No. 11-15956

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

BARACK OBAMA, et al.,
Defendant-Appellees.

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

REPLY BRIEF FOR PLAINTIFF-APPELLANTS

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ABBREVIATIONS

"Plaintiffs" and "Defendants," where capitalized, refer to the sets of parties in this specific lawsuit—the Plaintiff-Appellants and Defendant-Appellees, respectively.

"Dkt." precedes the docket numbers of documents in the Northern District of California, even where the document in question was first filed in the Southern District of New York.

"ER-" refers to the first volume of Excerpts of Record filed with this brief.

"SER-" refers to the government's Supplemental Excerpts of Record.

"SJ Br." refers to Plaintiffs' Memorandum in Support of Summary Judgment (Dkt. 16-3) (Mar. 8, 2006).

"MTD Opp." refers to Plaintiffs' Opposition to Defendants' Motion to Dismiss (Dkt. 16-5) (Jun. 30, 2006).

"SJ Reply" refers to Plaintiffs' Reply Memorandum in Support of Summary Judgment (Doc. # 16-10) (Aug. 29, 2006)

"Renewed SJ Br." refers to Plaintiffs' Memorandum in Support of Motion for Summary Judgment and in Opposition to Defendants' Motion to Dismiss ("Renewed SJ Br.") (Dkt. 47) (Jul. 29, 2010).

"Pls.' Br." refers to the opening Brief for Plaintiff-Appellants filed in this Court on August 29, 2011.

"Gov't Br." refers to the Brief for the Appellees filed in this Court on October 28, 2011.

ARGUMENT

The district court held that plaintiffs chilled by the government's announcement that it has conducted a secret surveillance program must be able to prove that they were actually subject to surveillance in order to establish standing. As the government's brief demonstrates, there is no valid authority for such a rule. The threat that the government continues to retain records from the NSA Program hangs over Plaintiffs' heads, causing harms so obviously concrete that the government did not contest them below. The Supreme Court's precedent does not demand that Plaintiffs show more.

Though the district court did not apply the state secrets privilege, the government now also claims the privilege should be applied on appeal to dismiss the case. But there is absolutely nothing that would risk disclosure of official secrets to have a court order the government to destroy *any such records as exist* that it acquired through the NSA Program, and then certify to the court that it has complied. The fact that the government is not even willing to assert that the Program was lawful—or, put another way, to deny our allegations that it was not merely *ultra vires* but criminal—is fatal to its claims that state secrets would somehow be necessary to a defense, or to otherwise litigating the merits of this case to resolution.

Plaintiffs' recordkeeping claims are at the center of this appeal

Defendants have consistently attempted to confuse the courts as to the nature of the injury asserted by Plaintiffs. Putting to one side the question of whether the claims for prospective injunctive relief against any *future* operation of the Program are moot, the central question at stake in this appeal is whether or not the government can be allowed to maintain any records relating to Plaintiffs' communications that it may have preserved from the patently illegal surveillance it conducted under the NSA Program *in the past*. The government has no plausible defense of the legality of the Program on the merits, and has conceded that destruction of records is a remedy within the inherent powers of the federal judiciary, so its focus on standing is understandable.

In describing the standing issue, however, Defendants spend the lion's share of their argument responding to Plaintiffs' request for prospective relief, Gov't Br. at 22-38, an issue which consumes all of one paragraph of Plaintiffs' opening brief, at 54-55. As should be obvious from Plaintiffs' opening brief, the central issue in this appeal is the harm presented by Plaintiffs' need to account for the risk that the government has retained records from unlawful NSA Program surveillance of Plaintiffs' privileged communications during the period when all parties concede the Program was in effect:

> Even assuming the NSA Program… were no longer in active operation with respect to continuing interception of communications, *and*

> there were no risk of the executive reviving the Program, Plaintiffs continue to be harmed by the risk that the government has retained records from surveillance under the Program. For this reason, Plaintiffs' renewed summary judgment briefing emphasized their request (also made in their original summary judgment motion) for an order that the government destroy all data, derivative materials, and fruits thereof relating to surveillance of plaintiffs.

Pls.' Br. at 26 (footnote omitted).

To be clear, Plaintiffs do not believe their claims for injunctive relief against further operation of the Program are moot. As set forth in our opening brief, we believe there is clear evidence that the government announced its voluntary cessation of the program only to avoid judicial review in this case and in the parallel *ACLU v. NSA* litigation. Given the prior administration's steadfast insistence that the Program was legal and that it maintained the right to resume it at any time,[1] and the current administration's conspicuous failure to repudiate that position, the government has failed to meet its burden[2] of showing that unlawful surveillance under the Program cannot "reasonably be expected to recur," *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189-90 (2000). *See* Pls.' Br. at 54-55.

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1 *See* Pls.' Br. at 16, 16 n.20.

2 The government, understandably, attempts to reverse this burden, casting the mootness issue as turning on Plaintiffs' failure to "provide[] ... reason to believe that the President will institute anew the" NSA Program. *See* Gov't Br. at 25.

