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NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

CAROLYN JEWEL, TASH HEPTING, YOUNG BOON HICKS, as executrix of the estate of GREGORY HICKS, ERIK KNUTZEN and JOICE WALTON, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

NATIONAL SECURITY AGENCY, *et al.*,

Defendants.

Case No. 4:08-cv-4373-JSW

***AMICUS CURIAE* BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

Ctrm: 5 – 2nd Floor
Judge: Honorable Jeffrey S. White

I. INTERESTS OF AMICUS

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, members of the Plaintiffs' class.

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. This violation also necessarily implicates other Constitutional rights, including the 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. Although Plaintiffs' pending motion for summary judgment seeks only to vindicate the violation of their Fourth Amendment rights, ECF No. 261 at 1, the government's seizure and search of their communications simultaneously undermines their Fifth and Sixth Amendment rights as well. The three rights are inextricably intertwined, and they stand or fall together.

II. ARGUMENT

A. Violating Plaintiffs' Fourth Amendment right by seizing and searching all of their communications constitutes a violation of the 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, communication must be testimonial, incriminating, and compelled." *Hiibel v.*

Sixth Judicial Dist. Court of Nev., Humboldt Cty., 542 US 177, 189 (2004). Furthermore, "[t]his is a privilege available in investigations as well as in prosecutions." *In re: Groban*, 352 US 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 (1972) (emphasis added).[1] Thus, having the entirety of a person's communications snatched from him, without his knowledge, seized by the government to be searched for inculpatory significance to be used against him, directly falls directly in the crosshairs of the sort of testimonial compulsion the Constitution expressly disallows.

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, 96 S. Ct. 1178 (1976)). The privilege exists to preserve an adversarial system of criminal justice. *Garner*, 424 U.S. at 655 (referencing *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." *Id.* 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.'"). By seizing and searching all the communications belonging to all members of the Plaintiffs' class, including millions of citizens whom the government has no reason, let alone probable cause, to

[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 them all *en masse* in order to search for evidence of malfeasance suggests that such a presumption would be unfounded. See discussion *infra* Section II.A. In any case, the *Chavez* court recognized that the plaintiff's substantive due process rights might nonetheless have been violated in other ways. *Id.* at 789-90. *See also id.* at 790-91 (Kennedy, J., dissenting) ("Our 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.")

suspect of wrongdoing, 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 in the context 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 means that no one in the Plaintiff class ever has the 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 of them 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 expressly invoke 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.'" *Garner*, 424 U.S., at 656-657, 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 also 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 this choice to remain silent—even assuming that, in this day and age, abstaining from using a major communications network like AT&T were at all 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 for its inspection and use. 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. Violating Plaintiffs' Fourth Amendment right by seizing and searching all of their communications constitutes a violation of the Sixth Amendment right to counsel.

The Sixth Amendment guarantees the right to counsel. U. S. Const., Amend VI. For that right to be meaningful, communications between lawyer and client must be immune from the prying eyes and ears of the government. *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947) ("[I]t is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that [the attorney] assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference."). Similarly, the protections of the attorney-client privilege "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice." *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998) (internal quotation marks omitted). *See also Upjohn Co. v. United States*, 449 US 383, 389-90 (1981) ("The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. 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

[2] The Plaintiff class only includes current or past residential subscribers or customers of AT&T's telephone services or Internet services. ECF No. 1 at ¶ 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* ECF No. 261 at pp. 8-9. What is relevant is that it had every single communication made over AT&T's network to choose from, having seized them all.

advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.") (internal cites omitted); *Trammel v. United States*, 445 U. S. 40, 51 (1980); *Fisher v. United States*, 425 U. S. 391, 403 (1976). But by seizing and searching all communications made by everyone in the Plaintiff class, the government has eviscerated the protections of confidentiality on which the right to counsel depends.[4] *Hunt v. Blackburn*, 128 U. S. 464, 470 (1888) ("[Privilege] 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").

The need to protect confidentiality is of particular significance for criminal defense lawyers. The American Bar Association's Standards for Criminal Justice, to which the courts have looked often in determining the professional duties of criminal defense lawyers, emphasize the importance of protecting the client's confidentiality in order to establish a relationship of trust and confidence with the accused that will prompt the full disclosure by the client of all the facts the lawyer needs to know to put forth an effective defense. ABA STANDARDS FOR CRIMINAL JUSTICE, DEFENSE FUNCTION 4-3.1(a) (3d. ed. 1993) ("ABA STANDARDS"). Without being assured of the full confidentiality of this disclosure "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." ABA STANDARDS 4-3.1 cmt.

The Standards emphasize the need for preserving the privacy of attorney-client communications. Standard 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 counsel." ABA 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-

[4] Confidentiality is destroyed as long as at least one member of the attorney-client relationship is a member of Plaintiffs' class.

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." ABA 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 "renders[] the prisoner less willing or able to raise substantial legal issues.").

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 egregiousness of the similar behavior by the government here is no less so 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. The government's destruction of the evidence of its wrongful search and seizure means that the injury to these other Constitutional rights cannot be remediated and must be presumed.

It is incontrovertible that the government has destroyed evidence of its unlawful interception of Plaintiffs' communications. *See* ECF No. 260 at 9. As Plaintiffs have 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, it is impossible for members of the Plaintiff class to know the full extent of their injury, let alone be able to petition the courts for remediation of it. 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 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, 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.[5] 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 defendants were routinely made aware of when evidence against them had been derived from the type of surveillance at issue in this case—when this assertion was not true.[6] 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,[7] despite knowing full well that many of the intercepted

[5] 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.

[6] *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.

[7] 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.

communications were covered by attorney-client privilege.[8] *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. 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 already occurred when any of this 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 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 US at 212-13 (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.'") (internal citations omitted)).

Because it is undisputed that the government did in fact intercept all communications made by everyone in the Plaintiff class, ECF No. 261 at 4-6, 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

[8] 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.

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 1, 2014

By: */s/ Catherine R. Gellis*
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CERTIFICATE OF SERVICE

I certify that all counsel of record is being served on August 1, 2014 with a copy of this document via the Court's CM/ECF system. I further certify that I mailed the foregoing document and the notice of electronic filing by first-class mail to all non-CM/ECF participants.

/s/ Catherine R. Gellis
Catherine R. Gellis