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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# SUPPLEMENTAL BRIEF OF PLAINTIFF-APPELLANTS

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Plaintiff-Appellants submit this supplemental brief in response to this Court's order of May 13, 2013, directing the parties "to submit supplemental briefs … on the effect of the Supreme Court's recent decision in *Clapper v. Amnesty Int'l*, No. 11-1025, [133 S. Ct. 1138 (Feb. 26, 2013) (hereinafter "*Amnesty*")] on this appeal."

## ARGUMENT

The FISA Amendments Act of 2008 (FAA) is the more recent of a pair of major amendments to the original FISA regime passed into law since (and likely as an indirect result of) the initiation of this lawsuit and a companion case. *See* Opening Br. at 17-19 (describing chronology). "On July 10, 2008, the same day Congress enacted the FAA"[1] and the President signed it into law, the ACLU filed the complaint in *Amnesty* challenging the constitutionality of the new statute.

The FAA is in essence a statute designed to enable judicial approval for whole programs of surveillance (in sharp contrast to the particularized warrants that had been the norm for judicial surveillance orders since the passage of Title III in 1968 in the wake of *Katz v. United States*, 389 U.S. 347 (1967)). Under the FAA, the government must obtain the approval of a Foreign Intelligence Surveillance Court (FISC) judge for a certification the government submits to the FISC, describing the program of surveillance contemplated, the targeting procedures for

[1] *Amnesty Int'l USA v. Clapper*, 638 F.3d 118, 126 (2d Cir. 2011).

such surveillance, and the minimization procedures that will be applied. *Amnesty*, 133 S. Ct. at 1145. Moreover, according to the majority, the FAA requires the FISC judges to ensure that these minimization procedures comport with the requirements of the Fourth Amendment, *id*. at 1145, 1145 n.3, meaning they must protect against the interception and retention of (*inter alia*) legally-privileged communications.[2]

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 sufficient to ground standing under existing precedent. *Id*. at 1143. The Supreme Court held that, on the facts before it, the likelihood that the plaintiffs' communications would be subject to FAA surveillance was simply too remote, ultimately resting on a "speculative chain of" contingencies that the Court found unlikely to happen: (1) that the government would choose to target people the *Amnesty* plaintiffs routinely communicated with overseas, (2) that it would seek out and (3) actually obtain appropriate court orders, and (4) that it would manage to intercept the communications of the targets of those orders (which could not intention-

[2] *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).

ally target U.S. persons per the terms of the statute[3]) *and* (5) incidentally intercept the communications of the *Amnesty* plaintiffs themselves as a result (despite the FISC judges' mandate to ensure Fourth Amendment-compliant minimization standards were in place), *see* 133 S. Ct. at 1149-50 The Court perceived the odds that all these things would happen—thus resulting in the feared injury, interception of plaintiffs' confidential and sensitive communications—as inherently low, especially given that all the individual plaintiffs (and all the plaintiffs' declarants in the cross-summary judgment motions) were United States persons.[4]

In rejecting this first theory, the Court concluded by stating that the facts did "not establish that injury based on potential future surveillance is certainly impending," *id.* at 1150, but immediately 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." *Id*. at 1150 n.5. "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." *Id*.

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

[4] 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.

The *Amnesty* plaintiffs' second, alternative theory of standing is more relevant to the instant case: they "maintain[ed] that the risk of surveillance under [the FAA] is 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 it as to the *Amnesty* plaintiffs' FAA challenge because, again, the threat posed by FAA surveillance was simply too speculative. *Id*. at 1148 ("highly speculative"), 1150 ("speculative chain of possibilities"), 1151 ("speculative threat").

In doing so, the Court said "the harm [the *Amnesty* plaintiffs] seek to avoid is not certainly impending." Again, this term "certainly impending" must be read in light of the Court's footnote 5, described above, equating "certainly impending" with "a 'substantial risk' that the harm will occur," and clarifying that the announced standard does not require "that it is literally certain" that the feared government action will come to pass. *Id*. at 1150 n.5.[5] Supporting this interpretation is the fact that the majority counterposes "certainly impending" to what it character-

[5] The standard the District Court applied to our claims in the instant case was, in fact, absolute certainty that surveillance had occurred—clearly an incorrect standard in the wake of the *Amnesty* decision. *Cf. Amnesty*, 133 S. Ct. at 1160 (Breyer, J., dissenting) ("as the majority appears to concede … *certainty* is not, and never has been, the touchstone of standing").

izes as the extremely permissive standard applied by the Second Circuit panel: "allow[ing plaintiffs] to establish standing by asserting that they suffer present costs and burdens that are based on a fear of surveillance, so long as that fear is not '*fanciful, paranoid*, or otherwise unreasonable.'" 133 S. Ct. 1151 (quoting panel decision, 638 F.3d at 134 (emphasis added); *id*. (approvingly quoting Judge Raggi's rehearing *en banc* dissent characterization of the panel standard as "not fanciful, irrational, or clearly unreasonable."); *id*. at 1147 ("'[a]llegations of '*possible*' future injury' are not sufficient" (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990))).

