No. 15-16133

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CAROLYN JEWEL, ET AL.,

Plaintiffs-Appellants,

v.

NATIONAL SECURITY AGENCY ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of California
4:08-cv-04373-JSW
Honorable Jeffrey S. White

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned states that National Association of Criminal Defense Lawyers does not have a parent corporation, and no publicly held corporation owns 10% or more of its stock.

DATED: August 11, 2015

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CERTIFICATE OF COMPLIANCE WITH RULE 29(C)(5)

Counsel for the parties did not author this brief in whole or in part. The parties have not contributed money intended to fund preparing or submitting the brief. No person other than Amicus Curiae or its counsel contributed money to fund preparation or submission of this brief.

DATED: August 11, 2015

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IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus National Association of Criminal Defense Lawyers ("NACDL") was founded in 1958 as a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. Direct national membership stands at over 10,000 attorneys, in addition to more than 40,000 affiliate members from all 50 states. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. It is also the only nationwide professional bar association for public defenders and private criminal defense lawyers, and the American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates. As part of its mission, NACDL files numerous amicus briefs each year in the United States Supreme Court and other courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

Many of NACDL's members are, or represent, people like the Plaintiffs: people who have had their Internet communications seized and searched by the government when passing through AT&T's network.

NACDL therefore submits this amicus brief to amplify to the Court that when the Fourth Amendment is violated on the scale by

which the government is currently violating it, it is not violated in a vacuum. Although Plaintiffs here seek to vindicate the violation of their Fourth Amendment rights, the government's seizure and search of their communications simultaneously undermines their Fifth Amendment right against self-incrimination and the Sixth Amendment right to counsel, each of which is inherently compromised through the wholesale collection of the Plaintiff class's communications. The three rights are inextricably intertwined, and they stand or fall together.

CONSENT OF THE PARTIES

Counsel for Appellants consented to the filing of this brief. Counsel for Appellees took no position. Amicus Curiae's motion for leave to file this Amicus Brief is filed concurrently herewith.

I. SUMMARY OF ARGUMENT

This case is about the wholesale, warrantless collection of people's communications made through the AT&T Internet network without their knowledge, consent, or even any individualized suspicion. As Plaintiffs argue, this dragnet surveillance represents an unconstitutional search and seizure prohibited by the Fourth Amendment. It is not, however, simply a general privacy interest that is undermined by this surveillance. Other privacy interests incorporated in other amendments are similarly undermined. In particular, the Fifth Amendment right against self-incrimination is undermined when the government can simply help itself to the full breadth and substance of people's communications. Similarly, the Sixth Amendment right to counsel—and the secrecy it depends on—is also undermined when the government can insert itself in the flow of otherwise private communications between lawyer and client.

Amicus agrees with Plaintiffs that the district court erred in dismissing Plaintiffs' Fourth Amendment claim. The undisputed evidence shows that this warrantless communications collection is occurring. That the government might wish to shield the details from view with evidence spoliation or unfounded claims of state secret privilege should be immaterial. The very design of this surveillance program's operation, indiscriminately collecting and analyzing people's communications without any particularized suspicion, means that

severe constitutional injury must be presumed. When balancing the fear of the government that its secrets be known to the people versus the fear the people have of their secrets being known to the government, the Constitution makes clear that the latter interest far outweighs the former, and for good reason.

II. ARGUMENT

A. Indiscriminately seizing and searching communications violates the Fifth Amendment.

Violating Plaintiffs' Fourth Amendment right by seizing and searching all of their communications constitutes a violation of their Fifth Amendment right against self-incrimination. The Fifth Amendment guarantees that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself, . . ." U.S. Const., amend. V. "To qualify for Fifth Amendment privilege [against self-incrimination], a communication must be testimonial, incriminating, and compelled." *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 189 (2004). Furthermore, "[t]his is a privilege available in investigations as well as in prosecutions." *In re Groban*, 352 U.S. 330, 333 (1957). "It can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against *any disclosures* that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972) (emphasis

added and footnote omitted).[1] Thus having the entirety of a person's communications secretly snatched from him, seized by the government to be searched for inculpatory significance to be used against him, falls directly in the crosshairs of the sort of testimonial compulsion the Constitution expressly forbids.

