No. 21-1017

IN THE
Supreme Court of the United States

CAROLYN JEWEL, *ET AL.*, *Petitioners*,
v.
NATIONAL SECURITY AGENCY, *ET AL.*, *Respondents*.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

Brief *Amicus Curiae* of America's Future, Free Speech Coalition, Free Speech Defense and Education Fund, DownsizeDC.org, Downsize DC Foundation, Gun Owners of America, Inc., Gun Owners Foundation, Heller Foundation, California Constitutional Rights Foundation, U.S. Constitutional Rights Legal Defense Fund, Conservative Legal Defense and Education Fund, and Restoring Liberty Action Committee in Support of Petitioners

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INTEREST OF THE *AMICI CURIAE*[1]

America's Future, Free Speech Defense and Education Fund, Inc., Downsize DC Foundation, Gun Owners Foundation, Heller Foundation, California Constitutional Rights Foundation, U.S. Constitutional Rights Legal Defense Fund, and Conservative Legal Defense and Education Fund are nonprofit educational and legal organizations, exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(3). Free Speech Coalition, Inc., Gun Owners of America, Inc., and DownsizeDC.org are nonprofit social welfare organizations, exempt from federal income tax under IRC section 501(c)(4). Restoring Liberty Action Committee is an educational organization. *Amici* organizations were established, *inter alia*, for the purpose of participating in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law. Some of these *amici* also filed *amicus curiae* briefs in this case in 2015, in 2019, and then again in 2021, in support of the Jewel Petitioners:

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[1] It is hereby certified that counsel for Petitioners and for Respondents have consented to the filing of this brief; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to its filing; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

- *Jewel v. NSA*, No. 15-16133, Brief *Amicus Curiae* of U.S. Justice Foundation, *et al.*, Ninth Circuit (Aug. 17, 2015);

- *Jewel v. NSA*, No. 19-16066, Brief *Amicus Curiae* of Free Speech Coalition, *et al.*, Ninth Circuit (Sept. 13, 2019); and

- *Jewel v. NSA*, No. 19-16066, Brief *Amicus Curiae* of Free Speech Coalition, *et al.*, in Support of Appellants' Petition for Rehearing and Petition for Rehearing *En Banc*, Ninth Circuit (Oct. 12, 2021).

STATEMENT OF THE CASE

This case originated in 2008, and it has a lengthy and complicated procedural history. On January 21, 2010, the U.S. District Court for the Northern District of California granted the Government's motion to dismiss, claiming that the Plaintiffs' allegations had not asserted a sufficient concrete and particularized injury, and thus did not have standing to bring any of their claims, and dismissed all counts. *See Jewel v. NSA*, 2010 U.S. Dist. LEXIS 5110 (N.D. Cal. 2010).

On December 29, 2011, the U.S. Court of Appeals for the Ninth Circuit reversed, finding that the Plaintiffs had alleged sufficient facts to show they had standing to sue on both statutory and constitutional grounds. *Jewel v. NSA*, 673 F.3d 902 (9th Cir. 2011). The court of appeals remanded the case to the district court to apply the correct standard for standing, and to decide whether the "state secrets doctrine" could be used to preclude litigation of Fourth Amendment

claims, and to hear the case on the merits, if appropriate.

After another brief trip to the Ninth Circuit,[2] the district court again ruled against Plaintiffs, and the Ninth Circuit affirmed. *Jewel v. NSA*, 856 Fed. Appx. 640 (9th Cir. 2021). The Ninth Circuit ruled that Plaintiffs' evidence failed to show particularized injury — "that the government has interfered with *their* communications and communications records" (*id*. at 641) — as opposed to everyone's communications were interfered with by the Government. The Ninth Circuit denied a Petition for Rehearing and Petition for Rehearing *En Banc*, followed by the filing of a petition for certiorari in this Court.

SUMMARY OF ARGUMENT

For 14 long years, Petitioners have challenged the millions of egregious violations of the Fourth and First Amendments being committed each year by the National Security Agency ("NSA"). The NSA's website promises that "NSA operates under legal authorities," but the reality is that its surveillance is carried on under a cloak of national security in defiance of the primary legal authority it should be subordinate to — the U.S. Constitution. The Department of Justice has invoked every available defense to evade judicial scrutiny, including favoring a robust state secrets doctrine over FISA established procedures, and its insistence that if everyone is being surveilled, no one

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[2] *Jewel v. NSA*, 810 F.3d 622 (9th Cir. 2015).

may challenge it. By that bizarre theory, the more egregious the constitutional violation, the less reviewable it becomes.

