No. 11-15956

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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CENTER FOR CONSTITUTIONAL RIGHTS, et al.,
Plaintiff-Appellants,

v.

BARACK OBAMA, et al.,
Defendant-Appellees.

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

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# PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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## CORPORATE DISCLOSURE STATEMENT

Petitioner The Center for Constitutional Rights, the sole corporate party, has no parent corporation, and no publicly-owned corporation owns any of its stock.

/s/
Shayana Kadidal
*Attorney for Plaintiff-Appellants*

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Plaintiff-Appellants respectfully petition this Court for rehearing of the opinion and judgment of the panel issued on June 10, 2013 (attached). In the alternative they seek rehearing *en banc* on the grounds that the panel decision conflicts with the approach of the Supreme Court in *Clapper v. Amnesty Int'l*, 133 S. Ct. 1138 (2013), and of this Court in *Libertarian Party of L.A. County v. Bowen*, 709 F.3d 867 (9th Cir. 2013), such that consideration by the full Court is necessary to secure and maintain uniformity of this Court's decisions, and that the proceeding involves a question of exceptional importance: Under what circumstances will fear of unlawful government surveillance be reasonable enough to allow attorney plaintiffs to successfully assert chilling-effect standing and challenge that surveillance in court?

## INTRODUCTION

In recent weeks, the international press has been saturated with the disclosures that our government has engaged in surveillance so broad that it touches every American and requires for its implementation direct access to the servers of internet companies whose products pervade our daily lives, including Facebook, Microsoft, Google, and Skype. Despite the vigorous public debate these stories have triggered, it seems possible that many of these programs may evade judicial review on the standard applied by the panel opinion in this case. The blatantly illegal program of surveillance challenged here was disclosed by the press over seven

years ago, but there has never been a judicial determination of its legality on the merits. Perhaps as a consequence, it has spawned the current-day programs that are only now being seriously debated by the American public.

On December 15, 2005, the *New York Times* revealed that for more than four years the NSA, with the approval of the President, had engaged in a widespread program of warrantless electronic surveillance in violation of the Foreign Intelligence Surveillance Act (FISA), the post-Watergate statute subjecting electronic surveillance for national security purposes to a judicial warrant process (hereinafter the "NSA Program"). Rather than seeking to amend the statute, the President simply violated it by authorizing warrantless wiretapping of calls and emails where an NSA "shift supervisor" believed one party had some link to terrorism (a "member of an organization affiliated with al Qaeda, or working in support of al Qaeda") and one end of the communication was located outside the United States, without any oversight by the judiciary. Remarkably, instead of denying the story or hiding behind assertions of secrecy, the President, the Attorney General, and other administration officials acknowledged these and many other specific operational details[1] of the Program in the course of carrying out a vigorous public defense of their actions. (The Attorney General, for example, specifically admitted that the Program

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[1] *See* Opening Br. at 9-12 (detailing admissions). Plaintiff-Appellants' Opening Brief was filed via ECF on August 29, 2011 and the Reply Brief on Nov. 29, 2011. Because the unpublished panel opinion is so brief, frequent reference to the merits briefs is made herein to set forth the facts of this case.

engaged in electronic surveillance that otherwise should have been governed by FISA.)

Based on these detailed public admissions about the nature of the NSA Program, Plaintiffs below—the Center for Constitutional Rights and several of its legal staff members—initiated this suit. CCR is a legal non-profit that has litigated several of the leading cases challenging post-9/11 detention, interrogation and rendition practices, and its legal staff communicates regularly by telephone and email with persons outside the United States whom Defendants asserted were associated with al Qaeda or associated groups. Since these communications fit precisely within the category that had been, and would be, potentially subject to warrantless surveillance under the NSA Program, Plaintiffs' reasonable fears led them to avoid engaging in some communications, and to take costly countermeasures to protect others, such as traveling internationally to meet in person rather than using the phone or email. In some circumstances, fears of such surveillance caused third parties to refuse to communicate with Plaintiffs altogether. Accordingly Plaintiffs sought declaratory and injunctive relief against the Program—specifically, an order that the administration cease the surveillance, disclose the nature of any past surveillance of Plaintiffs' communications, and destroy any such records remaining in the government's possession.