Proof of actual record retention is not necessary to underlie standing

The government argues that Plaintiffs' claims should be dismissed because they have failed to show that "the government maintained and retained records" of surveillance under the Program. Gov't Br. at 17; *see also id*. at 39. Presumably[3] the government intends to simply allude back to its legal argument that there can be no standing in chilling-effect cases without direct evidence that Plaintiffs were surveilled, and that here there is neither direct evidence that Plaintiffs were actually surveilled nor, correspondingly, direct evidence that the government retained records of Plaintiffs' communications. For all the reasons set forth in Plaintiffs' opening brief, at 32-51, there is simply no such rule. As we summarized the actual standards in our opening brief:

> Neither *Laird v. Tatum* nor subsequent cases demand that Plaintiffs prove actual surveillance or some other exercise of coercive power were applied against them. Plaintiffs changing their behavior in response to reasonable fears of surveillance have standing so long as they can point to concrete, objective harm resulting from those fears. The blatant—indeed, criminal—illegality of the Program, combined

[3] To be clear, there is ample evidence in the record that the NSA Program, in general, involved retention of records. For instance, a December 19, 2005 press briefing by original official-capacity Defendant Attorney General Alberto Gonzalez, and Principal Deputy Director for National Intelligence Michael Hayden, is part of the record. In it, Gen. Hayden describes how the NSA collected, in some cases redacted, and then reported to other agencies information collected by the Program. *See Press Briefing*, Ex. 7 to Affirmation of William Goodman (Mar. 8, 2006), Dkt. 16-4; *see also* Walter Pincus, *NSA Gave Other U.S. Agencies Information From Surveillance*, WASH. POST. (Jan. 1, 2006) at A08 (detailing admissions that NSA created reports of surveillance and shared records with FBI, DIA, CIA and DHS).

> with the special vulnerability of attorneys' privileged communications, suffice to render Plaintiffs' fears (and the measures taken in response to those fears) reasonable, and the consequent injuries to their professional interests constitute concrete harm sufficient to underlie standing.

Pls.' Br. at 21-22. The government argues that "fears of surveillance ... would be 'reasonable' only if plaintiffs demonstrate that they are under a concrete imminent threat of surveillance under the program they seek to challenge." Gov't Br. at 31-32. Putting to one side the fact that this focuses on the risk from continuing surveillance to the exclusion of the parallel harm from recordkeeping, nothing in the caselaw stands for the proposition that a plaintiff must prove that a governmental action or compulsion "actually applies to him." *Id*. at 33. Indeed, there is directly contrary authority in the caselaw: the Second Circuit has now upheld (after the rejection of the government's petition for review *en banc*) the decision of the panel in *Amnesty Int'l v. Clapper*, 638 F.3d 118 (2d Cir. 2011) (Lynch, J.), *reh'g en banc denied*, 2011 WL 4381737 (Sept. 21, 2011). Moreover, in *Riggs v. Albuquerque*, 916 F.2d 582 (10th Cir. 1990) cited by Defendants in support of their "actual surveillance" rule, Gov't Br. at 31, it was conceded that almost all of the evidence that could prove *actual* past surveillance of individual plaintiffs had been destroyed, *id*. at 584 n.2; remand followed nonetheless.

The government cites one of Plaintiffs' principal cases, *Presbyterian Church (USA) v. United States*, 870 F.2d 518 (9th Cir. 1989), as another example of the

application of its *per se* "actual surveillance" rule, Gov't Br. at 30, but in fact, as we noted in our opening brief (at 36), that case involved disclosures about a *past* program of surveillance provoking "fears of *future* surveillance" and that such surveillance information "will ... perhaps be kept on file in government records." 870 F.2d at 523. This Court did, as the government notes (Gov't Br. at 30), remand the case for further factfinding on the question of whether the plaintiffs could prove "a credible threat of future injury"—that is, whether "the [plaintiff] churches can in fact prove their allegations of a decrease in congregants' participation in worship services and other religious activities, of the cancellation of a Bible study class, of the diversion of clergy energy from pastoral duties, and of congregants' reluctance to seek pastoral counseling"—in which case "they would establish that the surveillance of religious activity has directly interfered with [their] ability to carry out their religious mission." 870 F.2d at 523. On remand, the district court found plaintiffs had standing and granted in part the prospective injunctive relief they sought. *Presbyterian Church (USA) v. United States*, 752 F. Supp. 1505, 1508-10 (D. Ariz. 1990). There is no record of an appeal from that decision by the United States.

Nor does *Meese v. Keene*, 481 U.S. 465 (1987), support the government's *per se* rule. It was conceded that plaintiff Barry Keene could have shown the films he sought to exhibit without disclosing that the government believed them to be

"political propaganda," effectively ignoring any ostensible "requirement" to "label" them. *See* Pls.' Br. at 42-43 ("'the *Meese* statute did not directly regulate the plaintiff or require him to do, or refrain from doing, anything at all.'").