The petition for certiorari more than demonstrates the weakness of the Ninth Circuit rationale for dismissal, but the petition should be considered in a broader context. In section I, *infra*, various aspects of the damage that is being done by this surveillance is explored. Federal government surveillance programs empower the "Deep State" to be the overlords of the People, rather than their servants. In section II, *infra*, these *amici* address how NSA surveillance of federal and state officials, in all branches of government including the judiciary, can strike fear into the heart of those officials who have hidden secrets, compromising their independent judgment.

In section III, *infra*, these *amici* suggest that the government's rationale for total surveillance of Americans is to prevent all wrongdoing — a role it should not have. As the Deep State increasingly identifies domestic terrorism as the nation's primary threat, it ramps up its "pre-crime" powers. Lastly, in section IV, *infra*, these *amici* discuss the *Fazaga* and *Zubayda* cases, and urge that if certiorari is not granted now, the petition should be deferred until those cases are decided.

ARGUMENT

I. DEEP STATE SURVEILLANCE OF THE SOVEREIGN PEOPLE UNDERMINES THE REPUBLIC.

A. The Prerequisites for a Republican Form of Government.

Although "there is no single 'correct' way to design a republican government,"[3] Madison explained in Federalist No. 39 that a republican form of government means "a government which derives all its powers directly or indirectly from the great body of the people; and is administered by persons holding their offices during pleasure, for a limited period, or during good behaviour." G. Carey & J. McClellan, The Federalist (Liberty Fund: 2001) No. 39 at 194. Thus, the term encompasses two essential attributes: popular sovereignty and political accountability. As Justice Alito has noted: "Liberty requires accountability."[4]

Thus, our republican form of government is undermined by the Ninth Circuit's decision which effectively shuts the courthouse door to claims based on mass surveillance of Americans by the federal government — at least when the Constitution is

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[3] *Evenwel v. Abbott*, 578 U.S. 54, 89 (2016) (Thomas, J., concurring in the judgment).

[4] *Dep't of Transportation v. Ass'n of Am. RRs*, 575 U.S. 43, 57 (2015).

violated for reasons of national security. If there is to be no review by a federal court of demonstrably unlawful activity by certain "Deep State" agencies, then there is every reason to believe that the federal government will take advantage of that "free pass" and continue to disregard the law that governs government — the U.S. Constitution. Since government surveillance is generally conducted in secret, the American People must depend on federal law enforcement to curtail illegal surveillance programs, but there is no reason to believe federal law enforcement has ever or will ever constrain intelligence agencies. Such lawlessness erodes the faith of the American people in all branches of government. The federal courts are the last line of defense for the constitutional liberties of Americans.

B. The Plenary Nature of Government Surveillance.

The issues presented in the petition for certiorari are of great significance standing alone. However, the National Security Agency ("NSA") is not the only federal agency spying on the public. For many years, the American People were told that those in public office worked for them — but one does not hear that platitude much any more.

For decades, the People's perception of the magnitude of federal spying on citizens was not understood, but while that perception lags, it is catching up with reality. Judge Andrew Napolitano received considerable attention for describing how 17 so-called intelligence agencies conduct at least some

spying on Americans.[5] Even the U.S. Postal Service is implicated. "[T]he USPS' law enforcement arm is tracking citizens' social media activity to gather data on a host of topics, including 'inflammatory' postings and planned protests, that it shares across multiple federal agencies as part of an effort called the Internet Covert Operations Program, or iCOP."[6] "If the individuals they're monitoring are ... simply engaging in lawfully protected speech, even if it's odious or objectionable, then monitoring them on that basis raises serious constitutional concerns," noted Rachel Levinson-Waldman of the Brennan Center for Justice. *Id*. Even worse, the USPS is sharing the data it collects with the Department of Homeland Security ("DHS"). *Id*.

Other federal agencies find it easier to use taxpayer money to buy personal data from private companies such as cellular telephone and internet providers which collect it "consensually" from customers. In December 2020, Vox.com reported that under pressure from numerous members of Congress, the DHS was reviewing its policies for use of location data purchased from private providers.[7] In 2020, the

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[5] A. Napolitano, "American government's surveillance kills freedom," *Washington Times* (Feb. 3, 2021).