Since the filing of the suit, there have been numerous indications that attorneys were subject to surveillance under the Program, including an admission in response to Congressional inquiry that attorney-client communications "would not be categorically excluded from interception" under the Program.[2] The Obama administration has consistently refused to take any position on the question of whether the original NSA Program was lawful.

In January 2007, just before oral argument in the Sixth Circuit in a parallel case brought by the ACLU,[3] the administration claimed to have shut down the original program. Plaintiffs' claims below thus centered on their request for destruction of records retained from the original program. The district court held that that Plaintiffs could only establish standing by proving that they had been actually subjected to surveillance under the NSA Program, and granted the government's motion to dismiss on January 31, 2011. This Court held Plaintiffs' appeal until after the resolution by the Supreme Court of *Clapper v. Amnesty Int'l* (described below), and then affirmed the dismissal.

## I. THE PANEL MISAPPLIES THE SUPREME COURT'S DECISION IN *CLAPPER V. AMNESTY INTERNATIONAL*

In upholding the dismissal of claims in the instant case, the panel relied entirely on the Supreme Court's Feb. 26 decision in *Clapper v. Amnesty Int'l*. *Amnes-*

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2 Opening Br. at 11.

3 *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007).

*ty* involved a facial challenge to the FISA Amendments Act of 2008 (FAA), the last in a series of Congressional responses to the litigation challenging the NSA Program. The FAA, in essence, modified FISA to enable judicial approval not for individualized targeting but rather for whole programs of surveillance (so long as those programs did not intentionally target U.S. persons). Under the FAA, the government submits to the Foreign Intelligence Surveillance Court (FISC) a certification describing the program of surveillance contemplated, the targeting procedures for such surveillance, and the minimization procedures that will be applied. *Amnesty*, 133 S. Ct. at 1145. As the Court described it, the FAA requires the FISC judges to ensure that the proposed "targeting and minimization procedures are consistent with the statute and the Fourth Amendment," *id.* at 1145, 1145 n.3. Fourth Amendment-compliant minimization procedures would protect against the interception and retention of (*inter alia*) legally-privileged communications.[4]

The plaintiffs in *Amnesty* based their claim to standing on two distinct theories. The first, less relevant here but taking up the majority of the opinion, was that there was a "reasonable likelihood" that their communications would actually be acquired by FAA surveillance in the future, thus constituting "imminent" future harm. *Id.* at 1143. Their second, alternative theory of standing is more relevant to the instant case: they "maintain[ed] that the risk of surveillance under [the FAA] is

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4 *See* Opening Br. at 48-49 (citing cases).

so substantial that they have been forced to take costly and burdensome measures to protect the confidentiality of their international communications; in their view, the costs they have incurred constitute present injury that is fairly traceable to [the FAA].” 133 S. Ct. at 1146. That chilling-effect theory is very similar in outline to the theory of standing Plaintiff-Appellants assert here.

The Court rejected both theories on the grounds that “the harm [the *Amnesty* plaintiffs] seek to avoid is not certainly impending.” However, the Court cautioned that “[o]ur cases do not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about. In some instances, we have found standing based on a ‘substantial risk’ that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm. ... But to the extent that the ‘substantial risk’ standard is relevant and is distinct from the ‘clearly impending’ requirement, respondents fall short of even that standard, in light of the attenuated chain of inferences necessary to find harm here”[5]—namely, that the FISC would approve of surveillance under the FAA that targeted only foreigners, complied with the Fourth Amendment, and implemented minimization safeguards, but still nonetheless ensnared the plaintiffs’ communications. (Moreover, all of this had to happen in a manner that violated plaintiffs’ rights under the

[5] *Id*. at 1150 n.5.

selfsame Fourth Amendment—as the central claim in the *Amnesty* complaint was a Fourth Amendment cause of action).

The *Amnesty* Court did not purport to be refashioning existing standing requirements, but rather providing a gloss[6] on the "concededly … somewhat elastic" concept of "imminence"[7] in cases where the claims relate to the always-contingent risk of future injuries. The question the Supreme Court asks is one of degree—"substantial risk" rather than "*possible* future injury"; "certainly impending" rather than "fanciful," "paranoid," or "irrational"—an abundance of formulations all working towards a concept of imminence that "'ensure[s] that the alleged injury is not too speculative for Article III purposes.'" *Id*. at 1147 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 565 (1992)).