Defendants' arguments to the contrary in their response brief are effectively a repackaging of the argument they made below that courts may only recognize chilling effect standing where the "challenged exercise of governmental power was regulatory, proscriptive, or compulsory in nature," Pls.' Br. at 41, refuted thoroughly in our opening brief, *id*. at 41-43, and foreclosed by precedent in this circuit, *see Presbyterian Church*, 870 F.2d at 522, and others.

Plaintiffs have consistently argued that the obvious, criminal illegality of the conduct challenged here, along with the particular vulnerability of the attorney plaintiffs to non-judicially-minimized surveillance, are additional factors supporting their claim that their fears are reasonable. *See* Pls.' Br. at 39-40. Defendants, in response, argue that "[e]very plaintiff who challenges a surveillance program claims the program is unlawful," Gov't Br. at 32, but that claim is not supported by the many cases that they claim illustrate the pattern. For instance, in *Laird*, there was absolutely nothing illegal about the surveillance, Pls.' Br. at 34 ("indeed it was 'nothing more than a good newspaper reporter would be able to gather by attendance at public meetings and the clipping of articles from publications available on any newsstand.' *Laird*, 408 U.S. at 9 (quoting Court of Appeals)"). Despite the

government's protestations to the contrary, the *Laird* plaintiffs failed to make even a colorable claim of illegality.

The same is true for several other cases principally relied on by the government (Gov't Br. at 28-29), *United Presbyterian Church v. Reagan* and *Halkin v. Helms*. *See* Pls.' Br. at 45-47 ("plaintiffs [in *Halkin* and *UPC*] made no allegations of gross illegality that would have rendered it objectively reasonable to fear the government actions at issue"). Absent a "threshold determination" of a "plausible claim of illegality," Pls.' Br. at 47 n.54, it is not surprising that the D.C. Circuit failed to find standing in those cases. Here, in contrast, Plaintiffs have made colorable allegations of surveillance that is not only *ultra vires* but criminal.

The harms the possibility of record retention creates are concrete

Defendants appear to claim for the first time on appeal that that record retention is not harmful in the same way that ongoing interception would be. Gov't Br. at 41. One might be inclined to respond by asking: "What sensible lawyer *wouldn't* be as alarmed by the government's retention of records of past privileged conversations as by the threat of surveillance hanging over future conversations?" At least as to the future communications, counter-measures such as those Plaintiffs implemented after the announcement of the Program[4] have a chance to mitigate the risk

[4] *See, e.g.*, Goodman Aff., Dkt. 16-4 (Mar. 8, 2006), ER-51-54, ¶¶ 13-14, 16-19 (describing certain of these countermeasures).

of harm; no straightforward voluntary mitigation is available as to the damage caused by the ongoing breach of confidence created by retention of past surveillance.

Viewed more narrowly, perhaps the government's argument merely is confined to whether Plaintiffs' claims are well-pled. *See id*. ("plaintiffs have provided no evidentiary support for the assertions [that] retention of records … causes them continuing harm. None of plaintiffs' affirmations [all dating from 2006] … appears to mention or describe any injuries" from record retention). The record flatly refutes these claims. Plaintiffs requested disclosure and destruction of records of surveillance in their initial complaint. *See* Complaint, Dkt. 16-1, SER-15-16, at Prayer for Relief ¶ (b)-(c). The affirmation of CCR's then-legal director Bill Goodman, submitted seven weeks after that complaint with our initial motion for summary judgment, is notable throughout for its emphasis on retrospective concerns as well as prospective concerns. For instance, in addition to making FOIA requests of agencies "with which intelligence gathered under the Program has been reportedly shared,"[5] the affirmation notes that:

> on February 11, 2006, I asked that the entire legal staff … review all sensitive communications to overseas clients, witnesses and other litigation participants during the period since the commencement of the NSA Program; try to recall the participants in, and the contents of, these sensitive communications; evaluate the risks to the participants and the litigation if such communications had been subject to surveil-

[5] *Id*. at ¶ 14.

> lance; if the risk is high, take corrective action, if possible, or discuss possible corrective action with the directors; and, if appropriate, move for disclosure of any such surveillance in the appropriate cases.

Goodman Aff., Dkt. 16-4 (Mar. 8, 2006), ER-54, ¶¶ 16. The risk of harm these efforts are a response to would have been present even if the Bush administration had halted and forever renounced reviving the Program on February 11, 2006, and the only risk faced by Plaintiffs were the risk posed by the government's retention of records. Obviously record retention has been an ongoing concern of Plaintiffs throughout this litigation, and the government is simply wrong in contending that Plaintiffs have failed to either "mention or describe" the resulting injuries in the appropriate pleadings.