[6] C. Field, "US Postal Service is secretly keeping tabs on Americans' social media posts as part of 'covert operations program,'" *The Blaze* (Apr. 21, 2021).

[7] S. Morrison, "A surprising number of government agencies buy cellphone location data. Lawmakers want to know why," Vox.com (Dec. 2, 2020).

House Oversight Committee sent a letter co-signed by Democrat Senators Elizabeth Warren and Ron Wyden to the private data company Venntel, announcing its investigation into "the collection and sale of sensitive mobile phone location data that reveals the precise movements of millions of American adults, teens, and even children," and seeking information about Venntel's "provision of consumer location data to federal government agencies for law enforcement purposes without a warrant and for any other purposes, including in connection with the response to the coronavirus crisis."[8]

C. Congressional Pushback to Government Surveillance Has Little Effect.

Senator Wyden has consistently warned of the dangers inherent in the vast collection of information about law-abiding Americans by their government. *The Blaze* reports that Wyden has accused the Pentagon of conducting warrantless searches.[9] The ranking Republican on the House Judiciary Committee, Rep. Jim Jordan, wrote to the Secretary of the Department of Homeland Security in August of 2021:

> DHS's use of non-governmental entities to engage in this warrantless surveillance is

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[8] Rep. C. Maloney, Letter to Chris Gildea, president of Venntel (June 24, 2020).

[9] P. Sacca, "Pentagon conducting warrantless surveillance of Americans, senator says," *The Blaze* (May 14, 2021).

> reportedly designed to circumvent legal restrictions that prohibit law enforcement and intelligence agencies from spying on Americans.... [T]he Department has a history of targeting Americans for holding "suspicious views," such as being pro-Second Amendment, favoring lower levels of immigration, or opposing the use of force by police.[10]

Last year, CNN exposed plans by the Biden Administration to evade restrictions to monitor Americans. "The Biden administration is considering using outside firms to track" American citizens' online speech, because the:

> Department of Homeland Security is limited in how it can monitor citizens online without justification and is banned from activities like assuming false identities to gain access to private messaging apps....[11]

Citizens from both sides of the aisle have denounced Biden's plan. *The Daily Wire* reports, "Bryan Dean Wright, a Democrat and former CIA officer, wrote: 'Joe Biden wants to "partner" with the private sector to conduct surveillance because the Govt can't do it

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[10] Rep. J. Jordan, Letter to Alejandro Mayorkas, Secretary, Department of Homeland Security (Aug. 18, 2021).

[11] Z. Cohen and K. B. Williams, "Biden team may partner with private firms to monitor extremist chatter online," *CNN* (May 3, 2021).

without a warrant or ongoing investigation. This is monstrous.'"[12]

"Former Trump chief of staff Mark Meadows responded: 'They spied on Donald Trump's presidential campaign and skated by with no consequences… and now they want to spy on you too. This is a chilling, terrible idea that should be roundly rejected.'" *Id.* It was widely reported that then President-elect Trump moved his transition headquarters to Trump National Gold Club in Bedminster, New Jersey, after being advised on November 17, 2016, by NSA head Admiral Mike Rogers, that he was under government surveillance.[13] Immediately thereafter, Director of National Intelligence James Clapper and Defense Secretary Ash Carter recommended the removal of Admiral Rogers from his NSA post. *Id.*

D. Intelligence Agencies Fail to Comply with Limits.

Numerous news outlets have reported that federal agencies have repeatedly failed to follow even their own policies to provide even the most limited protections for civil liberties. CNN recently reported that "[t]he National Security Agency failed to follow

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[12] R. Saavedra, "CNN: Biden Admin Considering Using Private Firms To Conduct Warrantless Surveillance Of U.S. Citizens," *Daily Wire* (May 3, 2021).

[13] "Who is Adm. Mike Rogers? Unsung 'hero' alerted President Trump to illegal spying," *WorldTribune* (May 1, 2019).

both court-approved and internal procedures designed to prevent officials from .... inappropriately monitor[ing] Americans' communications, the NSA inspector general found in a semi-annual report...."[14] The failures are widespread across multiple intelligence agencies, CNN further noted. "A redacted ruling by the Foreign Intelligence Surveillance Court ["FISC"] made public in 2021 revealed that between mid-2019 and early 2020, FBI personnel had searched for Americans' emails and other communications without proper justification — at least the third series of FBI breaches revealed by the court in the past several years." *Id*.

