ORAL ARGUMENT REQUESTED

CASE NO. 17-5281/5282 (CONSOLIDATED)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LARRY KLAYMAN, et al

Plaintiffs-Appellants,
v.

BARACK OBAMA, et al

Defendants-Appellees.

APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPELLANTS' INITIAL BRIEF

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Dated: September 4, 2018

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties

Larry Klayman is an individual and a Plaintiff/Appellant. Charles Strange is an individual and a Plaintiff/Appellant. Mary Ann Strange is an individual and a Plaintiff/Appellant. Michael Ferrari is an individual and a Plaintiff/Appellant. Matt Garrison is an individual and a Plaintiff/Appellant. J.J. Little & Associates, P.C. is a professional corporation and a Plaintiff/Appellant. Barack Obama is an individual and a Defendant/Appellee. Eric Holder is an individual and a Defendant/Appellee. Keith Alexander is an individual and a Defendant/Appellee. Roger Vinson is an individual and a Defendant/Appellee. The United States of America is a Defendant/Appellee. The National Security Agency is a Defendant/Appellee. There were no amici in the district court.

B. Rulings

Appellants appeal from the U.S. District Court for the District of Columbia's order granting the Defendants/Appellees' Consolidated Motion to Dismiss and all other rulings averse to Appellants in this matter. App. ___.

C. Related Cases

This case was previously before this Court in appeal numbers 14-05004, 14-05005, 14-05016, 14-05017, 14-05208, 14-05209, and 15-05307. This case is

related to *Montgomery v. Comey et al*, 1:17-cv-01074, which is currently on appeal before this Court in appeal number 18-5097.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure ("FRAP") 26.1, Appellants are not officers, directors, or majority shareholders of any publicly traded corporation.

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JURISDICTIONAL STATEMENT

The basis for the U.S. District Court for the District of Columbia's ("District Court") subject-matter jurisdiction is pursuant to 28 U.S.C. § 1331 under Federal Question Jurisdiction. The basis for the U.S. Court of Appeals for the District of Columbia Circuit's jurisdiction is pursuant to 28 U.S.C. § 1291 because this appeal is from a final judgment that disposes of all parties' claims. Pursuant to the order of the Court, Appellants' Initial Brief is due September 4, 2018

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the District Court err by granting Appellees' Consolidated Motion to Dismiss on November 21, 2017 before even allowing Appellants an opportunity to conduct discovery, especially given the intelligence agency Appellees' pattern and practice of willful disregard for the law and constitutional rights of millions of Americans?

STATEMENT OF THE CASE

As the District Court has undeniably already recognized, this is the case at the pinnacle of national importance. Despite the passage of the USA FREEDOM Act, the issues set forth initially in 2013 when this case was originally filed are still as pressing, if not even more so, today. The fact remains that our own Government, led by Appellees, has committed the biggest violation of constitutional rights in American history, and they continue to do so without repercussion. This Court

must, respectfully, stand up the for constitutional rights of Americans – including members of this Court – and simply say, "enough is enough."[1]

Appellant Larry Klayman ("Mr. Klayman") once argued in front of the District Court on November 18, 2013, "[w]e have never seen in the history of this country this kind of violation of the privacy rights of the American citizens. We live in an Orwellian state." App. ___. At the time, the District Court concurred, finding, "…the almost-Orwellian technology that enables the Government to store and analyze the phone metadata of every telephone user in the United States is unlike anything that could have been conceived in 1979." ECF No. 48 at 49. *See also id*. at 41 ("…empower the government to conduct wide-ranging 'DNA dragnets' that raise justifiable citations to George Orwell").

[1] Indeed, it would at least appear that the Honorable Richard Leon of the District Court may have subconsciously sought to dismiss this case as a matter of human nature to reduce his docket, as he is now on senior status and was also presiding over the AT&T/Time Warner case. Other courts have acted in a different fashion. *See American Civil Liberties Union v. Clapper*, 1:13-cv-3394 (S.D. N.Y.). The *ACLU* case also challenged the NSA's bulk metadata collection program, and while the lower court dismissed it, the U.S. Court of Appeals for the Second Circuit held, "the telephone metadata program exceeds the scope of what Congress has authorized and therefore violates [Section 215 of the Patriot Act]. Accordingly, we VACATE the district court's judgment dismissing the complaint and REMAND the case to the district court for further proceedings consistent with this opinion.
The Second Circuit has valiantly stood up to the intelligence agencies, and it is therefore incumbent upon this Court to do the same, which is the only hope that millions of Americans who are being illegally and unconstitutionally spied upon have at meaningful change.

