EPA*, 549 U.S. at 516; *Lujan*, 504 U.S. at 578.

c. Plaintiffs have standing for their SCA claims.

Plaintiffs' next six statutory causes of action, Counts X-XV, arise under the SCA. ER 59-72 (Complaint ¶¶ 212-57). The SCA prescribes the procedures that the government must follow when it solicits a provider to disclose a subscriber's information, including either the contents of a subscriber's stored communications (18 U.S.C. § 2703(a)-(b)) or records pertaining to the subscriber (18 U.S.C. § 2703(c)). The SCA also provides that "any provider of electronic communication service, *subscriber*, or other person aggrieved by any violation of this chapter" may maintain a civil action if the violation was done knowingly or intentionally. 18 U.S.C. § 2707(a) (emphasis added).[11]

Therefore, the SCA provides a cause of action to those whose own

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in fact subjected to surveillance.

[11] The SCA cause of action under 18 U.S.C. § 2707 is for damages and equitable relief, and it applies to the Defendant government officials here. In addition, as with Plaintiffs' ECPA claims, 18 U.S.C. § 2712 provides a damages cause of action against the government agency Defendants for their SCA violations; 5 U.S.C. § 702 provides a cause of action for equitable relief against the government

communications and records are improperly acquired by the government in violation of the SCA, which is exactly what Plaintiffs allege. ER 23, 32-34 (Complaint ¶¶ 9-10, 13, 73, 75, 83, 90). Because Plaintiffs allege the invasion of legal rights granted them by the SCA, they have standing to pursue their SCA claims. *See Massachusetts v. EPA*, 549 U.S. at 516; *Lujan*, 504 U.S. at 578.[12]

d. Plaintiffs have standing for their constitutional claims under the Fourth Amendment, First Amendment, and Separation of Powers.

Plaintiffs also bring constitutional claims under the Fourth and First Amendments and the separation of powers provisions of the Constitution. ER 38-44, 73-74 (Complaint ¶¶ 108-26 (Counts I & II—Fourth Amendment), 127-42 (Counts III & IV—First Amendment), 262-65 (Count XVII—Separation of Powers)). It is well established that the Fourth and First Amendments create personal, individually enforceable legal rights. *Rakas v. Illinois*, 439 U.S. 128, 140 (1978) (Fourth Amendment rights are "personal"); *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940) (First Amendment rights are "fundamental personal . . . liberties"). In addition, this Court has found that an individual plaintiff has standing to assert a separation-of-powers challenge where it causes concrete harm to that plaintiff. *See Chadha*, 634 F.2d at 418.

For Fourth Amendment claims, the Supreme Court's "long history of

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agency Defendants for their SCA violations.

[12] Plaintiffs additionally have standing for their claim under the APA, because their interest in the privacy of their communications and communications records that Defendants have unlawfully acquired is within the zone of interests protected by ECPA, FISA, the SCA, and the First and Fourth Amendments. ER 72-73 (Complaint ¶¶ 258-261 (Count XVI)); *NCUA v. First Nat'l Bank & Trust Co.*, 522

insistence that Fourth Amendment rights are personal in nature has already answered many . . . traditional standing inquiries" like injury-in-fact. *Rakas*, 439 at 140 (1978). Under the Fourth Amendment, each Plaintiff has an individual, substantive right to be free of unconstitutional searches and seizures; this right extends not only to the privacy of Plaintiffs' homes but to the privacy of their communications. *See Katz v. United States*, 389 U.S. 347, 353 (1967); *see also Berger v. New York*, 388 U.S. 41, 59 (1967) (finding that procedures of state wiretapping statute did not satisfy warrant requirement); *United States v. Forester*, 512 F. 3d 500, 510 (9th Cir. 2008), *cert. denied* 129 S. Ct. 249 (2008) (recognizing that content of Internet communications is protected by the Fourth Amendment).