The *Washington Examiner* reports, "[Justice Department] Inspector General Michael Horowitz released a report in December that criticized the Justice Department and the FBI for at least 17 'significant errors and omissions'" involving submission of surveillance information of American citizens to the Foreign Intelligence Surveillance Court for approval of further surveillance.[15]

The Blaze reported, "[a] chief judge on the Foreign Intelligence Surveillance Court accused the FBI of providing false information and withholding essential details on four applications for authority to surveil....

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[14] K. B. Lillis, "NSA watchdog finds 'concerns' with searches of Americans' communications," *CNN* (Jan. 31, 2022).

[15] J. Dunleavy, "No FISA reauthorization until John Durham investigation is done, GOP letter led by Jim Jordan says," *Washington Examiner* (June 17, 2020).

Presiding FISA Judge Rosemary Collyer issued a scathing rebuke over the FBI's 'misconduct and its implications' and ordered the bureau to overhaul its surveillance application process."[16] According to an NBC News report, Judge Collyer stated that the FBI's actions were "'antithetical to the heightened duty of candor'" required by the FISA law, and that the lack of candor "'calls into question whether information contained in other FBI applications is reliable.'"[17]

II. DEEP STATE SURVEILLANCE OF GOVERNMENT OFFICIALS CAN COMPROMISE THEIR EXERCISE OF INDEPENDENT JUDGMENT.

The NSA's constant surveillance of the American People who, at least at the founding of our country, were deemed America's true sovereigns,[18] presents a serious and continuing threat to the survival of the American republic. However, "Deep State" surveillance of federal and state government officials can undermine the integrity of the Republic in even more dramatic and immediate ways. Total surveillance can enable Deep State operatives to

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[16] "FISA court rebukes FBI for falsifying applications to surveil Trump campaign, Glenn Beck asks 'Is that enough?'," *The Blaze* (Dec. 18, 2019).

[17] P. Williams, "Secret FISA court issues highly unusual public rebuke of FBI for mistakes," *NBC News* (Dec. 17, 2019).

[18] *See generally*, C. Fritz, American Sovereigns: The People and America's Constitutional Tradition Before the Civil War (Cambridge University Press: 2007).

exercise control over all levers of government power — at all levels, federal and state — and in all branches, legislative, executive (including regulatory), and even judicial.

A. The Strange Case of Judge Vaughn Walker.

In response to revelations in the press, beginning in December 2005, multiple actions were filed in federal court challenging NSA programs involving warrantless electronic surveillance of telephone and email telecommunications of Americans. The first federal judge to rule on such a challenge was Judge Vaughn R. Walker of the U.S. District Court for the Northern District of California. On January 21, 2010, Judge Walker issued an order dismissing the complaint. *Jewel v. NSA*, 2010 U.S. Dist. LEXIS 5110 (Jan. 21, 2010). Judge Walker explained:

> the court has determined that neither group of plaintiffs/purported class representatives has alleged an injury that is sufficiently particular to those plaintiffs or to a distinct group to which those plaintiffs belong; rather, the harm alleged is a generalized grievance shared in substantially equal measure by all or a large class of citizens. [*Id*. at *3.]

In other words, Judge Walker ruled that because millions of Americans were being surveilled by the NSA, no subset of plaintiffs had standing to challenge that surveillance. The remarkable but unspoken consequence of this ruling is that if everyone is being

surveilled in violation of the Fourth Amendment, federal courts may not intervene to protect the property and privacy rights of all the people. The district court allowed a highly technical interpretation of the rules of standing to allow it to avoid resolving a true case or controversy between the surveilled and the surveillor. Judge Walker's decision was reversed by the Ninth Circuit in *Jewel v. NSA*, 673 F.3d 902 (9th Cir. 2011), but it set in motion a pattern of delay that has now required the plaintiffs to persevere for more than a decade of litigation.

For the People to have any confidence in the integrity of rulings by federal judges on such matters, they must believe that the judges are acting independently of undo influence from any source. When the potential source of undo influence is one of the parties before the court, the danger of losing public support is even greater.