The intelligence agencies' conscious disregard for the law has been ongoing for decades, and there is no reason to believe that, all of a sudden, they will begin to respect the constitutional rights of Plaintiffs, and all Americans, which is why Appellant should have, at a minimum, been allowed discovery before the Court dismissed their claims. In 2014, the Honorable Reggie Walton, who is now a member of the District Court wrote a scathing opinion and order, accusing intelligence agencies of callous and lawless disregard for the truth and the law, while he was part of the Foreign Intelligence Services Court. App. ___. At the heart of the Walton Order was the Department of Justice's (in representing the intelligence agencies) blatant misrepresentations on behalf of the NSA and other intelligence agencies, to the FISC court regarding whether certain parties had made requests to have their collected metadata preserved for litigation. Despite the fact that the parties, Jewel and First Unitarian, had contacted the government and made a "specific request" that the government inform the FISC of their existence, the government lies in a later pleading, stating that the parties "did not make a 'specific request' that the government inform this Court about the preservation orders…." App. ____. Judge Walton writes scathingly about the Department of Justice's deception, stating that, "[a]s the government is aware, it has a heightened duty of candor to the Court in *ex parte* proceedings. Regardless of the government's perception of the materiality of the preservation orders in Jewel and

Shubert to its February 25 Motion, the government was on notice, as of February 26, 2014, that the plaintiffs in Jewel and First Unitarian believed that orders issued by the U.S. District Court for the Northern District of California required the preservation of the FISA telephony metadata at issue in the government's February 25 Motion." App. ___.

> The government, upon learning this information, should have made the FISC aware of the preservation orders and of the plaintiffs' understanding of their scope, regardless of whether the plaintiffs had made a "specific request" that the FISC be so advised. Not only did the government fail to do so, but the E-mail Correspondence suggests that on February 28, 2014, the government sought to dissuade plaintiffs' counsel from immediately raising this issue with the FISC or the Northern District of California.

App. ___. Thus, as Judge Walton found, not only did the Department of Justice, in representing the intelligence agencies, blatantly attempt to deceive the court regarding its preservation obligations, it actively tried to cover up its deception by trying to "dissuade plaintiffs' counsel from immediately raising this issue." App. ___. This clearly demonstrates the lengths to which the intelligence agencies are willing to go to, in this case, destroy data that might be used as evidence of their illegal activities against them. Incredibly, this pattern and practice of blatant dishonest and lawless behavior has also been manifest over the course of this litigation, as the District Court explicitly questioned – on the record – Appellees' propensity for deception, stating, "[c]andor of this type defies common sense and

does not exactly inspire confidence!" *Klayman I*, ECF No. 48 at 38. *See also id.* at 62, n. 64 ("Such candor is as refreshing as it is rare.").

These instances of severe misconduct, which are ongoing, clearly evidence why the District Court's order granting dismissal of Appellants' claims was premature, since Appellants were denied a chance to take discovery. In doing so, the District Court has taken Appellees' word at face value, which is surprising given its own comments about their lack of candor and the fact that it has been widely reported that the conduct that Appellees disingenuously claim to have been ceased are still ongoing, if not amplified. This Court must therefore step in as the guardian for the millions of Americans whose constitutional rights are being grossly violated by Appellees.

SUMMARY OF THE ARGUMENT

The District Court erroneously held that Appellants' causes of action were mooted out by the passage of the USA FREEDOM Act, which is incorrect on two grounds: (1) history has clearly shown that Appellees have no regard for the law or Constitution, so a change in the law has no deterrent effect, and (2) the doctrine of voluntary cessation applies. Furthermore, Appellants have properly alleged facts that show that they have standing to challenge the illegal and unconstitutional spying and surveillance being conducted on them.

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STANDARD OF REVIEW

Whether the District Court properly granted Appellees Motion to Dismiss and entered judgment on the pleadings in favor of Appellees is a question of law, which this Court reviews *de novo*. *Peters v. National R.R. Passenger Corp*., 966 F.2d 1483, 1485 (D.C. Cir. 1992); *see also Croixland Properties Ltd. v. Corcoran,* 174 F.3d 213, 215 (D.C. Cir. 1999). In doing so, this Court must treat all the factual allegations of the complaint as true, *see Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164 (1993) (reviewing de novo the district court's dismissal of claims), and must grant plaintiff[s] "the benefit of all inferences that can be derived from the facts alleged," *Schuler v. United States*, 617 F.2d 605, 608 (D.C. Cir. 1979).