As with Plaintiffs' statutory claims, the proper question for determining standing is not whether Plaintiffs have stated a claim for a Fourth Amendment violation, but simply whether they are authorized to bring suit so that a court may decide that question. *See Rakas*, 439 U.S. at 140 ("[the] definition of [Fourth Amendment] rights is more properly placed within the purview of substantive Fourth Amendment law than within that of standing"). Here, Plaintiffs have established their standing to sue under the Fourth Amendment by alleging Defendants' warrantless search and seizure of Plaintiffs' individual communications.

Plaintiffs similarly have standing to challenge Defendants' violation of their First Amendment right to preserve the privacy of their associations with others and their right to speak anonymously. *See NAACP v. Alabama*, 357 U.S. 449, 460-61

U.S. 479, 488 (1998).

(1958) (right of association protected from government scrutiny); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-43 (1995) (right to speak anonymously); *Talley v. California*, 362 U.S. 60, 63-65 (1960) (same). "[C]ompelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 64 (1976).

Here, Plaintiffs use AT&T's network to speak or receive speech anonymously and to associate privately. ER 42-43 (Complaint ¶ 128, 137). Plaintiffs allege that Defendants have acquired Plaintiffs' private communications made over AT&T's network, as well as AT&T records related to those communications, thereby subjecting Plaintiffs' associational activities to government scrutiny and depriving them of the right to speak, associate, and receive speech anonymously. ER 23, 32-34 (Complaint ¶¶ 9, 13, 73, 75 (communications); *id.* ¶¶ 10, 13, 83, 90 (records)). Thus, Plaintiffs have standing to challenge these First Amendment violations.

Plaintiffs also have been injured by Defendants' violation of the constitutional principle of separation of powers: Defendants—the Executive branch—have disregarded Congress's express surveillance laws and the Judiciary's authority to conduct prior judicial review of electronic surveillance, intruding on Plaintiffs' private communications as a result. The Supreme Court has regularly found standing to challenge the legality of government conduct violating the separation of powers where, as here, a plaintiff has been concretely harmed by that conduct. *See, e.g.*, *Buckley*, 424 U.S. at 12 (plaintiffs alleged a sufficiently personal stake to challenge federal statute on separation of powers

grounds). This Court has also recognized that those suffering a concrete injury from a separation of powers violation have standing to challenge the government's conduct. *Chadha*, 634 F.2d at 418. In *Chadha*, the Court explained that where a plaintiff asserting a separation of powers violation "presents a specific instance of injury flowing directly from the statute's operation," as Plaintiffs have done here, "this type of concrete injury is sufficient for standing purposes." *Id.*

In sum, Plaintiffs have standing to assert each of their constitutional and statutory claims, based on the concrete injuries described above and in Plaintiffs' Complaint: Defendants' seizure of Plaintiffs' own personal communications and communications records through the government's program of unlawful surveillance. By this unlawful conduct, Defendants have violated the First and Fourth Amendment requirements that judicial review precede any surveillance of domestic communications—even for national security purposes. *See United States v. U.S. Dist. Ct.*, 407 U.S. 297, 313, 320-21 (1972) ("*Keith*"). Defendants have also unlawfully disregarded the procedures that Congress established in surveillance statutes explicitly intended to reduce the President's authority in the area of domestic surveillance to its "lowest ebb"[13]—violating both the applicable statutory requirements, and the more fundamental constitutional principle of separation of powers. The concrete and particularized injuries that Plaintiffs have suffered from these unlawful actions are sufficient to support standing on all of

[13] *See* H.R. Conf. Report No. 95-1720 at 35, *reprinted in* 1978 U.S.C.C.A.N. 4084, 4064 (quoting *Youngstown Sheet and Tube v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)); *see also* S. Report No. 95-604 at 64, *reprinted in* 1978 U.S.C.C.A.N. 3904, 3966.

Plaintiffs' claims.

3. The District Court's other rationales lack merit.

As well as misinterpreting the generalized grievance principles discussed above (*see supra* Section I.A.2), the District Court presented an assortment of other rationales for its dismissal of Plaintiffs' claims. As explained below, the District Court's reasoning on these points must also be rejected.

a. Authority addressing taxpayer and citizen suits is inapposite here.