Judge Walker was appointed to the district court for the Northern District of California by President George H.W. Bush in 1989. He was serving as Chief Judge of that court when he issued his opinion in *Jewel*. On September 29, 2010, Judge Walker announced he would retire at the end of 2010. On April 6, 2011, shortly after retiring, Judge Walker revealed for the first time, that he was homosexual and had been in a long-term relationship with a male physician.[19] Perhaps his most notable decision was issued in August 2010, finding that Proposition 8 —

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[19] C. Geidner, "Prop 8 Judge Walker, Now Retired, Tells Reporters He's Gay," *MetroWeekly* (April 6, 2011).

the California ballot proposition which amended the state constitution to ban same-sex marriage — was unconstitutional. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D.CA 2010).

Judge Walker may well have dismissed the challenge to NSA surveillance based on an exercise of his independent legal judgment, but there is every reason to wonder whether his judgment was affected by his closeted homosexual status. In deciding the *Jewel* case, Judge Walker would have known that the NSA (the defendant in the case) had total access to his private communications which likely would have revealed his sexual orientation which he worked hard to conceal. Could that realization have affected his judgment or that of any other judge?[20]

For the Deep State to influence government officials, no direct threat is even required. The fact that the official knows that the Deep State has compromising information can be enough to keep that official from doing his duty. How many members of the House and Senate Intelligence Committee, which are entrusted with the responsibility to oversee parts of the Deep State, are paralyzed by the risk, or threat, of secrets about their lives which could influence their electibility being exposed? Only occasionally will members of Congress act to protect the people, such as when Senators Ron Wyden and Martin Heinrich

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[20] If he had ruled against the NSA and his secret life had been exposed, would he have been able to preside over *Hollingsworth v. Perry*, which enabled him to mandate same-sex marriage — a status that he might have wanted for himself?

challenged a CIA data collection program on the American People. When challenged, Deep State operatives feel authorized to obfuscate, misdirect, and even under oath — to protect themselves — without any adverse consequence to themselves or their agency. For example:

> In 2013, Wyden asked then-Director of National Intelligence James Clapper if the NSA collected "any type of data at all on millions or hundreds of millions of Americans." Clapper responded, "No."
>
> Former systems administrator Edward Snowden later that year revealed the NSA's access to bulk data through U.S. internet companies and hundreds of millions of call records from telecommunications providers. Those revelations sparked worldwide controversy and new legislation in Congress.
>
> Clapper would later apologize in a letter to the Senate Intelligence Committee.[21]

B. A Long Tradition of Deep State Spying on Government Officials.

Ronald Kessler's book, The Secrets of the FBI, details Director J. Edgar Hoover's special Official and Confidential files on elected and appointed government officials kept in his office. An article in *The Daily Beast* explains how these files were used:

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[21] Associated Press, "Senators on Intelligence Committee say that CIA secretly collects Americans' data," *Bangor Daily News* (Feb. 10, 2022).

> "The moment [Hoover] would get something on a senator," said William Sullivan, who became the number three official in the bureau under Hoover, "he'd send one of the errand boys up and advise the senator that **'we're in the course of an investigation, and we by chance happened to come up with this data on your daughter. But we wanted you to know this.** We realize you'd want to know it.' Well ...what does that tell the senator? From that time on, the senator's right in his pocket."...
>
> "He [Hoover] would send someone over on a very confidential basis," Heim said. As an example, if the Metropolitan Police in Washington had picked up evidence of homosexuality, "he [Hoover] would have him say, **'This activity is known by the Metropolitan Police Department and some of our informants, and it is in your best interests to know this.'** But nobody has ever claimed to have been blackmailed. You can deduce what you want from that." [R. Kessler, "FBI Director Hoover's Dirty Files: Excerpt from Ronald Kessler's 'The Secrets of the FBI,'" *Daily Beast* (July 13, 2017) (emphasis added).]

In 2006, ABC News reported that the George W. Bush administration reportedly used intelligence surveillance to entrap Democrat Rep. Jane Harman (D-CA) into supporting continuation of the Bush administration's surveillance program.

