No. 11-15956

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CENTER FOR CONSTITUTIONAL RIGHTS et al.

Plaintiffs-Appellants,

v.

BARACK OBAMA et al.

Defendants-Appellees.

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

SUPPLEMENTAL BRIEF OF THE APPELLEES

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INTRODUCTION

This supplemental brief is being filed at the direction of the Court, which ordered the parties to address the effect of the Supreme Court's decision in *Clapper* v. *Amnesty International USA*, 133 S. Ct. 1138 (2013), on this case.

Plaintiffs are lawyers and other professionals who claim standing to challenge an antiterrorism intelligence surveillance program that has

been over for more than six years. Plaintiffs claim that they have standing to sue because of their alleged fear that their clients' communications (and incidentally plaintiffs') may have been targeted for surveillance under that program. Those alleged fears, however, rest on the same kind of speculation that the Supreme Court in *Amnesty International* rejected as a basis for standing to challenge a statute authorizing certain types of government surveillance. Indeed, plaintiffs' purported fears of surveillance here, which stem from a narrow surveillance program that has since ceased, are even more speculative than the claims rejected by the Supreme Court in *Amnesty International*.

ARGUMENT

1. The plaintiffs in *Amnesty International* were attorneys, journalists, and human rights, labor, legal, and media organizations who alleged that as part of their professional activities they regularly communicated with foreign citizens located abroad whom the government suspected of having ties to terrorism. 133 S. Ct. at 1145. Those plaintiffs brought a constitutional challenge to the 2008 amendments to the Foreign Intelligence Surveillance Act, which

provided the government with additional legal authority to target non-U.S. persons located abroad for intelligence surveillance. *Id.* at 1144-45. They premised their standing argument on the contention that they feared that the government would target their foreign contacts for surveillance, which might subject some of their own communications with those targets to electronic surveillance. *Id.* at 1146. The *Amnesty* plaintiffs claimed that this fear had "forced" them "to take costly and burdensome measures to protect the confidentiality of their international communications." *Id.*

The Supreme Court held that the plaintiffs lacked Article III standing to challenge the statute. The Court concluded that the plaintiffs' arguments were "inconsistent with [the Court's] requirement that 'threatened injury must be certainly impending to constitute injury in fact.'" 133 S. Ct. at 1147 (quoting *Whitmore* v. *Arkansas*, 495 U.S. 149, 158 (1990)). The Court also explained that the *Amnesty* plaintiffs' claim to injury rested on "their highly speculative fear"

- that the government "will decide to target the communications of non-U.S. persons with whom [the plaintiffs] communicate," 133 S. Ct. at 1148;
- that in doing so the government "will choose to invoke its authority" conferred by the 2008 FISA amendments "rather

than utilizing another method of surveillance," *id.*; *see id.* at 1149;

- that the Foreign Intelligence Surveillance Court will approve such surveillance, *id.* at 1148, 1149-50;

- that the government "will succeed in intercepting the communications of [the plaintiffs'] contacts," *id.* at1148; *see id.* at 1150; and finally,

- even if the government successfully acquired the communications of the plaintiffs' foreign contacts, that plaintiffs' own communications would be among those incidentally acquired. *Id.* at 1148, 1150.

For these reasons, the Supreme Court concluded that the *Amnesty* plaintiffs' speculative chain of possibilities did not establish that injury based on potential future surveillance was certainly impending or fairly traceable to the new FISA authority at issue in that case. *Id.* at 1150.

2. The Court also rejected the *Amnesty* plaintiffs' attempt to premise their standing on the claim that they "suffer present costs and burdens" resulting from their speculative fear of surveillance. *Amnesty Int'l*, 133 S. Ct. at 1151. "[R]espondents," the Court explained, "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Id.* The Court relied on *Laird* v. *Tatum*, 408 U.S. 1 (1972), which established that "'[a]llegations of a subjective "chill" are not an

adequate substitute for a claim of specific present objective harm or a threat of specific future harm.'" *Amnesty Int'l*, 133 S. Ct. at 1152 (quoting *Laird*, 408 U.S. at 13-14). The Court also rejected the suggestion that the plaintiffs could establish standing "simply by claiming that they experienced a 'chilling effect' that resulted from a government policy that does not regulate, constrain, or compel any action on their part." *Id.* at 1153.

3. Plaintiffs in this case are attorneys and other professionals who similarly claim to communicate with individuals the government suspects of ties to terrorism. *See* Pls.' Br. 23. They contend that their foreign contacts may have been subject to surveillance under the Terrorist Surveillance Program, a program of intelligence surveillance directed at monitoring the communications of al Qaeda members and affiliated organizations, which has been defunct since January 2007. *See* Gov. Br. 8-9. Plaintiffs fear that some of their communications with their foreign contacts may have been incidentally intercepted under that program, and claim to have incurred various costs out of that fear. Pls.' Br. 24-25.