The District Court mistakenly relied on three decisions in which plaintiffs sought to bring a claim against the government based on nothing more than their status as taxpayers or citizens, and lacking any individualized injury or statutorily created rights: *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587 (2007); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974); and *Flast v. Cohen*, 392 U.S. 83 (1968). ER 16-18 (Order at 16-18). These cases are inapposite here, where Plaintiffs have alleged individualized injuries and violations of specific statutory rights.

Two of the decisions the District Court cited, *Flast* and *Hein*, are taxpayer-standing suits where taxpayers sought to prevent the government from making expenditures the taxpayer-plaintiff contended were unconstitutional. The Supreme Court in *Flast* established special rules for taxpayer standing where the government expenditure and the conduct it funds have not directly harmed the taxpayer.[14] *Flast*, 392 U.S. at 102-03; *Hein*, 551 U.S. at 602-03. In *Hein*, the

[14] For a taxpayer to have standing solely by virtue of his or her status as a taxpayer, the taxpayer must allege that the challenged spending is an exercise of Congress'

Supreme Court clarified the rules that the *Flast* Court had established and held that taxpayers lacked standing to challenge an expenditure that fell within the discretion that Congress had conferred upon the Executive. *Id.* at 603-05.

Flast and *Hein* have no application to Plaintiffs' claims, because Plaintiffs' standing is not based on their status as taxpayers. Plaintiffs' standing does not stem from any harm they have suffered from the government's expending money to operate its unlawful surveillance program, and Plaintiffs do not seek to enforce a constitutional limitation on congressional spending. Instead, Plaintiffs' standing rests on Defendants' unlawful seizure of Plaintiffs' individual communications and communications records, in violation of Plaintiffs' individual, substantive statutory and constitutional rights.

Schlesinger, 418 U.S. at 217, is similarly inapposite. In that case, the plaintiffs suffered no concrete personal injury at all. Rather, the *Schlesinger* plaintiffs filed suit against the Secretary of Defense and other public officials in order to stop members of Congress from serving in the reserves, asserting standing as citizens and as taxpayers. The plaintiffs based their claims on the Incompatibility Clause (Article I, Section 2 of the Constitution), a constitutional provision that does not create any individual, substantive rights, and that therefore cannot give rise to any concrete, personal injury. As the Court noted in rejecting the plaintiffs' claims, the plaintiffs' complaint sought "to have the Judicial Branch

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power under the taxing and spending clause of Article I, section 8 of the Constitution and must allege that the spending violates a specific constitutional limitation on congressional spending (e.g., the Establishment Clause). *Flast*, 392 U.S. at 102-03; *Hein*, 551 U.S. at 602-03.

compel the Executive Branch to act in conformity with the Incompatibility Clause, an interest shared by all citizens." *Id.* at 217. This alleged unconstitutional conduct, "standing alone, would adversely affect only the generalized interest of all citizens in constitutional governance, and that is an abstract injury," and for that reason the plaintiffs lacked standing. *Id.*

In contrast to each of these cases, Plaintiffs here do not sue merely as concerned citizens seeking to enforce abstract obedience to law, but as injured persons who have had their own personal communications and communications records seized by the government. Plaintiffs also sue under constitutional and statutory provisions that create personal, individually enforceable substantive rights, unlike the plaintiffs in *Schlesinger*, *Flast*, and *Hein*. The District Court's mischaracterization of Plaintiffs' claims as nothing more than a "citizen suit[] seeking to employ judicial remedies to punish and bring to heel high-level government officials for the allegedly illegal and unconstitutional warrantless electronic surveillance program" contravenes the allegations of the Complaint, and is no basis for dismissal. *See* ER 16-17 (Order at 16-17).

b. This is not a political question case.

The District Court also hinted at an additional rationale: that "the political process, rather than the judicial process, may provide the more appropriate remedy for a widely shared grievance," and that "[i]f an injury is far-reaching, it is likely that a better solution would come from a political forum." ER 15 (Order at 15) (quotations and citations omitted).