The privilege against self-incrimination "is an exception to the general principle that the Government has the right to everyone's testimony." *Salinas v. Texas*, 133 S. Ct. 2174, 2179, ___ U.S. ___ (2013) (citing *Garner v. United States*, 424 U.S. 648, 658 n.11 (1976)). The

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[1] Despite this precedent, in a fractured decision the Supreme Court held in dicta that no Fifth Amendment violation sufficient to support a claim under 42 U.S.C. § 1983 could be found if the testimony obtained under duress had not actually been used against the plaintiff. *Chavez v. Martinez*, 538 U.S. 760, 770 (2003). Here, however, no member of the Plaintiff class can be assured that their captured communications have not been, nor ever will be, used against them. In fact, that the government sought to obtain all these communications *en masse* to search for evidence of malfeasance suggests that such a presumption would be unfounded. See discussion *infra* Section II.C. In any case, even the *Chavez* court recognized that the plaintiff's substantive due process rights might nonetheless have been violated in other ways. *Id.* at 789-90. Furthermore, as Justice Kennedy observed, "[o]ur cases and our legal tradition establish that the Self-Incrimination Clause is a substantive constraint on the *conduct* of the government, not merely an evidentiary rule governing the work of the courts. . . . The Clause provides both assurance that a person will not be compelled to testify against himself in a criminal proceeding and *a continuing right against government conduct intended to bring about self-incrimination*." *Id.* at 791 (Kennedy, J., dissenting) (emphases added).

privilege exists to preserve an adversarial system of criminal justice. *Garner*, 424 U.S. at 655-56; *see also Tehan v. United States ex rel. Shott*, 382 U. S. 406, 415 (1966). "That system is undermined when a government deliberately seeks to avoid the burdens of independent investigation by compelling self-incriminating disclosures." *Garner*, 424 U.S. at 655-656; *cf. Riley v. California*, 573 U.S. __, 134 S. Ct. 2473, 2493 (2014) ("Our cases have historically recognized that the warrant requirement is an 'important part of our machinery of government,' not merely an 'inconvenience to be somehow weighed against.'") (citation and third internal quotation marks omitted). By seizing and searching all the communications belonging to all members of the class in order to discover inculpatory information, the government is doing exactly what the Supreme Court in *Garner* warned against.

Although it has long been settled that the privilege "generally is not self-executing" and that a witness who desires its protection "must claim it," *Salinas*, 133 S. Ct. at 2178 (referencing *United States v. Monia*, 317 U.S. 424, 427, 63 S. Ct. 409 (1943)), the need to claim the privilege exists only when a person is in the position of voluntarily giving testimony. *Garner*, 424 U.S. at 644-645 (citing *Monia*, 317 U.S. at 427). The clandestine means by which the government obtains these communications denies everyone in the Plaintiff class any opportunity to claim the privilege. It also means there is nothing voluntary about their surrendering of their testimony to the government. The

government's secret collection from AT&T is happening without their knowledge, much less their permission.

The Supreme Court has long held that when the disclosure of one's testimony is involuntary there is no requirement to invoke expressly one's testimonial privilege. *Salinas*, 133 S. Ct. at 2180 (citing *Miranda v. Arizona*, 384 U.S. 436, 467-68 and n.37, 86 S. Ct. 1602 (1966)). *See also id.* (citing *Garrity v. New Jersey*, 385 U.S. 493, 497, 87 S. Ct. 616 (1967) (involuntary nature of requiring testimony in order to retain public employment); *Lefkowitz v. Cunningham*, 431 U.S. 801, 802-804, 97 S. Ct. 2132 (1977) (involuntary nature of requiring testimony as a condition for public office); *Lefkowitz v. Turley*, 414 U.S. 70, 84-85, 94 S. Ct. 316 (1973) (involuntary nature of requiring testimony to obtain public contracts)). "The principle that unites all of [these] cases is that a witness need not expressly invoke the privilege where some form of official compulsion denies him a 'free choice to admit, to deny, or to refuse to answer.'" *Salinas*, 133 U.S. at 1280, 96 S.Ct. 1178 (quoting *Lisenba v. California*, 314 U.S. 219, 241, 62 S. Ct. 280 (1941)).