Of course, none of this need be considered since it is raised initially on appeal. Despite the fact that Plaintiffs' renewed summary judgment briefs argued to the district court that their "disclosure and disgorgement claims … are essentially equivalent for standing purposes to [P]laintiffs' ongoing interception claims," the government failed to make any such argument below. Plaintiffs specifically noted this failure in their opening brief, at 32, and the government has compounded the fault by not contesting this waiver in their response brief on appeal. It is the government that is "attempting to fill this gap in their appellate briefs" (Gov't Br. at 41), not Plaintiffs. The district court agreed with Plaintiffs on this score, noting that "Plaintiffs appear to have established that their litigation activities have become

more costly due to their concern about the [NSA Program]," ER-27 (though it ultimately dismissed for failure to prove "actual surveillance").

The government, along with the district court, confuses the question of standing to assert each claim with the merits of the individual claims

The set of injuries Plaintiffs have described could have resulted from any of the independent violations of law pled in their complaint. Any of the four claims—whether the statutory claims under FISA (via the APA) or the various constitutional claims (under the First and Fourth Amendments and the principle of Separation of Powers)—is capable of connecting the violation of law to the injury caused by the violation of law, and therefore of grounding relief that would remedy those injuries. As Plaintiffs noted in their opening brief:

> Plaintiffs need merely to show that relief on their claims would remedy the injuries they assert. That is true here: Presumably, *any* of the four causes of action pled by Plaintiffs—claims based on APA § 702 (for violation of FISA), Separation of Powers, the Fourth and First Amendments—could, if won on the merits, result in and be partially redressed by each of the remedies sought: disclosure, destruction, and an injunction against future surveillance.
>
> The district court purported to analyze standing claim-by-claim, but it announced the same rule for measuring injury-in-fact in all cases involving chilling effect from surveillance, then dismissed each claim individually for failing to meet that "actual surveillance" test. ER-27-30. In *Amnesty v. Clapper*, plaintiffs pled four causes of action, under the Fourth Amendment, First Amendment, Article III and Separation of Powers. However, they had one fundamental injury common to all claims—harm flowing from the threat posed by unconstitu-

> tional[6] surveillance—and relief on *any* of their four legal claims would have redressed it. The Court of Appeals analyzed their claims together. *See, e.g.*, 638 F.3d at 143 n.26. The same approach applies here.

Pls.' Br. at 51 n.60. That is all that is required by the Supreme Court's pronouncements that "a plaintiff must demonstrate standing separately for each form of relief sought." *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 185 (2000). The government is simply in error in trying to suggest that plaintiffs must somehow identify an injury of a different character for each of their claims. *See, e.g.*, *INS v. Chadha*, 462 U.S. 919, 935-36 (1983); *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 78-79 (1978) (rejecting application, outside taxpayer suits, of additional requirement of "nexus" "between the injuries [plaintiffs] claim and the [precise] rights being asserted"); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 225 n.15 (1974) (declining to extend *Flast* nexus requirement to other citizen-standing cases).

The government's mistaken notion that every chilling-effect injury can only underlie standing for First Amendment claims leads it, along with the district court, to conclude Plaintiffs only seriously assert their First Amendment claim, to the exclusion of their FISA claim. *See* Gov't Br. at 55 n.9; *cf.* Dist. Ct. Opinion at ER-28. An injury to a "legally protected interest" is sufficient to convey standing. An in-

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6 In *Amnesty*, the plaintiff's claims were all predicated on violations of *constitutional* structure or provisions; here, the Plaintiffs have in addition alleged *statutory* violations (of FISA via the APA).

terest in communicating free of the chill of government interference, and indeed in communicating and associating for the purpose of bringing public interest litigation, is quite obviously protected against government intrusion by the First Amendment. But the government would have this Court believe that they are somehow not "legally protected interests" under FISA, a statute created specifically to prevent recurrence of politically-motivated government surveillance, and to thereby maintain the Separation of Powers and ensure that the constitutional guarantees of a private sphere in American life free from governmental interference, embodied in the Fourth Amendment, remain meaningful.

Several pages after (wrongly) arguing that Plaintiffs no longer assert their FISA claim, the government argues that any FISA claim for equitable relief that Plaintiffs *do* assert would be invalid, arguing that "FISA [does] not authorize the declaratory and injunctive relief plaintiffs seek here" because the APA's waiver of sovereign immunity for declaratory and injunctive relief is somehow displaced by FISA's "specific, comprehensive remedies." Gov't Br. at 59. Defendants cite not a single iota of information about FISA, its legislative history or purpose in asserting this argument, but make the cognitive leap to the assertion that the remedy outlined in FISA's section 1810 (a section titled "Civil Liability" providing for *damages*, including liquidated damages and attorneys' fees, under specific circumstances) is intended to be "comprehensive," Gov't Br. at 59, and to displace the APA's gen-

eral waiver. The government would have this Court believe that the 95th Congress drafted FISA—just two years after the creation of APA § 702—with the intent to provide for damages and criminal prosecution but not equitable relief.[7] Had the government delved into the legislative history, it would have found frequent reference to Congress' desire to "assure accountability"[8] of the executive branch in the wake of broad surveillance programs like SHAMROCK (that had been designed merely to gather intelligence that would never be introduced in court proceedings), and to counter the "formidable" chilling effect that warrantless surveillance had on those who "were not targets of the surveillance, but … perceived themselves, whether reasonably or unreasonably, as potential targets."[9]

Put another way, even if the Supreme Court were to require here the additional "zone of interests" element required in certain APA suits—typically those

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[7] Congress included specific equitable relief sections when it created Title III in the late 1960s, *prior to* the creation of a general waiver of federal sovereign immunity in APA § 702 in 1976; FISA was passed just two years *after* APA § 702 obviated the need for specific equitable relief provisions.