Federal Rule of Civil Procedure 8(a)(2) requires a complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). In several cases, the U.S. Supreme Court addressed the standards for deciding motions to dismiss a complaint for failure to state a claim.

First, in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the Court held that facts alleging that companies engaged in parallel business conduct, but not indicating the existence of an actual agreement, did not state a claim under the Sherman Act. The Court stated that in an antitrust action, the complaint must contain "enough factual matter (taken as true) to suggest that an agreement was

made," explaining that "[a]sking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading state; it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id*. at 556. The Court also explained, more generally, that ". . . a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations," yet "must be enough to raise a right to relief above the speculative level" and give the defendant fair notice of what the claim is and the grounds upon which it rests. *Id*. at 555. In other words, Plaintiffs-Appellants here need only allege "enough facts to state a claim to relief that is plausible on its face" and to "nudge[] the[] claims[] across the line from conceivable to plausible." *Id*. at 570.

Subsequently, in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), the Court elaborated. There, the Court held that a pretrial detainee alleging various unconstitutional actions in connection with his confinement failed to plead sufficient facts to state a claim of unlawful discrimination. The Court stated that the claim for relief must be "plausible on its face," *i.e.*, the plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. at 1949. In this regard, determining whether a complaint states a plausible claim for relief is necessarily "a context-specific task." *Id*. at 1950. Therefore, if a complaint alleges enough facts to

state a claim for relief that is plausible on its face, such as here, a complaint may not be dismissed for failing to allege additional facts that the plaintiff would need to prevail at trial. *Twombly*, 550 U.S. at 570; *see also Erickson v. Pardus*, 551 U.S. 89, 93 (plaintiff need not allege specific facts, the facts alleged must be accepted as true, and the facts need only give defendant "fair notice of what the *** claim is and the grounds upon which it rests" (quoting *Twombly*, 550 U.S. at 555).

Where the requirements of Rule 8(a) are satisfied, even "claims lacking merit may be dealt with through summary judgment." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002). In this regard, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Twombly*, 550 U.S. at. 556.

ARGUMENT

I. THE DISTRICT COURT ERRED BY FINDING APPELLANTS' CLAIMS MOOT WITHOUT EVEN ALLOWING DISCOVERY AFTER REMAND

The District Court erroneously found that Appellants' challenges to Section 215 of the USA PATRIOT Act ("Section 215") and Section 402 of the Foreign Intelligence Surveillance Act ("Section 402") are moot. The District Court reasoned that Appellants' Section 215 claims are mooted out by the passage of the USA FREEDOM Act, which purportedly replaced Section 215 bulk collection of

telephone metadata with targeted production of call-detail records by telecommunications service providers. App. ___. The District Court further reasoned that Appellants' Section 402 claims were mooted because of the NSA's own assertions that it had discontinued the program and destroyed the metadata as well as the passage of the USA FREEDOM Act. App. ___. However, given the Appellees' pattern and practice of disregard for the law, a change in the law is likely to have little to no effect on reducing the scope of their mass-scale unconstitutional surveillance programs. The only solution is a standing permanent injunction from this Court, so that Appellees can be haled into court when they commit these illegal acts, and be made to account for their actions.

As set forth above, the District Court's dismissal of these claims is based entirely on the acceptance at face value of Appellees' own assertions that the misconduct alleged in Appellants' complaint is no longer occurring. This is especially baffling given the Appellees' long standing pattern and practice of willfully deceiving the courts to cover up their mass-scale illegal and unconstitutional surveillance and spying programs, which the District Court experienced first hand during the litigation. Indeed, as laid out in the statement of the case, Appellees' word simply cannot be trusted, as they have proven time and time again to have simply no regard for the rule of law, the Constitution, or the truth. By way of analogy, the District Court's decision to dismiss Appellants'

claims due to the passage of the USA FREEDOM Act prohibiting the conduct set forth by Appellants in their complaint is akin to it dismissing a wrongful death claim against an alleged killer because murder is prohibited by law. Given the fact that Appellees have clearly shown that the law means little to nothing to them with regard to their illegal and unconstitutional surveillance programs, it is clear that Appellants should have, at a minimum, been allowed discovery to determine whether the misconduct under Section 215 and Section 402 has truly ceased (one can almost guarantee it has not) instead of taking a repeat offender's word that it has. This defies all logic and reason.