At no time have members of the Plaintiffs' class had the opportunity to make the choice to admit, deny, or refuse to divulge any testimonial information to the government. *See Miranda*, 384 U.S. at 444 ("The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently."). At no

time were members of the Plaintiffs' class ever warned, *see id.* at 479, that they had a choice to remain silent—even assuming that, in this day and age, abstaining from using a major communications network like AT&T were a viable option to begin with.[2] Instead, that choice was taken from them when the government surreptitiously helped itself to the entirety of their communications passing through AT&T's network. This makes the coercion here particularly insidious, because it was simply the class members' ordinary use of the AT&T network to facilitate their communications that provided the government the lever to extract from them all the testimonial information it could want to use against them.[3]

B. Indiscriminately seizing and searching communications violates the Sixth Amendment.

Violating Plaintiffs' Fourth Amendment right by seizing and searching all of their communications constitutes a violation of the

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[2] The Plaintiff class only includes current or past residential subscribers or customers of AT&T's telephone services or Internet services. ER 299 ¶ 99. However the rights of people outside the class who communicated with those within it are also implicated by the surveillance at issue in this case.

[3] That the government might choose to retain only a subset of the communications it seized and searched is irrelevant. *See* Pls.' Mot. Partial Summ. J. at 8-9, ECF No. 261. What is relevant is that it had every single communication made over AT&T's network to choose from, having seized them all.

Sixth Amendment right to counsel. The Sixth Amendment guarantees the right to counsel. U.S. Const., amend VI ("In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence."). The Supreme Court has interpreted this provision to grant the right to "effective" assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771 (1970). For assistance of counsel to be effective, however, the attorney-client relationship must be able to take root "with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Hickman v. Taylor*, 329 U.S. 495, 510 (1947).

Maintaining this sphere of privacy is particularly important when it comes to preserving the confidentiality of attorney-client communications. "The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888).

Privacy in these communications is preserved by the attorney-client privilege. This privilege "is the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (citation omitted). "Its purpose

is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." *Id.* *See also Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998) (same); *Trammel v. United States*, 445 U.S. 40, 51 (1980) ("The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out.").

Similarly, lawyers' independent ethical duty to protect the confidentiality of their clients' information also serves to protect the privacy in lawyer-client communications necessary to induce client candor. *See* Model Rules of Prof'l Conduct R. 1.6(a) (1983) ("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, ..."). This duty of confidentiality is even broader than attorney-client privilege. *X Corp. v. Doe*, 805 F. Supp. 1298, 1307-10 (E.D. Va. 1992), *aff'd mem.*, 17 F.3d 1435 (4th Cir. 1994). *See also* Model Rules of Prof'l Conduct R. 1.6 cmt. 3 (2011) ("The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through

compulsion of law."). The ABA Model Rules of Professional Conduct explain the purpose and importance of this duty:

> [The ethical duty of confidentiality] contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

Id. cmt. 2.

Although the principles of lawyer-client confidentiality permeate all lawyer-client relationships, the need for privacy in attorney-client communications is particularly acute in the context of criminal defense, where liberty is at stake. With stakes so high, the American Bar Association has put forth standards stressing the importance for lawyers to protect the client's confidentiality in order to establish a relationship of trust and confidence with the accused. These Standards for Criminal Justice, to which the courts have looked often in determining the professional duties of criminal defense lawyers,[4]

[4] *See, e.g.*, *Padilla v. Kentucky*, 559 U.S. 356, 366-67 (2010); *Gonzalez v. United States*, 553 U.S. 242, 249 (2008); *Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Roe v. Flores-Ortega*, 528 U.S. 470, 479 (2000).

emphasize the necessity of this trust and confidence to prompt full disclosure by the client of all the facts the lawyer needs to know to put forth an effective defense. American Bar Association, *Standards for Criminal Justice*, Defense Function, § 4-3.1(a) (3d. ed. 1993) ("Standards").[5] "Nothing is more fundamental to the lawyer-client relationship than the establishment of trust and confidence. Without it, the client may withhold essential information from the lawyer. Thus, important evidence may not be obtained, valuable defenses neglected, and, perhaps most significant, defense counsel may not be forewarned of evidence that may be presented by the prosecution." *Id.* at 149-50 (cmt. "Confidentiality").

The Standards emphasize the need for preserving the privacy of attorney-client communications. Standards 4-3.1(b) provides that "[t]o ensure the privacy essential for confidential communication between defense counsel and client, adequate facilities should be available for private discussions between counsel and accused in jails, prisons, courthouses and other places where accused persons must confer with

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[5] These Standards were updated in February 2015 with a Fourth Edition. The annotations to that version appear not to have been released yet. *See* American Bar Association, *Standards for Criminal Justice, Defense Function* chapters 3 and 4 (adopted Feb. 2015), *available at* http://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition-TableofContents.html.

counsel." Standards 4-3.1(b). The Commentary declares: "It is fundamental that the communication between client and lawyer be untrammeled. The reading by prison officials of correspondence between prisoners and their lawyers inhibits communication and impairs the attorney-client relationship, may compel time-consuming and expensive travel by the lawyer to assure confidentiality, or even prevent legitimate grievances from being brought to light." Standards 4-3.1 cmt. *See also Marquez v. Miranda*, No. C 92-3934 FMS, 1998 WL 57000, at *2-3 (N.D. Cal. Jan. 28, 1998) (holding that prison guards' practice of conducting brief "scans" of prisoner's legal mail violated prisoner's rights under First and Sixth Amendments because of "potential chilling effect" of such review which "render[ing] the prisoner less willing or able to raise substantial legal issues.").