First, the possibility of a political remedy for a concrete but widely shared

injury (a possibility that always exists) cannot defeat the existence of Article III standing. As the Supreme Court explained in *Akins*, the existence of a political remedy for a widely shared injury has no bearing on whether the plaintiff's harm is sufficiently concrete to be an injury-in-fact satisfying Article III: "[T]he fact that a political forum may be more readily available where an injury is widely shared . . . does not, by itself, automatically disqualify an interest for Article III purposes. Such an interest, where sufficiently concrete, may count as an 'injury in fact.'" *Akins*, 524 U.S. at 24.

Second, if the District Court meant to suggest that it should dismiss Plaintiffs' claims under the political question doctrine, that too was error. The political question doctrine does not apply to Plaintiffs' statutory claims. *See Baker*, 369 U.S. at 217 (explaining doctrine). As the Supreme Court made clear in *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221 (1986), "one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones." *Id.* at 230. This rule applies, and the courts' role remains the same, even in statutory cases involving a field—such as foreign relations or national security—in which Congress and the Executive play "the premier role." *Id.* Consequently, "[t]he Supreme Court has never applied the political question doctrine in a case involving alleged statutory violations. Never." *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 856 (D.C. Cir. 2010) (Kavanaugh, J. concurring in judgment).[15]

[15] Judge Kavanaugh further explained why the political question doctrine does not

Moreover, the District Court's apparent suggestion that Plaintiffs should petition Congress to pass another law to constrain Defendants' behavior ignores the laws that Congress has already passed. In ECPA, FISA, and the SCA, Congress has already enacted, and the President has already signed, statutes specifically written to prohibit the conduct alleged here and to create a cause of action for those harmed by that conduct should it occur.[16] In other words, the political process has *already* spoken, and it is now the courts' duty to apply and interpret those laws. *Japan Whaling Ass'n*, 478 U.S. at 230.

The District Court's apparent deference to the "political process" as "the more appropriate remedy" is also improper as to Plaintiffs' constitutional claims. The Judiciary cannot shirk its role as a protector of the individual liberties at issue in Plaintiffs' claims under the First and Fourth Amendments. As the Supreme Court has recently explained, "[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy

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apply in cases alleging statutory violations, noting:

> "[U]se of the political question doctrine in statutory cases loads the dice against the Legislative Branch." "If a court refused to give effect to a statute that regulated Executive conduct, it necessarily would be holding that Congress is unable to constrain Executive conduct in the challenged sphere of action." "That is a weighty question—and one that must be confronted directly through careful analysis of Article II, not resolved *sub silentio* in favor of the Executive through use of the political question doctrine."

El-Shifa at *855-857.

[16] Congress has recently reiterated this prohibition. As part of the FISA Amendments Act of 2008, Congress created a second provision commanding that the surveillance statutes are the exclusive means by which the Executive may conduct domestic electronic surveillance. *See* Pub.L. 110-261, Title I, § 102(a),

organizations in times of conflict, it most assuredly envisions a role for *all three branches* when *individual liberties* are at stake." *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (emphasis added); *see also Trop v. Dulles*, 356 U.S. 86, 103 (1958) ("The Judiciary has the duty of implementing the constitutional safeguards that protect individual rights. When the Government acts to take away fundamental rights . . . , the safeguards of the Constitution should be examined with special diligence."); *see also, e.g., Keith*, 407 U.S. at 313 (applying Fourth Amendment safeguards to domestic national security surveillance). To defer to the political process where fundamental rights are at stake is to shirk the essential role of the Judiciary in our constitutional system.

The political question doctrine also does not apply to Plaintiffs' claim that Defendants have violated the separation of powers doctrine. As this Court held in *Chadha*, because "this doctrine [of separation of powers] is not textually committed to any one branch, the political question doctrine is not implicated." *Chadha*, 634 F.2d at 419. The political question doctrine also does not apply to separation-of-powers claims for a "more fundamental reason": the political question doctrine depends on a *judicial* recognition of separation-of-powers concerns, and it would "stand the political question doctrine on its head to require the Judiciary to defer to another branch's determination that its acts do not violate the separation of powers principle." *Id.* (internal citations omitted). Therefore, under the law of the Supreme Court and this Circuit, Plaintiffs' claims that the Executive has inflicted concrete harm on them by exceeding its constitutional

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July 10, 2008, 122 Stat. 2459, *codified as* 50 U.S.C §1812.

powers—like their claims that Defendants have harmed them by violating Congress's laws and trampling individual liberties protected by the Constitution—pose no political questions at all.

c. No prudential standing barrier exists here.