Furthermore, regardless of whether Appellees have ceased the unconstitutional conduct under Section 215 and Section 402 (they have not), the doctrine of voluntary cessation renders Appellants' claims not moot. Appellees claim, and the District Court erroneous concurred, that the reason that Appellants' claims are moot because Congress has enacted the USA FREEDOM Act of 2015 However, what the USA FREEDOM Act conveniently fails to set forth is that the USA FREEDOM Act is replete with loopholes that create plenty of "wiggle room" for the intelligence agencies to continue to operate unchecked, and in many ways actually expands the scope of wide-scale unconstitutional surveillance, without probable cause, on Americans. First, the USA FREEDOM Act creates extremely broad "emergency" powers that allow the intelligence agencies to collect all kinds

of personal data without prior court approval. *See* Section 102 ("Emergency Authority"). Critics of the USA FREEDOM Act have recognized these expansive loopholes, stating that, "[t]he latest draft opens up an unacceptable loophole that could enable the bulk collection of Internet users' data..."[2] A letter sent to Congress by a bipartisan coalition of 60 advocacy groups summarizes the loopholes in the USA FREEDOM Act perfectly:

> The USA Freedom Act has significant potential to degrade, rather than improve, the surveillance status quo… At best, even if faithfully implemented, the current bill will erect limited barriers to Section 215, only one of the various legal justifications for surveillance, create additional loopholes, and provide a statutory framework for some of the most problematic surveillance policies, all while reauthorizing the Patriot Act.[3]

In addition to the expansive "wiggle room" and loopholes explicitly written into the USA FREEDOM Act, which maintain the status quo, if not expand the scope of wide-scale surveillance, the Appellees have engaged in a longstanding pattern and practice of ignoring existing law and acting in an unchecked capacity in its intelligence collection efforts. As such, any argument that Appellants have been rendered moot by passage of the USA FREEDOM Act under *ABA v. FTC*, 636

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[2] Christian Brazil Bautista, *Congress Passes Bill That May Allow the NSA to Continue Gathering Phone Records*, Digital Trends, May 22, 2014, available at: http://www.digitaltrends.com/mobile/congress-passes-nsa-reform-bill/

[3] James Richard Edwards, *The USA Freedom Act Eroding America's Rights*, Communities Digital News, Jun. 5, 2015, available at: http://www.commdiginews.com/politics-2/the-usa-freedom-act-eroding-americas-rights-42779/

F.3d 641 (D.C. Cir. 2011) is erroneous under the doctrine of voluntary cessation. **Clearly, with the incontrovertible loopholes built into the USA FREEDOM Act, any cessation of the Appellees' illegal and unconstitutional conduct would be voluntary, at best**.

The court in *ABA* recognized that voluntary cessation is an exception to the doctrine of mootness. *Id*. at 647-48.

> As a general rule, a defendant's 'voluntary cessation of allegedly illegal conduct does not deprive [a court] of power to hear and determine the case.' Voluntary cessation will only moot a case if 'there is no reasonable expectation . . . that the alleged violation will recur' and 'interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.' The defendant carries the burden of demonstrating 'that there is no reasonable expectation that the wrong will be repeated,' and '[t]he burden is a heavy one.'

Id. at 648 (internal citations omitted). As set forth in *ABA*, the Defendant has the heavy burden of showing that there is no reasonable expectation that the wrong will be repeated, *id*, which the Appellees cannot come close to meeting. Indeed, the Appellees have engaged in a longstanding pattern and practice of acting outside of the law and ignoring the Constitution when conducting intelligence gathering, as set forth in the statement of the case, and there is foolish, at best, believe that the passage of the USA FREEDOM Act will do anything to curtail this. Indeed, the USA FREEDOM Act does little to limit the scope of illegal and unconstitutional surveillance, leaving significant loopholes that the intelligence agencies, have and will undoubtedly continue to, exploit.

The second element of voluntary cessation—complete eradication of the effects of the alleged violation—are also purportedly met by the passage of the USA FREEDOM Act, as it clearly now—on paper— purports to prohibit the activity that Appellants seek to enjoin. However, it is clear that the rule of law means little to nothing to Appellees. In actuality, only permanent injunctive relief will do anything to curtail the ongoing and future instances of illegal and unconstitutional surveillance.