* * *

On its face none of this is inconsistent with the standing arguments made by Plaintiff-Appellants in their merits briefs here. The *Amnesty* Court does not purport to be remaking the existing standing requirements, but rather providing a gloss[6] on

[6] *Cf. Amnesty*, 133 S. Ct. at 1160-61 (Breyer, J., dissenting) ("Sometimes th[is] Court has used the phrase 'certainly impending' as if the phrase described a *sufficient*, rather than a *necessary*, condition for jurisdiction. [citing *Babbitt v. UFW Nat'l Union*] … On other occasions, it has used the phrase as if it concerned *when*, not *whether*, an alleged injury would occur. [citing *Lujan v. Defenders of Wildlife*; *McConnell v. FEC*]… On still other occasions [it has used] phrases such as 'reasonable probability' …. Taken together the case law uses the word 'certainly' as if it emphasizes, rather than literally defines, the immediately following term 'impending.'"); *id*. at 1164 (noting that no prior cases "use the words 'certainly impending' to *deny* standing").

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 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)). Ultimately, "speculation" is the most damning of the many terms the Court uses to explain its conclusion: The Court found that the odds that the "speculative chain of" contingencies (leading from the new statute to the asserted harms) would happen were not close to being "so substantial" that it could render the plaintiffs' chilling-effect injuries "fairly traceable" to the FAA. *Id*. at 1146.

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 is obvious. Whereas the Court in *Amnesty* took pains to point out at length 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 1146-47, in the instant case Plaintiff-Appellants challenge a program of surveillance car-

[7] 133 S. Ct. at 1147 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 565 (1992).

ried 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 is 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," as we described it in our Opening Brief, at 38. In the Supreme Court's evaluation, all of this diminished the chances of interception of the *Amnesty* plaintiffs' communications.

Perhaps the most important difference between the cases is the fact that there were no judicially-supervised minimization standards applied under the NSA Pro-

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[8] *Cf.* Opening Br. at 5-7 (describing "exclusive means" clause). It remains the case, remarkably, that the current administration has not offered any defense of the legality of the NSA Program. *Cf. id*. at 40, 40 n.45.

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

gram to protect legally-privileged communications from interception and retention. *See* Opening Br. at 48-51. 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. 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 Amendment." 133 S. Ct. at 1150.

One might well presume from the careful design of these provisions—allowing some amount of judicial examination of minimization procedures and containing other key features that would undermine fundamental elements of the standing claims like those in the original January 2006 CCR and ACLU challenges to the NSA Program—that the FAA was 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, *see* Opening Br. at 17-19, adding a number of standing-undermining features to the original set of FISA amendments in the 2007 Protect America Act,[10] 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,[11] 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.[12]

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[10] The Protect America Act of 2007 (PAA) is described briefly 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, contemporaneous judicial review of these programs of surveillance. *See* § 105B, Protect America Act, Pub. L. 110-55, 110 Stat. 552, 553 (Aug. 5, 2007). Instead, surveillance programs could be authorized for one-year periods upon certification by the DNI and Attorney General. Copies of such certifications were to be transmitted to the FISC, but only reviewed by the FISC judges if some other judicial proceeding demanded a determination of whether the PAA's requirements had been complied with. *See* Proposed Supplemental Complaint, Dkt. 19-1, *CCR v. Bush*, No. 3:07-1115 (N.D. Cal. Aug. 10, 2007).

[11] Except, of course, in those rare instances where the government chose to introduce intelligence in a criminal case against a defendant. *Cf. Amnesty*, 133 S. Ct. at 1154.

[12] In the course of ruling that the *Amnesty* plaintiffs did have standing, the Second Circuit panel expressed a very skeptical view of the FAA's minimization procedures, seemingly because of its presumption that the Fourth Amendment typically requires ongoing (as opposed to *ex ante*) judicial supervision of compliance with such procedures, and that ongoing review, the panel believed, was simply not available under the FAA. *See Amnesty*, 638 F.3d at 125-26; *see also id*. at 138 n.21; *but see id*. at 126 n.8 (indicating government was elusive as to exact parame-

The government's 28(j) letter regarding the *Amnesty* decision (Dkt. 37-1 (filed Mar. 13, 2013), at 2) claimed that the *Amnesty* plaintiffs' fears of interception should have been stronger than Plaintiff-Appellants' because the surveillance potentially authorized under the FAA is "considerably broader" that that under the NSA Program. But the limited scope of the NSA Program actually undercuts the government's argument. Plaintiff-Appellants here are part of a very small group of individuals who work on international terrorism cases against the government.[13] The NSA Program was described in the public statements of executive branch officials 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 had some link to terrorism.[14] So, even assuming that the FAA al-