Nor does any prudential standing requirement bar Plaintiffs' claims. The District Court got it backwards in suggesting that it should abdicate its statutory responsibility to decide Plaintiffs' claims and instead rely on the political branches to remedy Plaintiffs' injuries. Congress already recognized that harm from rampant electronic surveillance could affect many people, and yet still made it actionable by passing the surveillance statutes that Plaintiffs assert here.

The Supreme Court has held that a plaintiff whom Congress has identified as a person entitled to bring suit under an express statutory remedy satisfies not only Article III's standing requirements, but also any prudential standing requirements. Where "Congress, intending to protect [persons such as plaintiffs] . . . from suffering the kind of injury here at issue, intended to authorize this kind of suit . . ., [plaintiffs] satisfy 'prudential' standing requirements." *Akins*, 524 U.S. at 20.[17] In

[17] Likewise, where "'Congress intended standing under [a statutory section] to extend to the full limits of Art. III' . . . the courts accordingly lack the authority to create prudential barriers to standing in suits brought under that section." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982).

The Supreme Court further explained in *Warth* why courts cannot interpose prudential standing barriers to express statutory causes of action like those under which Plaintiffs have sued:

> [T]he source of the plaintiff's claim to relief assumes critical importance with respect to the prudential rules of standing that, apart from Art. III's minimum requirements, serve to limit the role of the courts in resolving public disputes . . . . Congress may grant an express right of action to persons who otherwise

so ruling, the Court noted Congress's use of the word "aggrieved" in the statute at issue: "History associates the word 'aggrieved' with a congressional intent to cast the standing net broadly—beyond the common-law interests and substantive statutory rights upon which 'prudential' standing traditionally rested." *Id.* at 19. The same is true here. By using the word "aggrieved" and by specifying who is an aggrieved person under ECPA, FISA, and the SCA, Congress intended to authorize this kind of suit by individuals—like Plaintiffs—whose personal communications and communications records have been unlawfully obtained by the government. Plaintiffs therefore "satisfy 'prudential' standing requirements" and the courts must hear their claims. *Id.* at 20.

The courts have no authority to refuse cases where Congress has determined they should proceed. *See Lujan*, 504 U.S. at 577. Rather, where standing exists and the case is otherwise justiciable, "the federal courts have a 'virtually unflagging obligation . . . to exercise the jurisdiction given them.'" *Ankenbrandt v. Richards*, 504 U.S. 689, 705 (1992) (quoting *Colo. River Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976)).

Thus, contrary to the District Court's view, there is nothing defective or

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> would be barred by prudential standing rules. Of course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants. But so long as this requirement is satisfied, persons to whom Congress has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others, and, indeed, may invoke the general public interest in support of their claim.

Warth, 422 U.S. at 500-01 (citations omitted).

even unusual about an action "seeking to redress alleged misfeasance by the executive branch of the United States government," so long as the plaintiff is a victim injured personally by that misfeasance, like Plaintiffs here. ER 15 (Order at 15). The courts are full of such claims, and the courts can and must adjudicate them.[18]

B. The District Court should have granted leave to amend even under its view of the law.

Finally, the District Court erred in failing to allow Plaintiffs any opportunity to amend. "Dismissal without leave to amend is improper unless it is clear, upon *de novo* review, that the complaint could not be saved by any amendment." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1034 (9th Cir. 2008) (quoting *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1296 (9th Cir. 1998)).