In *ABA*, the court held that the voluntary cessation doctrine did not apply when the "Clarification Act" expressly amended the definition of a creditor under the "FACT Act." *Id*. at 646. The American Bar Association was challenging the inclusion of law firms and legal professionals as creditors under the FACT Act, but this challenge was mooted out when the definition of creditor was amended to not include legal professionals. Unlike the instant matter, in *ABA* there was no evidence that the FTC had engaged in a pattern and practice of disregarding the law, or that there was any risk that the FTC would continue to exercise its Extended Enforcement Policy to include legal professionals as creditors. As such, the Court held that the voluntary cessation exception did not apply. Here, however, Appellees have engaged in a longstanding pattern and practice of operating outside of the law and Constitution in its intelligence gathering efforts, and as such, the risk of the continued employment of the methods that Appellants seek to enjoin is

very real. The Appellees simply cannot show that there is no "reasonably expectation" that the conduct will not be repeated, as set forth by *ABA*. Appellees' contention that they are not "free" to recommence broad collection of metadata and to query the collected data are disingenuous at best, given the enormous loopholes contained in the USA FREEDOM Act, and their history of simply ignoring the law. As such, Appellees and the District Court cannot rely on the mootness doctrine, and permanent injunctive relief from this Court is the only solution. This would preserve the status quo and provide the lower court oversight and contempt powers if the permanent injunction is violated. In effect, this would provide insurance that the Fourth Amendment and the law in general would now be respected and adhered to.

II. THE DISTRICT COURT ERRED BY FINDING APPELLANTS DID NOT HAVE STANDING TO PURSUE THEIR SECTION 215 AND PRISM CLAIMS

The District Court further erred when it held that Appellants lacked standing to pursue expungement of their metadata collected pursuant to Section 215, as well as to challenge the collection of their personal information under Section 702 of the Foreign Intelligence Surveillance Act ("PRISM").

With regard to Appellants claim for expungement under Section 215, the District Court found that Appellants lacked standing simply because they had asked Appellees to comply with their duty to preserve evidence for the purpose of

litigation, which this Court deemed to have been a "self-inflicted harm." App. ___. It is clear that the relief requested by Appellants was not for Appellees to immediately destroy the metadata collected under Section 215 - which would have been illegal destruction of evidence – and that Appellants did ask Appellees to simply preserve evidence for the sake of the litigation. This is not the "injury." The actual injury occurred the moment when the Appellees collected Appellants' metadata. No one forced Appellees to engage in a pattern and practice of unconstitutional surveillance and data collection. This is the actual injury, not the mere assertion of a party's duty not to destroy evidence. If this logic held true, then just about no party would ever have standing, lest they allow the other side to destroy evidence.

The District Court further erred by holding that Appellants had not pled sufficient facts to show that their information had been targeted under the PRISM program. Under PRISM, the Government engaged in a surveillance program "targeting…persons reasonably believed to be located outside of the United States to acquire foreign intelligence information." 50 U.S.C. § 1881(a). By statute, PRISM is subject to limitations, insofar as an acquisition authorized thereunder

> (1) may not intentionally target any person known at the time of acquisition to be located in the United States; (2) may not intentionally target a person reasonably believed to be located outside the United States if the purpose of such acquisition is to target a particular, known person reasonably believed to be in the United States; (3) may not intentionally target a United States person

> reasonably believed to be located outside the United States; (4) may not intentionally acquire any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States; and (5) shall be conducted in a manner consistent with the fourth amendment to the Constitution of the United States.

50 U.S.C. § 1881(b).

Indeed, Appellants have pled specific facts that strongly support Plaintiffs' contention that their metadata was collected under the PRISM Program, and that it remains substantially at risk of such collection. For instance, Appellant Klayman has specifically pled that he has engaged in communications with persons in foreign regions and nations that are almost certainly to have been the target of the PRISM Program. For example, in *Klayman II* Appellant Klayman has alleged that he communicates via telephone and e-mail with, among others, (1) Mark Regev, the press secretary for Prime Minister Benjamin Netanyahu, (2) Ron Nachman, the former mayor of Ariel, Israel, (3) Danny Danon, a member of Israel's legislative body who is currently serving as the Deputy Minister of Defense, and (4) Aaron Klein, a reporter who hosts a radio show on WABC in New York, who lives in Israel and whose show originates in Israel. ECF No. 106-1 ¶¶ 13-1. All of the persons listed above are highly influential members in or around the government of Israel, "a high-conflict area where the threat of terrorism is always present." ECF No. 106-1 ¶ 12.

Furthermore, the Strange Appellants specifically allege that they "make telephone calls and send and receive e-mails to and from foreign countries and have received threatening e-mails and texts from overseas, in particular Afghanistan." ECF No. 106-1 ¶ 19. Afghanistan is indisputably a "hot-bed" for terrorist activity.