For APA § 702 purposes, courts (including this one) have recognized surveillance without legal authority as agency action outside of law for purposes of waving sovereign immunity for relief "other than money damages." *See, e.g.*, *Presbyterian Church*, 870 F.2d at 523-26 (reversing on availability of declaratory and injunctive relief); *cf. Menard v. Mitchell*, 430 F.2d 486, 494-95 (D.C. Cir. 1970) ("discretion" to maintain arrest records in FBI files "assuming it exists, may not be without limit."). Alternatively, this Court could find such a waiver implicit in FISA. *See Al-Haramain*, 564 F. Supp. 2d at 1124-25.

[8] S. Select Comm. To Study Governmental operations with Respect to Intelligence Activities [Church Committee], *Book II: Intelligence Activities and the Rights of Americans*, S. Rep. 94-755 at 289 (1976).

[9] S. Rep. No. 95-604(I) at 8, *reprinted in* 1978 U.S.C.C.A.N. 3904, 3909-10.

where the plaintiff is "not itself the subject of the contested regulatory action"[10]—it is obvious that Plaintiffs stand within the "zone of interests" Congress intended to protect with the FISA statute, and also that protected by the constitutional provisions relied on here. The Supreme Court has specifically stated that "the [zone of interests] test is most usefully intended as a gloss on the meaning of [APA] § 702," the very provision Plaintiffs here rely on in their FISA claim. *Clarke v. Securities Industry Assoc*., 479 U.S. 388, 400 n.16 (1987); Complaint, ¶ 46, SER-14. The Court has several times gone to pains to state that the "zone of interests" requirement does not present a high threshold for plaintiffs to cross, holding that the test is "not meant to be especially demanding" and that "there need be no indication of Congressional purpose to benefit the would be plaintiff," *Clarke*, 479 U.S. at 400, and that plaintiffs making statutory claims subject to the prudential application of a zone of interests requirement need only show that the statute "arguably" protects their interest, *National Credit Union Admin. v. First Nat'l Bank & Trust Co*., 522 U.S. 479, 488 (1998) (in challenge to regulations allowing credit unions to better compete with banks, banks can invoke statute limiting credit union membership without express showing that Congress intended to benefit banks).

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[10] *Clarke v. Securities Industry Assoc*., 479 U.S. 388, 399 (1987). The government seems to argue much the same is the case here, given that Plaintiffs have no proof that they were actually subject to (secret) surveillance under the NSA Program.

Indeed, "in view of Congress' evident intent [in APA § 702] to make agency action presumptively reviewable," the Courts will "den[y] a right of review [only] if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke*, 479 U.S. at 399; *see also De Jesus Ramirez v. Reich*, 156 F.3d 1273, 1276 (D.C. Cir. 1998) (Silberman, J.) (despite "some doubts that Congress ever contemplated aliens suing to challenge a denial of a labor certification [to an employer,] neither the statute's text, structure, nor legislative history supplies the requisite 'clear and convincing evidence' of a preclusive purpose." (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967) ("only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review"))); *Pinnacle Armor, Inc. v. United States*, 648 F.3d 708, 719 (9th Cir. 2011) (quoting *Abbott* standard, and holding that only exceptions are "when Congress expressly bars review by statute" or when there is no standard in statute against which to confine agency discretion to act). There is surely no such "clear and convincing evidence" that Congress intended to bar equitable relief here, and in any event the government has cited none.

The government's redressability arguments are unavailing

As it has at every other stage of this litigation, the government (Gov't Br. at 43-47) professes incredulity that these attorney Plaintiffs would have such a pro-

nounced fear of criminal surveillance openly flouting a statute that mandated prior judicial review and ongoing judicially-supervised minimization processes for exactly the sort of surveillance the Program engaged in (despite lacking either safeguard). The government's argument is the one deserving this Court's incredulity.

A variant on this argument is the claim that Plaintiffs "never explain how to distinguish their claimed fear from surveillance conducted pursuant to a valid court order." Gov't Br. at 45. As we noted in our opening brief (at 48), the unspoken premise of this variant argument is that the government *surely* could obtain a FISA order for surveillance on witnesses, clients, overseas co-counsel and other litigation participants we communicate with in the course of litigating our terrorism cases. For the reasons given previously (*see, e.g.*, Pls.' Br. 48 n.57 and accompanying text), that premise is far from obvious.