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[18] Although the District Court erred here in holding that Plaintiffs lacked standing, previously the court correctly concluded that these Plaintiffs did have standing in a different case in which four of these same plaintiffs sued AT&T under the same causes of action for the same conduct. *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006). There, the court correctly found that "as long as the named plaintiffs were, as they allege, AT&T customers during the relevant time period . . . the alleged dragnet [surveillance and seizure of AT&T's network and databases] would have imparted a concrete injury on each of them. *Id.* at 1000. The court correctly explained that "the alleged injury is concrete even though it is widely shared . . . . [T]his dragnet necessarily inflicts a concrete injury that affects each customer in a distinct way, depending on the content of that customer's communications and the time that customer spends using AT&T services." *Id.* at 1001.

In its order here, the District Court tried to distinguish its ruling in *Hepting* by erroneously asserting that "the gravamen of the [*Hepting* complaint] was rooted in a contractual relationship between private parties." ER 15 (Order at 15). In fact, however, none of the claims in *Hepting* involved breach of contract. Like this action, *Hepting* was an action asserting that the plaintiffs were injured by violations of statutory and constitutional duties imposed by law, not breaches of contractual obligations. *See Hepting*, 439 F. Supp. 2d at 978-79 (describing claims).

Moreover, "[a]n outright refusal to grant leave to amend without a justifying reason is . . . an abuse of discretion." *Manzarek*, 519 F.3d at 1034. *Manzerek* involved an insurance coverage dispute in which the plaintiff insured was seeking coverage of a claim arising out his allegedly tortious use of the name and logo of the band, "The Doors." The plaintiff and his counsel only learned that the district court was not going to allow an opportunity to amend the complaint when the district court signed the defendant's proposed order. *Id.* At no time did the district court "consider the viability of any potential amendments to the complaint." *Id.*

Plaintiffs in this case had even less notice than the plaintiff in *Manzerek*. They had no notice that the District Court was considering dismissing their complaint *sua sponte* for lack of standing, and no opportunity to be heard, either to oppose dismissal on that ground or to seek leave to amend. Rather, Plaintiffs only learned that the District Court would deprive them of an opportunity to amend to cure any alleged standing deficiencies *after* the court filed its order.

The District Court's refusal to grant leave to amend—without notice and without any justification or analysis of potential amendments—was an abuse of discretion. ER 19 (Order at 19).

VIII. CONCLUSION

For all the foregoing reasons, the District Court's order and judgment dismissing Plaintiffs' complaint for lack of standing should be reversed. This action should be remanded for further proceedings.

Respectfully submitted,

Dated: August 13, 2010

By: */s/ Rachael E. Meny*

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that this Appellant's Opening Brief is proportionately spaced, has a typeface of 14 points or more, and contains 12,527 words.

Dated: August 13, 2010

/s/ Rachael E. Meny
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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Plaintiffs and Appellants Carolyn Jewel, Tash Hepting, Gregory Hicks, Erik Knutzen and Joice Walton, by and through their counsel of record, hereby certify that they are aware of the following related cases pending in this Court:

Shubert, et al. v. Obama, et al., No. 10-15638, is the *Shubert* plaintiffs' appeal from the same District Court order that is the subject of this *Jewel* appeal. The District Court dismissed *Shubert* and *Jewel* in the same order, although the District Court had not consolidated or related the two cases. (Unlike *Jewel*, *Shubert* was part of a multi-district litigation (MDL) proceeding pending before the District Court, MDL No. 06-1791-VRW.) This Court has consolidated the *Jewel* and *Shubert* appeals for calendaring purposes only, and the *Shubert* plaintiffs are filing a separate opening brief.

In the District Court, *Jewel* is related to *Hepting, et al. v. AT&T Corp., et al.*, No C-06-00672-VRW ("*Hepting*"); like *Shubert*—but not *Jewel*—*Hepting* is a part of the MDL proceeding referenced above. *Hepting* and the other MDL cases against telecommunications carrier defendants currently are on appeal to this Court on a wholly unrelated issue, as this Court's Case No. 09-16676, titled *In re National Security Agency Telecommunications Records Litigation.*

Dated: August 13, 2010

/s/ Rachael E. Meny
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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 using the appellate CM/ECF system on August 13, 2010.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Rachael E. Meny
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