Both Appellant Klayman and the Strange Appellants' allegations meet the requirements set forth by *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (U.S. 2013). In *Clapper*, the Supreme Court held that the plaintiffs lacked Article III standing to challenge the PRISM Program because they could that show that the "threatened injury …[was] certainly impending to constitute injury in fact." *Id*. at 1147. However, the majority in *Clapper* based its ruling on the plaintiffs' broad statements that they "believe that some of the people with whom they exchange foreign intelligence information are likely targets of surveillance under [the PRISM Program]" because "they communicate by telephone and e-mail with people the Government 'believes or believed to be associated with terrorist organizations,' 'people located in geographic areas that are a special focus' of the Government's counterterrorism or diplomatic efforts, and activists who oppose governments that are supported by the United States Government." *Id*. at 1145. On the other hand, here, Appellants have set forth specific persons that they contacted in high-risk terrorism regions in the world, particularly in the Middle East and

Central Asia. As the dissent correctly, and ably points out, plaintiffs in *Clapper* and by extension, Appellants here have standing to challenge the PRISM Program.

The threatened injury in *Clapper*, and here, clearly go far beyond "speculative," as the Government Defendants would have this Court believe. "Several considerations, based upon the record along with commonsense inferences, convince me that there is a very high likelihood that Government, acting under the authority of [the PRISM Program], will intercept at least some of the communications just described." *Id*. at 1157 (Dissent).

> First, the plaintiffs have engaged, and continue to engage, in electronic communications of a kind that the 2008 amendment, but not the prior Act, authorizes the Government to intercept…. Second, the plaintiffs have a strong *motive* to engage in, and the Government has a strong *motive* to listen to, conversations of the kind described…. Third, the Government's *past behavior* shows that it has sought, and hence will in all likelihood continue to seek, information about alleged terrorists and detainees through means that include surveillance of electronic communications…. Fourth, the Government has the *capacity* to conduct electronic surveillance of the kind at issue. To some degree this capacity rests upon technology available to the Government.

Id. at 1158-59 (Dissent). These factors are all clearly applicable to the facts at bar, and as such, the threatened injury—that the Government will continue, as it demonstrably has in the past, to harvest Appellants' data under the PRISM Program—clearly rises about the "speculative" level. In effect, the past is a prologue for Appellees' continuing illegal and unconstitutional conduct, as they

wrongly believe they are exempt, as intelligence agencies which engage in spying, from the law!

The District Court erroneously sides with Appellees' primary assertion in this regard that Appellants cannot possibly show that they communicated with targets of the PRISM Program because the targets of the PRISM Program are classified. App. ___. Thus, regardless of the amount compelling evidence set forth by Appellants that their communications were collected under the PRISM Program, they would still never be able to demonstrate that their information was actually collected because the information is deemed classified, by the Appellees themselves. The inherent flaw in this line of reasoning is readily apparent. Regardless of whether this information is classified, the District Court and Judge Leon, who possesses the necessary security clearance, could have conducted an *in camera* review to determine whether Appellants' information was collected. Appellees' refusal to do so and consent to this secure method of discovery strongly creates an evidentiary inference that this information was, in fact, collected. Their blanket denials in the past have proved to be false.

CONCLUSION

For the foregoing reasons, the District Court's decision should be reversed, and Appellants awarded costs. As the District Court itself has recognized, this case involves a matter at the pinnacle of national importance. The intelligence agency

Appellees have for far too long operated unchecked by any moral code, much less the law or Constitution. In allowing them to do so, the courts as well as the legislators have, in effect, "created a monster" that continues to grow in power. At this point, there is not even any sense disputing the fact that Appellees are engaged in massive scale unconstitutional and illegal surveillance of millions of Americans, as it has been widely reported in nearly every news outlet. Yet, they are still allowed to operate with impunity.

This Court must intervene. The only solution is permanent injunctive relief, so that policymakers and decisionmakers may finally be held to account for their illegal misconduct. It has already been shown that a mere change in the law is entirely ineffective. Our nation was built on a system of checks and balances. This Court must perform its duty to reasonably "check" the intelligence agencies before it is too late.

Dated: September 4, 2018

Respectfully Submitted,

/s/ Larry Klayman_____

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CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B)(i) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) this document contains 4,653 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 15.28 in 14-point Times New Roman.

Dated: September 4, 2018 /s/ Larry Klayman_____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically and served through the court's ECF system to all counsel of record or parties listed below on September 4, 2018

/s/ Larry Klayman_____