By seizing all communications made by everyone in the Plaintiff class, the government has eviscerated the protections of confidentiality on which the right to counsel depends. The surveillance at issue in this case is vastly more expansive than that described in *Marquez*. In seizing and searching every communication by Plaintiff class members, no attorney-client privileged information among that mass of data is safe from scrutiny. The government's position—that it somehow hasn't actually seized a citizen's information until and unless it queries or reads it—would be absurd in any other context. If police indiscriminately seized all of the paper files in an attorney's office, no

court in the land would deny a motion to return those papers by accepting the prosecution's argument that "it's okay, we haven't read them yet, but we might need them in a later investigation." The government's similar behavior here is no less egregious simply because what it has seized is electronic rather than physical.

Steps to minimize the impact on attorney-client communications are also meaningless when such minimization happens only when the government searches what it has already seized. The reality is that when the government has complete, unfettered access to everyone's communications, it chills citizens' ability to seek legal advice, either in defense of past actions (charged or uncharged) or as to the legality of contemplated actions. This chilling flies in the face of the Constitutional mandate that everyone be entitled to the assistance of counsel. When every reasonable modern method of communication is apparently subject to routine mass search and seizure by the government, the right to consult with counsel, under the protection of the attorney-client privilege, simply disappears.

C. Allowing the government to shield evidence of its wrongful search and seizure means that the injury to these other Constitutional rights cannot be remedied and must be presumed.

The district court put Plaintiffs in an impossible situation: It denied discovery of the full extent of their Constitutional injury, allowed the government to destroy evidence that would have measured it, and

then used the absence of this evidence to find that Plaintiffs had no standing to seek redress for an injury that was undeniably occurring based on the evidence Plaintiffs did have. Instead, the district court allowed the government to hide its unconstitutional dealings behind state secret privilege. Amicus agrees with Plaintiffs that the district court erred in doing so.

As Plaintiffs argue in their brief, there is credible evidence that this dragnet surveillance is happening. Appellants' Opening Brief at 14-16; *id.* at 24-31. It is also incontrovertible that the government has destroyed evidence of its unlawful interception of Plaintiffs' communications. *See* Pls.' Final Br. Enforcement Evidence Preservation Orders at 9, ECF No. 260. As Plaintiffs earlier argued, this destruction should be considered wrongful spoliation. *Id.* at 9-12. This wrongful spoliation should therefore give rise to an inference of fact that the government indeed did what Plaintiffs allege: the wholesale, indiscriminate, warrantless and unlawful interception of Plaintiffs' communications. *Id.* at 12-14.

Such a presumption is particularly warranted where, as a direct result of this destruction, even if the district court had permitted discovery of the government's remaining evidence, it would have been impossible for members of the Plaintiff class to know the full extent of their injury, let alone petition the courts for redress. Aside from the Fourth Amendment injury the search and seizure represents, without a

way to know what communications were intercepted and when, there is no way for members of the Plaintiff class to know exactly the extent to which their Fifth and Sixth Amendment rights have also been compromised.

The worry that those rights have been compromised is hardly hypothetical. In addition to the abstract harm of having one's Constitutional rights violated, there is reason to believe that once the government has unbidden access to people's communications it can and will use them in ways beyond the scope of the rationale under which they were intercepted in the first place. For example, as Amicus previously argued to the district court, with regard to the Fifth Amendment, Reuters reported that the DEA uses information provided by the NSA as the basis for ordinary domestic criminal investigations—and then obfuscates about where the information originated to make it appear as though the investigations were predicated on legitimately acquired leads.[6] United States Senators Mark Udall, Ron Wyden and Martin Heinrich also raised the concern that Solicitor General Donald Verrilli misled the Supreme Court in *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013), when he misrepresented to it that criminal