## A. The Likelihood of Harm to Plaintiffs in This Case Is Materially Greater Than That Faced by the *Amnesty* Plaintiffs

The likelihood of harm to the *Amnesty* plaintiffs from the FAA was more "speculative" and far "less substantial" than the likelihood of the harms asserted in the present case. One initial difference between the cases is obvious. In *Amnesty* the Court took pains to stress that it had been especially vigilant about not relaxing standing requirements in cases where the judiciary was asked to pass judgment against a power exercised by the other two "political branches," 133 S. Ct. at 1146-

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[6] *Cf. Amnesty*, 133 S. Ct. at 1160-61 (Breyer, J., dissenting).

[7] 133 S. Ct. at 1147 (quoting *Lujan*).

47. In this case, Plaintiff-Appellants challenge a program of surveillance carried out in secret by the executive in blatant violation of a Congressional criminal prohibition that had been in place for over two decades.[8]

The federal courts "have regularly given great weight to the illegality of government conduct" in determining that contingent fears of future harm from that conduct were sufficient to support standing. Opening Br. at 40, 40 n.44 (citing numerous cases); *see also* Reply Br. at 7-8. The reasons this should be so are obvious: *criminal* executive surveillance operates outside of restraint by either Congress or *ex ante* judicial review, is presumptively more likely to trench where independent Article III judges would not have, and naturally raises questions about why existing (typically quite workable[9]) legal authorities for surveillance were circumvented. In contrast, in *Amnesty*, the surveillance being challenged was notionally legal (in the sense of being authorized by statute) and required some judicial involvement and a minimization process. In the Supreme Court's evaluation, all of this diminished the chances of interception of the *Amnesty* plaintiffs' communications. *See* 133 S. Ct. at 1148, 1150 (noting that scenario under which plaintiffs would be at risk of surveillance depended on Article III judges of the FISC deter-

[8] *See* 50 U.S.C. § 1809 (making it a felony to "engage[] in electronic surveillance under color of law except as authorized by statute" or knowingly "disclose[] or use[]" such information).

[9] *Cf.* Opening Br. at 7, 7 nn.4, 5 (noting that "[i]n practice FISA appeared to be extraordinarily permissive").

mining that FAA surveillance touching plaintiffs' communications nonetheless somehow comported with Fourth Amendment[10]).

Perhaps the most important difference between the cases is the fact that there were no judicially-supervised minimization standards applied under the NSA Program to protect legally-privileged communications from interception and retention.[11] That stands in sharp contrast to the FAA, which the *Amnesty* majority interpreted to mandate FISC judge review of minimization procedures. 133 S. Ct. at 1145. The individual Plaintiff-Appellants in the instant case were all either attorneys or legal staff of CCR, so the vast majority of their communications would have been covered by legal privilege (work product, attorney-client, or joint litigation privilege). In contrast, in *Amnesty* the plaintiffs included both attorneys and legal groups, on the one hand, and on the other "human rights, labor, … and media organizations" whose members were primarily not attorneys and whose communications were therefore only "sometimes" legally privileged.[12] 133 S. Ct. at 1145. Moreover, even as to the attorney plaintiffs in *Amnesty*, the Supreme Court noted that—"critically," in its view—the FAA mandated that the FISC "assess whether the Government's targeting and minimization procedures comport with the Fourth

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[10] This is the third in the list of five factors that the majority held to render the *Amnesty* plaintiffs' fears overly speculative. *See* 133 S. Ct. at 1148.

[11] *See* Opening Br. at 48-51.

[12] The non-attorney plaintiffs might well fear incidental surveillance under other statutes requiring minimization, such as Title III or pre-FAA FISA provisions—the second of the majority's five factors.