There exists in our world, of course, all manner of "other surveillance [not] regulated by FISA" (Gov't Br. at 43, 45); again, Defendants conceded that the Program involved surveillance *governed by FISA* (see Pls.' Br. at 8 n.7), and in any event, as Plaintiffs' opening brief demonstrates, the Supreme Court has repeatedly reemphasized that a plaintiff need not "show that a favorable decision will relieve his *every* injury," and instead need only show that the relief sought "would at least partially redress" the injury asserted. *Id.* at 50-51 (quoting *Larson v. Valente*; *Keene*). That much is the case here.

State secrets privilege

The District Court did not rely on the state secrets privilege in dismissing Plaintiffs' claims below, and whether the privilege is appropriately invoked is not a question best suited for initial resolution in the Court of Appeals.[11] Because the district court's ruling is entirely premised on the incorrect notion that proof of actual surveillance is required to underlie standing, it never considered the government's state secrets arguments,[12] and consideration of them is better left to the district court on remand in the first instance.

* * *

The government's prior claim that the "very subject matter" of this litigation—the NSA Program—constitutes a state secret has since been disposed of by this Court, *see Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190, 1200 (9th Cir. 2007). That leaves two remaining lines of argument for the government: first, that the privilege denies the government the ability to adduce in court

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[11] *See Mohammed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1087 n.10 (9th Cir. 2010) (en banc) (district court had dismissed on ground that "very subject matter of the entire case" was a state secret; this Court found "it would have been preferable for the district court to conduct [a proper SSP] analysis first," but affirmed district court's dismissal based on application of the privilege premised on different grounds); *cf.* Gov't Br. at 57-58 (complaining that "[u]nnecessary prolonging of this dispute risks inadvertent disclosure of privileged information in any remand proceeding").

[12] Plaintiffs have not requested discovery of whether or not surveillance occurred *for the purposes of proving standing* in this case.

evidence relevant to unspecified legal defenses (Gov't Br. at 56-58), and second, that the disclosure remedy sought by Plaintiffs is absolutely foreclosed by the privilege. Neither is tenable.

The government has not alluded to any valid defense that could justify invocation of the privilege, nor identified specific items of evidence required for any such defense

This Court cannot accept a generic, categorical assertion from the government that it cannot defend this action without access to evidence protected by the state secrets privilege. Doing so would allow the government a back door to asserting the "very subject matter" claims regarding the NSA Program that were rejected by this Court in *Al-Haramain*. Instead, Defendants here must be required to identify specific items of evidence that would be essential to specific defenses. *Cf. Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 994 (N.D. Cal. 2006) (declining to dismiss on generic "evidence necessary … to raise a valid defense" claim).[13] Moreover, this Court of Appeals and others have adopted a requirement that the asserted defense must be not merely hypothetical or colorable, but a *valid* defense. *See Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998); *In re Sealed Case*, 494 F.3d 139, 149 (D.C. Cir. 2007) (citing 2d, 5th and 6th Cir. cases and noting: "In

[13] *See also In re United States,* 872 F.2d 472, 478 (D.C. Cir. 1989) (rejecting categorical, prediscovery privilege claim because "an item-by-item determination of privilege will amply accommodate the Government's concerns"); *Nat'l Lawyers Guild v. Att'y General*, 96 F.R.D. 390, 403 (S.D.N.Y. 1982) (privilege must be asserted on document-by-document basis)

other contexts, this court has consistently equated 'valid' with meritorious and dispositive. … Simply put, a 'valid defense' in a civil case 'prohibits recover[y]'"). That requirement obviously implies a great deal of specificity—specificity entirely absent from the government's briefing here. *Cf.* Gov't Br. at 56-57 (not naming any defenses or specifying facts relevant thereto).

As we noted in our opening brief (at 20), the government currently refuses to take any position on the ultimate legality of the Program. Indeed, looking back over the long course of this litigation, the government has only proposed two defenses on the merits. The first is the claim that the September 18, 2001 Authorization to Use Military Force (AUMF) somehow authorized the executive to carry out surveillance in furtherance of it within the field of electronic surveillance otherwise exclusively regulated by FISA and Title III. That argument was rendered insupportable in the wake of the Supreme Court's *Hamdan* decision, stating that "there is nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth in Article 21 of the [Uniform Code of Military Justice]." *Hamdan v. Rumsfeld*, 548 U.S. 557, 594 (2006). There is similarly "nothing ... even hinting" at a Congressional intent to change the FISA scheme, which is as comprehensive as the UCMJ scheme for military trials was, in the text or legislative history of the AUMF.

The second defense suggested by earlier government papers consists in the idea that there is somehow an inherent *and exclusive* Article II presidential surveillance power (*i.e.* an area of surveillance power under *exclusive* control of the executive, not subject to Congressional restriction or regulation), the parameters of which the NSA Program might fit into—but that to explain how the NSA Program would fit into this box of exclusively executive surveillance powers would require explaining in detail the targeting criteria of the Program, at some level of detail that remains secret. *Cf.* Legal Authorities Supporting the Activities of the National Security Agency as Described by the President (Jan. 19, 2006) ("White Paper"), *available at* http://www.justice.gov/opa/whitepaperonnsalegalauthorities.pdf, at 31, 35 (analogizing to supposedly-exclusive presidential power to direct troop movements in concluding that FISA would be unconstitutional if applied to prohibit program); *Al-Haramain*, 564 F. Supp. 2d at 1121 (describing government allusion to issue of FISA's constitutionality at oral argument in 2008). Whether or not the new administration still adheres to this idea, it lacks historical foundation.