Like the plaintiffs in *Amnesty International*, plaintiffs claim standing to challenge a government surveillance program even though they have no knowledge that "their communications have been monitored" under that program. 133 S. Ct. at 1148. Like the plaintiffs in *Amnesty International*, plaintiffs' fears of surveillance do not establish a concrete, imminent injury in fact, which requires that the "threatened injury must be certainly impending." *Id.* at 1147 (internal quotation marks and emphasis omitted). Like the plaintiffs in *Amnesty International*, *see id.* at 1148-50, plaintiffs' claimed injury from the defunct Terrorist Surveillance Program is premised on a highly speculative causal chain: that government may have targeted their foreign contacts for surveillance; that the government may have targeted those foreign contacts under the authority of the Terrorist Surveillance Program, as opposed to any number of alternative means at the government's disposal for conducting surveillance; that the government may have succeeded in acquiring those communications; and that plaintiffs' communications may have been among those communications incidentally intercepted in the course of monitoring

their foreign clients suspected by the government of ties to terrorism. *See* Gov. Br. 26, 38-40, 43-44.

Plaintiffs' arguments in favor of their standing here are virtually identical to the arguments rejected by the Supreme Court in *Amnesty International*. Indeed, in their briefs in this Court, plaintiffs heavily relied on the now-reversed Second Circuit decision in *Amnesty International*, *see* Pls.' Br. 19, 37-38, 40, 42-44, 47-48, 51; Reply Br. 5, 11-12, and even twice characterized themselves as "similarly-situated [sic]," Pls' Br. 19, 37, to the *Amnesty International* plaintiffs. If anything, plaintiffs' asserted fears are even more speculative than the fears rejected as a basis for standing in *Amnesty International*, which involved a statute currently in effect that authorized a "considerably broader surveillance program" than the Terrorist Surveillance Program. *Amnesty Int'l* v. *Clapper*, 638 F.3d 118, 149 n.32 (2d. Cir. 2011), *reversed* 133 S. Ct. 1138 (2013). The Terrorist Surveillance Program, by contrast, ceased more than six years ago, and even when it was in existence was a "narrow surveillance program that monitored particular individuals the government suspected were associated with al Qaeda." *Id.*; *see* Gov. Br. 35-36.

4. Plaintiffs' further claim that they have standing because they have chosen to incur certain costs out of fears of surveillance of which they have no knowledge, Pls.' Br. 32-51, is the same argument rejected by the Supreme Court in *Amnesty International*. *See* 133 S. Ct. at 1150-53. In their briefs in this appeal, plaintiffs labored to establish that their choices to incur costs out of fears of surveillance were "objective" injuries instead of the kind of "subjective chill" rejected by *Laird* v. *Tatum* as a basis for standing. *E.g.*, Pls.' Br. 38-39; Reply Br. 4-5. The Supreme Court in *Amnesty International* held, however, that "[b]ecause respondents do not face a threat of certainly impending interception," any "costs that they have incurred to avoid surveillance are simply the product of their fear of surveillance, and our decision in *Laird* makes clear that such a fear is insufficient to create standing." 133 S. Ct. at 1152. "If the law were otherwise," the Court explained, "an enterprising plaintiff would be able to secure a lower standard for Article III standing simply by making an expenditure based on a nonparanoid fear." *Id.* at 1151.

5. Plaintiffs' argument that the government may have retained "records" from any past surveillance it conducted of plaintiffs'

communications under the long-defunct Terrorist Surveillance Program, *see* Reply Br. 4-8, adds nothing but further speculation to the analysis. *See* Gov. Br. 38-42. That claimed fear depends on the conjecture that plaintiffs' communications were subject to surveillance under the Terrorist Surveillance Program in the first place, which for reasons already discussed is exactly the kind of the speculation already rejected by the Supreme Court in *Amnesty International* as a basis for standing. *See* Pls.' Br. 27-28 (arguing that "there is little to distinguish the threat of injury posed by ongoing surveillance of Plaintiffs' communications from the threat posed by past surveillance . . ."); *but see* Reply Br. 5 (attempting to distinguish "the risk from continuing surveillance" from "the parallel harm from recordkeeping"). Indeed, plaintiffs' "recordkeeping" argument requires the additional speculation that the government not only monitored plaintiffs' communications in the course of targeting foreign terrorists for surveillance, but also created and maintained records of any such hypothesized surveillance. Plaintiffs cannot manufacture a case or controversy by piling speculation on speculation.

CONCLUSION

Amnesty International disposes of any possibility that plaintiffs have standing here. For that reason, as well as for the reasons stated in the government's responsive brief, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2013, I filed this Supplemental Brief by filing with the court using the appellate CM/ECF system.

I certify that the participants in this case are registered CM/ECF filers and that service upon them will be accomplished by the CM/ECF system.

/s/ Henry C. Whitaker
HENRY C. WHITAKER