Amendment." 133 S. Ct. at 1150. Because of this, the Court felt the likelihood that the *Amnesty* attorney plaintiffs—all of whom were U.S. persons[13]—would be subject to incidental surveillance when their foreign contacts were targeted was minimal.[14]

The FAA was carefully designed to allow some amount of judicial examination of minimization procedures and to contain other key features that would undermine fundamental elements of standing claims like those deployed in the CCR and ACLU challenges to the NSA Program. Indeed, the FAA's provisions seem intentionally structured so as to undercut the strongest potential chilling effect standing claims that would otherwise exist: those of attorneys engaged in national security litigation against the government. The fact that the FAA lies at the tail end of a series of Bush Administration responses to the present litigation, adding a number of standing-undermining features to the initial round of FISA amendments

[13] All the individual plaintiffs in *Amnesty* (and all the plaintiffs' declarants in the cross-summary judgment motions) were United States persons. There were U.S.-based organizations included among the plaintiffs, and obviously some of their membership or staff may have been non-U.S. persons.

[14] The first, fourth and fifth speculative factors the majority listed were (1) that the government would choose to target and (4) intercept the communications of the foreign contacts of the *Amnesty* plaintiffs, and (5) that the *Amnesty* plaintiffs' communications would be *incidentally* intercepted as a result. *See* 133 S. Ct. at 1148. (Since they were U.S. persons, the plaintiffs' communications could not have been targeted *directly* under the FAA.)

Congress enacted in 2007,[15] simply reinforces that impression. If one goal of the FAA's drafters was to avoid ever exposing actual surveillance practices under the FAA to litigation,[16] the *Amnesty* decision is a sign that they succeeded, but this should serve to reinforce for this Court how important it is that those carefully-placed features of the FAA were entirely absent from the NSA Program.

**B. The Panel Erred In Assessing the Risk of Harm Faced by Plaintiffs in This Case**

The panel acknowledged the force of these arguments, noting that Plaintiff-Appellants "might have a slightly stronger basis for fearing interception" because of the lack of any judicial review under the NSA Program. Op. at 3. However, the panel claimed that, "[l]ike the *Amnesty Int'l* plaintiffs, the CCR plaintiffs 'have no actual knowledge of the government's…targeting practices.'" *Id.* That is simply untrue: public statements of executive branch officials described the NSA Program as narrowly targeted at *exactly* the type of communications Plaintiff-Appellants in the instant case routinely engaged in in their work, namely, one-end international calls and emails where the government believed one party to the communication

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[15] The Protect America Act of 2007 (PAA) is described in our Opening Brief at 17-18. Among its other differences from the FAA, the PAA did not provide for judicial review of minimization procedures, or indeed for *any* routine, *ex ante* judicial review of these programs of surveillance. *See* § 105B, Protect America Act, Pub. L. 110-55, 110 Stat. 552, 553 (Aug. 5, 2007).

[16] Except in those rare instances where the government chose to introduce FAA surveillance (and admitted it was acquired under FAA) in a criminal case against a defendant. *Cf. Amnesty*, 133 S. Ct. at 1154.

had some link to terrorism.[17] So, even assuming that the FAA allows for surveillance as broad as that described by the *Amnesty* plaintiffs,[18] the Supreme Court found that the many safeguards the statute put in place—judicial review ensuring that "targeting and minimization procedures comport with the Fourth Amendment"[19]—rendered it unlikely that the plaintiffs, all U.S. based individuals or organizations, would be injured by surveillance that complied with the FAA's statutory requirements (which included that the surveillance could not intentionally target U.S persons, even when outside the U.S.).[20] In contrast, here the government circumvented resort to the courts entirely, and the NSA was admittedly directing the Program's surveillance at the communications of the small universe of people suspected of links to terrorism with the equally small universe of U.S. persons who speak to them. It hardly requires a "highly attenuated chain" of "speculative…possibilities"[21] for Plaintiff-Appellants' contingent harms to be realized.

Finally, the panel erred in concluding that here "the asserted injury relies on a different uncertainty not present in *Amnesty Int'l*, namely, that the government

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[17] *See* Opening Br. at 9-12 (detailing government's *admitted* criteria for interception).