As an initial matter, there is no presidential power that trumps the congressional power to regulate details of military conduct (including the conduct of the NSA, which is part of DOD). *See generally* Saikrishna Prakash, *The Separation and Overlap of War and Military Powers*, 87 Tex. L. Rev. 299, 350-51 (2008) (while it may seem reasonable to assert presidential autonomy over an exclusive

field of military operations, "when we broaden the inquiry and use text, structure, and early history as guideposts, we see that this robust conception is mistaken. … early Congresses regularly regulated operations, deciding such mundane matters as training and tactics, and such vital questions as the type of war to fight and the men and material that could be used to wage war. Legislators apparently did not believe that the Constitution left all operational details to the sole discretion of the Commander in Chief … text, structure, and history suggest that when congressional and presidential rules clash, the former prevails"); *id*. at 386 (concluding that "the President lacks exclusive control over any military subject matter"); Shayana Kadidal, *Does Congress Have the Power to Limit the President's Conduct of Detentions, Interrogations, and Surveillance in the Context of War?*, 11 N.Y.C.L. Rev. 23 (2007) (same). Thus, the idea that such an uncheckable, exclusive executive war power can then be extended from tactical movements on the battlefield to the field of electronic surveillance fails at birth—because no such exclusive, unregulable power exists on the battlefield.

As the Supreme Court has recognized repeatedly, the war powers are "powers granted *jointly* to the President and Congress." *Hamdan*, 548 U.S. at 591 (emphasis added). When Congress affirmatively exercises these powers, the Executive's power is at its "lowest ebb," in the classic tripartite formulation of *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J.,

concurring), where "[c]ourts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject," *id*. at 637-38. Throughout our history, the Supreme Court has reaffirmed Congress' power to "make Rules for the Government and Regulation" of the Executive's war powers. *See, e.g., Little v. Barreme*, 6 U.S. 170, 178-79 (1804) (because Congress had imposed limitations on searches and seizures by naval vessels during war, Executive could not authorize searches and seizures beyond the scope of what Congress authorized); *see also* SJ Br. at 21-28.

The "exclusive means" provision created with FISA (Pls.' Br. at 6-7) was intended to "put[] to rest the notion that Congress recognizes an inherent Presidential power to conduct such surveillances in the United States outside of" FISA and Title III. Foreign Intelligence Surveillance Act, S. Rep. No. 95-701, 95th Cong. 2d Sess. 71, *reprinted in* 1978 U.S.C.C.A.N. 3973, 4040. With Congress occupying the field, only if FISA were unconstitutional would the government have a defense to Plaintiffs' FISA claim. As far as counsel can determine, the Obama administration has not yet to date asserted such an argument (which appears to have first originated with a still-classified OLC memo authored by John Yoo[14]).

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[14] *See* NSA Inspector General, Unclassified Report On The President's Surveillance Program, *available at* www.dni.gov/reports/report_071309.pdf, at 13 ("'we do not believe that Congress may restrict the President's inherent constitutional powers'") (quoting Nov. 2, 2001 OLC memo).

Because the government has no defense that it cares to assert to against Plaintiffs' FISA/APA claim, the government's state secrets section (like the rest of its brief) focuses entirely on Plaintiffs' First Amendment claim (Gov't Br. at 56-57). Consistent with the Obama administration's policy of not explicitly defending (or opining on) the legality of the Program, its "argument" is confined to one case citation (*United States v. Mayer*, 503 F.3d 740 (9th Cir. 2007)), presumably designed to imply[15] that evaluating Plaintiffs' First Amendment claim might involve some evaluation of the government's interests and bona fides in carrying out the Program, and that evidence relevant to that evaluation might be unavailable because of the privilege. Even if this were the case,[16]and even if it were appropriate and prudent to consider this issue for the first time on appeal, Plaintiffs note (as they did below, *see* Renewed SJ Br. at 13-14) that FISA § 1806 might be available to allow litigation to proceed notwithstanding any assertion of the privilege, and that the question of whether FISA preempts the state secrets privilege is specifically before this Court in a pending appeal. *See Al Haramain Islamic Foundation, Inc. v. Obama*, Ninth Cir. Nos. 11-15468 & 11-15535.

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[15] Lacking any further elaboration, this argument should in fairness be deemed waived—especially given that, in order to claim that the state secrets privilege preempts the ability to present a defense to this claim, the government must *clearly articulate* a valid defense.