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ters of review under FAA). The four justices joining the dissent in the Supreme Court opinion seemed to share this skepticism, *see, e.g.*, 133 S. Ct. at 1156 (Breyer, J., dissenting) prompting a responsive footnote in the majority opinion. *See* 133 S. Ct. at 1145 n.3 ("the dissent does not directly acknowledge that [FAA] surveillance must comport with the Fourth Amendment … and that the Foreign Intelligence Surveillance Court must assess whether targeting and minimization procedures are consistent with the Fourth Amendment.") Again, all of this simply underscores the importance of these factors, particularly the presence or absence of judicially-reviewed minimization, to the standing determination in cases like these.

[13] *Cf*. Opening Br. at 40 n.46.

[14] *See* Opening Br. at 9 (describing government's admitted criteria for interception); *id*. at 10-12 (detailing evidence that attorneys were surveilled under NSA Program); *id*. at 12 (fears leading to filing of this lawsuit were triggered by the fact that NSA Program "primarily targeted exactly the sorts of privileged phone calls

lows for surveillance as broad as that described by the *Amnesty* plaintiffs,[15] 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"[16]—rendered it unlikely that the plaintiffs, all U.S. based individuals or organizations,[17] 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.).[18] In contrast, here the NSA Program allowed the government to avoid resort to the courts,[19] 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

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and emails regularly engaged in by Plaintiffs in the course of their work with clients, family members of clients, witnesses, and co-counsel located overseas").

[15] For example, they claimed 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).

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

[17] *See* Complaint, *Amnesty Int'l USA v. McConnell*, No. 08-6259 (S.D.N.Y. Jul. 10, 2008), at ¶¶ 6-18, *available at* http://www.aclu.org/files/pdfs/natsec/ amnesty/07_10_2008_Complaint.pdf.

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

[19] Or for that matter Congress: *see* Opening Br. at 10 n.15 (quoting Attorney General, who admitted that administration did not ask Congress to alter FISA's terms to legislatively validate the NSA Program because they knew such changes would not be approved).

chain" of "speculative … possibilities"[20] for Plaintiff-Appellants' contingent harms to be realized.

* * *

This Circuit has already addressed the impact of the Supreme Court 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. Mar. 6, 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. By "well-founded" this Court meant simply that those fears were not "speculative" in the sense the Supreme Court found the chain of contingencies leading to injury in *Amnesty* to be excessively speculative: too many unlikely things needed to happen in order for the harm to come about. *See 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 *Clapper*, Plaintiffs' fear of enforcement here is actual and well-founded and does not involve a 'highly attenuated chain of possibilities.' [*Id*. at 1148]").

[20] *Amnesty*, 133 S. Ct. at 1148, 1150.

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.[21]

In contrast, the NSA Program was admittedly outside of the scope of the "exclusive means"[22] Congress had carefully provided for electronic surveillance in Title III and FISA. Such surveillance was not only unauthorized, it was *criminalized* by Congress. The NSA carried out this surveillance in a manner entirely unsu-

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21 *See supra* note 2.

22 *Cf.* Opening Br. at 5-7 (describing "exclusive means" clause).

pervised by courts, and directed it at a narrowly targeted class of communications that overlaps closely with our legally privileged communications.

Of course, the relief requested in *Amnesty* was also broader than the minimal relief requested here. Whereas the *Amnesty* plaintiffs sought facial invalidation of the FAA statute and "a permanent injunction"[23] "prohibiting the government from conducting surveillance under the FAA,"[24] the relief Plaintiff-Appellants here request is narrowly cabined. The primary relief we seek at this stage is an order of expungement mandating that the government destroy any records of Plaintiff-Appellants' communications that were acquired through the warrantless surveillance program that is the subject of this action, or were the fruit of such surveillance, and certify to the district court that it has in fact destroyed any such records as may exist. *See* Opening Br. at 51-52, 52-54. 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.

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[23] 133 S. Ct. at 1146.

[24] *Amnesty Int'l USA v. Clapper*, 638 F.3d at 140 n.24; *id*. at 127 (plaintiffs "sought declaratory and injunctive relief, alleging that the FAA facially violates the Fourth Amendment, the First Amendment, Article III of the Constitution, and the principle of separation of powers")

## CONCLUSION

For the reasons stated above, this Court should reverse the ruling of the district court and remand for further proceedings on the merits.

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## 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. The brief was prepared in 14-point Times New Roman font using Microsoft Word 2010 and is under the 15 page limit set by this Court's order of May 13, 2013, mandating the filing of supplemental briefs.

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Dated: April 26, 2013

## 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 April 26, 2013 (PDT).

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

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