[18] They claimed, for example, that a single FAA authorization could cover "[a]ll telephone and e-mail communications to and from countries of foreign policy interest – for example, Russia, Venezuela, or Israel – including communications made to and from U.S. citizens and residents." *Amnesty*, 638 F.3d at 126 (quoting from plaintiffs' pleadings).

[19] *Amnesty*, 133 S. Ct. at 1150.

[20] *See Amnesty*, 133 S. Ct. at 1142 n.1 (citing 50 U.S.C. § 1881a).

[21] *Amnesty*, 133 S. Ct. at 1148, 1150; Op. at 2 (quoting same).

retained 'records' from any past surveillance it conducted under the [NSA Program]." Op. at 3. As Plaintiff-Appellants noted in their Opening Brief, at 4 n.3, "there is ample evidence in the record that the NSA Program, in general, involved retention of records," including a statement from a press conference in which Deputy DNI Michael Hayden described the process for redacting and passing on to other agencies records collected by the Program.[22]

## II. THE PANEL'S INTERPRETATION OF THE *AMNESTY* DECISION CONFLICTS WITH A PRIOR DECISION OF THIS COURT

This Circuit has already addressed the impact of the *Amnesty* decision in the context of a pre-enforcement challenge to California election code provisions that restrict who may gather nomination signatures in a given district to local residents, on pain of criminal sanctions. *See Libertarian Party of L.A. County v. Bowen*, 709 F.3d 867 (9th Cir. 2013). This Court did not find that the *Libertarian Party* plaintiffs needed to show that the risk of injury from enforcement of the challenged rule against them and imposition of sanctions was "certain" to happen, only that it was "based on an actual and well-founded fear." *Id*. at 870; *id*. at 870 n.3 ("The Supreme Court's recent decision in *Clapper v. Amnesty International USA*, No. 11-1025, 133 S. Ct. 1138…, does not change our analysis. Unlike in [*Amnesty*], Plain-

[22] *See Press Briefing*, Ex. 7 to Affirmation of William Goodman (Mar. 8, 2006), Dkt. 16-4; *see also* Walter Pincus, *NSA Gave Other U.S. Agencies Information From Surveillance*, WASH. POST. (Jan. 1, 2006) at A08 (detailing admissions that NSA created reports of surveillance and shared records with FBI, DIA, CIA and DHS).

tiffs' fear of enforcement here is actual and well-founded and does not involve a 'highly attenuated chain of possibilities.' [*Id*. at 1148]").

In the district court in *Amnesty*, the government made a similar argument to the one rejected by this Court in *Libertarian Party*: that only "'a threat of imminent enforcement'" would suffice. *See Amnesty Int'l USA v. McConnell*, 646 F. Supp. 2d 633, 645 (S.D.N.Y. 2009) (quoting gov't briefs). But the Supreme Court could not have meant to say (as the district court did in the instant case) that certainty was a requirement. What caused the *Amnesty* plaintiffs' claims to fail was not that only *certain* enforcement could produce standing. (If so, this Court would have come to the opposite result in *Libertarian Party*.) Instead, they failed because the Supreme Court found that the chain of events that had to occur to produce injury was *highly unlikely* to happen. It was highly unlikely to happen because the statutory scheme exempted U.S. persons like the *Amnesty* plaintiffs from being direct targets, and because a FISC judge would have ensured compliance with that statutory mandate and the requirement to implement Fourth-Amendment compliant minimization standards, which would (at minimum) protect any legally privileged communications from interception and retention.[23]

[23] *See* Opening Br. at 49 nn.58, 59 (citing cases that hold that minimization is a constitutional requirement, and cases that hold that minimization mandate must extend at a minimum to protection for privileged communications).

In contrast, the NSA Program was admittedly outside of the scope of the "exclusive means"[24] Congress had carefully provided for electronic surveillance in Title III and FISA. The Program was not only unauthorized but *criminalized* by Congress. The NSA carried it out in a manner entirely unsupervised by courts, and directed it at a narrowly targeted class of communications that overlaps closely with Plaintiff-Appellants' legally privileged communications.