[16] Notably, even if this were a colorably valid defense, other courts have managed to adjudicate questions about the constitutionality of surveillance authorities without encountering irremediable secrecy problems. *See* MTD Opp. at 30 n.33; SJ Reply at 8-9 (each citing cases).

Finally, the government also argues that the question of chilling-effect standing might also turn on facts that must remain hidden from view: "whether [Plaintiffs' chilling-effect] fears were in fact 'reasonable' in any relevant sense crucially depends on the nature and scope of the … Program" (Gov't Br. at 56). Of course, that is nonsense: the *public* disclosures *selectively made by Defendants* about the nature of the Program are the basis for Plaintiffs' fears. In light of the limited disclosures about the Program's "extent" that were made by Defendants, Plaintiffs' fears and responses to those fears were and are reasonable in light of the absence of any suitably reassuring disclosures amidst the many disclosures about the program that created cause for concern. By studiously saying nothing about the scope of their unlawful surveillance, Defendants forced Plaintiffs to assume the worst—as any conscientious attorneys and legal professionals would.

Public *disclosure is not essential to remedy the injury here*

There is absolutely nothing that would risk disclosure of official secrets to have a court order the government to destroy (or quarantine) all records of surveillance of Plaintiffs under the Program and report back to the court certifying that it had done so. *See* Pls.' Br. at 51-53.

In addition to destruction of the records of surveillance, Plaintiffs have sought some form of disclosure of such records. We note briefly here that full, *public* disclosure of the fact of surveillance might not be necessary to remedy the

injuries claimed here. Plaintiffs proposed below a variety of incremental steps ranging between *in camera ex parte* production of these records for the district court's review (alluding to the orders that were made—and not appealed by the government—in *Turkmen v. Ashcroft*[17]) to *in camera* review with the assistance of security cleared counsel for Plaintiffs.[18] *See* Renewed SJ Br. at 21-25.

The privilege should be interpreted to preserve the separation of powers

The executive official defendants here have no defense on the merits to refute the criminal illegality of the Program that they are now even willing to allude to before this Court. This case thus raises the question of whether the state secrets privilege requires the dismissal of an action challenging a program that the executive does not even contest was illegal and criminal. Leaving this particular group of Plaintiffs—civil rights attorneys litigating challenges to a vast array of unlawful

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[17] *Turkmen v. Ashcroft*, No. 02-CV-2307, 2006 U.S. Dist. LEXIS 40675 at *20-*21 (E.D.N.Y. May 30, 2006) (Gold, M.J.) (ordering the government to disclose whether any conversations between plaintiffs' counsel (including a named Plaintiff in this lawsuit) and their clients had been intercepted or monitored by the government/NSA); Order, Doc. # 455, *Turkmen v. Ashcroft*, No. 02-CV-2307, 2006 U.S. Dist. LEXIS 95913 (E.D.N.Y. Oct. 3, 2006) (Gleeson, U.S.D.J.) (modifying M.J. Gold's R&R slightly); Order, Doc. # 573 (Dec. 6, 2006) (noting government compliance).

[18] Several attorneys at CCR, including the undersigned, have acquired Top Secret//Sensitive Compartmented Information (TS//SCI) security clearance from the Justice Department in relation to our Guantánamo litigation (*see* MDL Doc. # 472-8), and have had over two years of experience with the protocols for handling such information. Counsel could thus assist the Court with review of any documents "disclosed" in camera.

executive policies in the wake of 9/11—without a remedy threatens to undermine the very judicial structure on which every other aspect of the constitutional separation of powers and the rule of law depends.

The judiciary is perfectly well-suited to consider and decide these issues. Indeed, Congress determined that the Judiciary was the appropriate branch to exercise oversight of electronic surveillance. Both the House and the Senate considered the same arguments the government has raised in all the NSA surveillance appeals: that the Judiciary lacks expertise in matters of foreign policy and national security, and the national security will be harmed if national security secrets are used in litigation, even *in camera* and *ex parte*. These arguments were soundly rejected by a strong majority in Congress. The legislative record is replete with expressions of Congress' firm view that the government's need for secrecy in matters of national security simply did not trump the need for judicial oversight of its electronic surveillance activities. *See* S. Rep. No. 94-1035 at 79 ("We believe that these same issues—secrecy and emergency, judicial competence and purpose—do not call for any different result in the case of foreign intelligence collection through electronic surveillance."); *Foreign Intelligence Surveillance Act of 1977, Hearings on S.1566 Before the Subcomm. on Criminal Laws and Procedures of the S. Comm. on the Judiciary*, 95th Cong., at 2728 (1977) (Attorney General Bell asserting that "[t]he most leakproof branch of the Government is the judiciary…. I have seen intelli-

gence matters in the courts…. I have great confidence in the courts," and Senator Orrin Hatch replying, "I do also.").

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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Dated: November 27, 2011

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is in compliance with Rule 32(a)(7) of the Federal Rules of Appellate Procedure. The brief contains 6,986 words, and was prepared in 14-point Times New Roman font using Microsoft Word 2003.

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Dated: November 27, 2011

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 November 27, 2011.

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