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[6] John Shiffman & Kristina Cooke, *Exclusive: U.S. directs agents to cover up program used to investigate Americans*, Reuters, Aug. 5, 2013, *available at* http://www.reuters.com/article/2013/08/05/us-dea-sod-idUSBRE97409R20130805.

defendants were routinely made aware when evidence against them had been derived from the type of surveillance at issue in this case—when this assertion was not true.[7] And with respect to the Sixth Amendment, the New York Times reported that the NSA monitored the communications of lawyers at Mayer Brown, an American law firm representing a client in a trade dispute,[8] despite knowing full well that many of the intercepted communications were covered by attorney-client privilege.[9] *See also Clapper*, 133 S. Ct. at 1145-46 (reciting that the case was brought in part by lawyers fearing their communications with clients were being intercepted).

These examples raise serious concerns about how the type of surveillance at issue in this case is affecting class members' Fifth and Sixth Amendment rights, a concern that the government is not able to

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[7] *See* Press Release, Ron Wyden, "Udall, Wyden, Heinrich Urge Solicitor General to Set Record Straight on Misrepresentations to U.S. Supreme Court in Clapper v. Amnesty," Nov. 21, 2013, *available at* http://www.wyden.senate.gov/news/press-releases/udall-wyden-heinrich-urge-solicitor-general-to-set-record-straight-on-misrepresentations-to-us-supreme-court-in-clapper-v-amnesty.

[8] That the client may have been foreign is irrelevant. The firm is American, with duties of confidentiality to clients to protect, which it could not do when its communications were being monitored.

[9] James Risen & Laura Poitras, *Spying by N.S.A. Ally Entangled U.S. Law Firm*, New York Times, Feb. 15, 2014, *available at* http://www.nytimes.com/2014/02/16/us/eavesdropping-ensnared-american-law-firm.html.

dispel. *See* Summ. J. Mot. Tr. 98:18-105:10 Dec. 19, 2014, ECF No. 318; *Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act by the Privacy and Civil Liberties Oversight Board* at ER 130-31. The government argues that because the overall number of captured communications is reduced as they pass through each stage of the surveillance process, these reduction protocols should allay any concerns regarding the use of captured communications in domestic prosecutions. These assurances are unconvincing, however, and also miss the point, which is that it is constitutionally untenable for any communications to have been seized for later use in the first place. Even if any subsequent surveillance of a member of the class were done with the complete court oversight the Fourth Amendment demands, the damage to the rights of the putative defendant had already occurred whenever illegally-obtained evidence was used to make him or her a target of a government investigation in the first place. It is irrelevant whether the government might inadvertently discover a genuinely bad actor through its fishing expedition; these Constitutional rights exist to protect the guilty as well as the innocent, none of whom should have had to lose their right to live their lives free of government surveillance, which occurred when the government first helped itself to any and all of their communications that happened to pass through AT&T's backbone. *See*, *e.g.*, *Doe v. United States*, 487 U.S. 201, 212-13 (1988) (citing *Murphy v. Waterfront*

Comm'n of New York Harbor, 378 U. S. 52, 55 (1964) ("[The Fifth Amendment] privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.'") (citation omitted)).

Because it is undisputed that the government did in fact intercept all communications made by everyone in the Plaintiff class, Pls.' Mot. Partial Summ. J. at 4-6, ECF No. 261, and because, as a result of its deletions, the government can provide no evidence to the contrary, every member of the Plaintiff class must presume that their captured communications have been used by the government in ways that compromise their Fourth, Fifth, and Sixth Amendment rights. And because every member of the Plaintiff class must make this presumption, so too should this Court.

III. CONCLUSION

The fact that the Fifth and Sixth Amendment rights of Plaintiffs have been undermined by the surveillance at issue in this case supports the finding that this surveillance has been made in violation of the Fourth Amendment. When the Fourth Amendment falls, so do the Fifth and Sixth. This Court should therefore find the surveillance at issue in this case unlawful.

DATED: August 11, 2015

Respectfully submitted,

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I hereby certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1 this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and (6), because it is written in 14-pt Century Schoolbook font, and with the type-volume limitations of Fed. R. App. P. 29(d) and Ninth Circuit Rule 29-2(c), because it contains 4, 274 words, excluding the portions excluded under Fed. R. App. P. 32(a)(7)(B)(iii). This count is based on the word count feature of Microsoft Word.

DATED: August 11, 2015

/s/ Catherine R. Gellis
Catherine R. Gellis
Counsel for Amicus Curiae

9th Circuit Case Number(s) 15-16133

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