## III. THIS CASE PRESENTS A MATTER OF EXCEPTIONAL IMPORTANCE

Parties seeking to challenge unlawful government surveillance programs face a Catch-22: Where there is direct proof of illegal surveillance, the government will assert that the proof is secret and therefore inadmissible in litigation (even where it was released through government negligence).[25] Where there is no direct proof that individuals have been subjected to actual surveillance, under the panel decision no chilling-effect injury will be deemed sufficient to maintain standing. It matters not how sensitive those individuals' communications are (attorneys with clients, human rights investigators with victims, journalists with sources), whether those communications are legally privileged, or whether the program of surveillance in question is nominally lawful (having been approved by Congress and reviewed by an Article III court) or patently lawless and lacking any judicial supervi-

[24] 18 U.S.C. § 2511(2)(f) (2006) (stating that FISA and Title III shall be the "*exclusive* means by which electronic surveillance ... and the interception of domestic wire, oral, and electronic communications may be conducted.").

sion or judicially-supervised minimization to protect those privileged communications (like the NSA Program).

That is illustrated by the panel decision here, which, like the district court decision, effectively demanded that the chilling effect asserted here was motivated by Plaintiffs' certainty that they were surveillance targets. That could not have been the point of the Supreme Court's opinion in *Amnesty*, which goes out of its way to note that it does not disturb settled law and was not premised on the fact that the plaintiffs fell short of demonstrating with absolute certainty that they would be surveilled under the FAA. The fact that the NSA now has direct access to the servers of Microsoft, Google, Apple, and other major communication service providers such that it is able to "'watch your ideas form as you type,'"[26] or that the federal government records and stores a complete log of the phone calls of nearly

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[25] *See, e.g.*, *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190 (9th Cir. 2007).

It should be noted that secrecy is not implicated by the relief Plaintiff-Appellants seek here, which at this stage is primarily an order of expungement mandating that the government destroy any records of Plaintiff-Appellants' communications that were acquired through the NSA Program, and certify to the district court that it has in fact destroyed *any such records as may exist*. (*See* Opening Br. at 51-54.) That relief is extremely plaintiff-specific (especially in comparison to the broad injunctive relief sought in *Amnesty*), does not threaten the exposure of any secrets (either directly or indirectly), and would grant Plaintiff-Appellants significant redress.

[26] Barton Gellman & Laura Poitras, *U.S., British intelligence mining data from nine U.S. Internet companies in broad secret program*, WASH. POST (Jun. 6, 2013).

all Americans,[27] might be irrelevant under the panel's reading of the law, as even the fears of attorneys engaged in national security litigation of international scope against the federal government may be found "too speculative" to generate avoidance costs that could underlie standing. The government, which vigorously claims its current policies are lawful and constitutional, would then be able to deny the judicial branch an opportunity to opine on these critical legal questions when presented by plaintiffs who have the strongest of reasons to fear official surveillance.

Seven years after the initial disclosures that spawned this litigation, the seeming futility of attempts to debate the legality of surveillance in the courts has led to that debate being removed to the only remaining open forum available—the press—through the intervention of whistleblowers. The current vitality of that debate demonstrates the exceptional importance of the question before this Court.

## CONCLUSION

For the foregoing reasons, Plaintiff-Appellants respectfully request that this Court vacate the panel's opinion and rehear their appeal, either before the panel or in the alternative before the Court sitting *en banc*.

/s/ Shayana Kadidal
Shayana Kadidal
Rachel E. Lopez
Baher Azmy

[27] Glenn Greenwald, *NSA collecting phone records of millions of Verizon customers daily*, THE GUARDIAN (June 5, 2013).

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*Attorneys for Plaintiff-Appellants*

Dated: July 25, 2013

## CERTIFICATE OF COMPLIANCE

I hereby certify that this supplemental brief is in compliance with Rule 32(a)(7) of the Federal Rules of Appellate Procedure and Circuit Rule 40-1(a). The brief was prepared in 14-point Times New Roman font using Microsoft Word 2010 and contains 4,170 words according to the word count feature of that software.

/s/ Shayana Kadidal
Shayana Kadidal
*Attorney for Plaintiff-Appellants*

Dated: July 25, 2013

**CERTIFICATE OF RELATED CASES**

Counsel is aware of no related cases currently before this Court.[28]

/s/sdk
Shayana Kadidal
*Attorney for Plaintiff-Appellants*

[28] There are two cases arising out of the NSA Program, and coordinated with the instant case as part of the multidistrict litigation in the district court, currently pending in the district court after remand from decisions of this Court: *Jewel v. NSA*, N.D. Cal. No. C 08-4373 JSW, on remand per this Court's decision in 9th Cir. No. 10-15616, and *Shubert v. Obama*, N.D. Cal. No. C 07-693 JSW, on remand per this Court's decision in 9th Cir. No. 10-15638.

## 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 July 25, 2013.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/Shayana Kadidal
Shayana Kadidal
*Attorney for Plaintiff-Appellants*

## PANEL OPINION

FILED

JUN 10 2013

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: NATIONAL SECURITY AGENCY TELECOMMUNICATIONS RECORDS LITIGATION,

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CENTER FOR CONSTITUTIONAL RIGHTS; TINA M. FOSTER; GITANJALI S. GUTIERREZ; SEEMA AHMAD; MARIA LAHOOD; RACHEL MEEROPOL,

Plaintiffs - Appellants,

v.

BARACK OBAMA, President of the United States; NATIONAL SECURITY AGENCY, Ltg. Keith B. Alexander, Director; DEFENSE INTELLIGENCE AGENCY, Ltg. Ronald L. Burgess, Jr., Director; CENTRAL INTELLIGENCE AGENCY, Leon Panetta, Director; DEPARTMENT OF HOMELAND SECURITY, Janet Napolitano, Secretary; FEDERAL BUREAU OF INVESTIGATION, Robert S. Mueller III, Director; JAMES R. CLAPPER, Director of National Intelligence,

No. 11-15956

D.C. No. 3:06-md-01791-VRW
Northern District of California,
San Francisco

MEMORANDUM*

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Defendants - Appellees.

Appeal from the United States District Court
for the Northern District of California
Vaughn R. Walker, District Judge, Presiding

Submitted June 3, 2013[**]
San Francisco, California

Before: PREGERSON, HAWKINS, and McKEOWN, Circuit Judges.

The Center for Constitutional Rights (CCR) appeals the district court's dismissal on standing grounds of its suit challenging the National Security Agency's program of warrantless surveillance, referred to as the Terrorist Surveillance Program (TSP), which ended in 2007. We have jurisdiction under 28 U.S.C. § 1291 and, reviewing de novo, we affirm.

The Supreme Court in *Clapper v. Amnesty Int'l*, 133 S. Ct. 1138 (2013), addressed a substantially similar challenge to surveillance conducted under the Foreign Intelligence Surveillance Act Amendments Act of 2008, 50 U.S.C. § 1881a. The Court held the plaintiffs lacked standing because they could not demonstrate that they were injured by the Act. Of the five steps that the Court identified in the "highly attenuated chain" of alleged injury there, *Amnesty Int'l*, 133 S. Ct. at 1148, four of them apply to CCR's challenge. The plaintiffs here

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

"fear that: (1) the Government [decided] to target the communications of non-U.S. persons with whom they communicate; (2) in doing so, the Government [chose] to [utilize the TSP] rather than utilizing another method of surveillance . . . (4) the Government [succeeded] in intercepting the communications of [their] contacts; and (5) [plaintiffs were] parties to the particular communications that the Government intercept[ed]." *Id.* Like the *Amnesty Int'l* plaintiffs, the CCR plaintiffs "have no actual knowledge of the Government's . . . targeting practices." *Id.*

One link in the speculative chain is inapplicable here: the fear that "(3) the Article III judges who serve on the Foreign Intelligence Surveillance Court [FISC] will conclude that the Government's proposed surveillance procedures satisfy § 1881a's many safeguards and are consistent with the Fourth Amendment." *Id.* Although CCR might have a slightly stronger basis for fearing interception because of the lack of FISC involvement, CCR's asserted injury relies on a different uncertainty not present in *Amnesty Int'l*, namely, that the government retained "records" from any past surveillance it conducted under the now-defunct TSP. In sum, CCR's claim of injury is largely factually indistinguishable from, and at least as speculative as, the claim rejected in *Amnesty Int'l*.

**AFFIRMED.**