> Sources told [Congressional Quarterly] **the NSA had taped senior House intelligence committee member** Jane Harman (D-CA) promising an unnamed person she would intervene with the Bush administration to be lenient with a couple of pro-Israel lobbyists suspected of spying for Israel, in exchange for supporting her ill-fated bid to become chair of the intelligence committee.
>
> [T]hen-AG Alberto Gonzales blocked the FBI from probing the matter, because he "needed Jane" as a vocal supporter of the NSA's warrantless wiretapping program. According to the story, Gonzales believed Harman had helped convince the New York Times to delay publishing details of the program back in 2004.[22]

From the era of Hoover to the circumstances existing today as described by Senator Charles Schumer, information collected by the "Deep State" can and has been used to intimidate and control those in positions of power. Perhaps this is the dominant reason why lawbreakers at the highest levels of government are almost never investigated, charged or punished no matter what they do.

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[22] J. Rood, "Capital Quiet Amid Spy Flap," ABC News (April 20, 2009).

C. The Deep State's Trump-Russia Collusion Fraud.

The Deep State has the ability to target candidates for the Presidency and even the President of the United States. Responding to evidence of such activities, on September 21, 2021, an op-ed in the *Wall Street Journal* rang out with the call: "Abolish the FBI."[23] That publication is not known for taking extreme views. The spark that led to this commentary was special counsel John Durham's indictment of "Michael Sussmann, then a lawyer for the Democrat-linked firm Perkins Coie":

> In delivering to the FBI fanciful evidence of Trump-Russia collusion a few weeks before the 2016 election, Mr. Sussmann is alleged to have lied to the FBI's chief lawyer, James Baker, claiming he was acting on his own behalf and not as a paid agent of the Clinton campaign....
>
> Mr. Durham provides ample reason in his own indictment for why the FBI would have known exactly whom Mr. Sussmann was working for. If Mr. Sussmann didn't lie at the time, Mr. Baker may have lied since about what transpired between him and Mr. Sussmann. Either way, we are free to suspect the FBI would have found it useful to be protected from inconvenient knowledge about the Clinton campaign's role. The same FBI then was busy ignoring the political

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[23] H. Jenkins, Jr., "Abolish the FBI," *Wall Street Journal* (Sept. 21, 2021).

> antecedents of the Steele dossier, also financed by Mr. Sussmann's law firm on behalf of the Clinton campaign, information that the FBI would shortly withhold from a surveillance court in pursuit of a warrant to spy on Trump pilot fish Carter Page.

In a sane country, the FBI's efforts to change the outcome of the 2016 Presidential Campaign would have already led to efforts to rein in, restructure, or abolish that agency. But it hasn't — raising the question "why?" Perhaps the reason why neither Congress, nor most of the Judiciary, nor any other Administration except that of President Trump, has confronted the FBI or the Intelligence Community is well-explained by U.S. Senate Majority Leader Chuck Schumer to Rachel Maddow:

> "Let me tell you: you take on the Intelligence Community — they have six ways from Sunday of getting back at ya."[24]

The final comments of Senator Schumer in that interview have been largely ignored, but in light of what is now known about the fraudulent foundations of the Trump-Russia hoax, they are revealing:

> From what I am told, they [the Intelligence Community] are very upset with how [President Trump] has treated them and talked about them. And we need the

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[24] "Schumer Warns Trump: Intel Community Has Many Ways to 'Get Back at You,'" *The Rachel Maddow Show* (Sept. 26, 2019).

> Intelligence Community ... look at the Russian hacking, without the Intelligence Community we wouldn't have discovered it.... [*Id.* (emphasis added).]

III. A GOVERNMENT WHICH BELIEVES IT HAS A DUTY TO PREVENT WRONGDOING MUST CREATE A SURVEILLANCE STATE.

The Petition for Certiorari explains that, after the terrorist attacks on September 11, 2001, "our government instituted an unprecedented regime of domestic mass surveillance, seizing and searching the communications and communications records of hundreds of millions of Americans whom the government suspects of nothing." Pet. Cert. at 18. Although Deep State surveillance of Americans by the NSA and other agencies existed long before the turn of the century, it certainly was put on steroids after 9/11. *Time* magazine explained how fears of terrorism directly led the federal government to monitor Americans: "As the War on Terror began, so too did the increase of the U.S. government's surveillance of its own citizens."[25]

The very language "War on Terror" is so vague that it readily leads to mischief. What is the goal of such a war? Who is it against? When does such a war end? The basic purpose of government is "for the punishment of evildoers, and for the praise of them that do well." 1 Peter 2:14 (KJV). That basic purpose

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[25] M. Carlisle, "How 9/11 Radically Expanded the Power of the U.S. Government," *Time* (Sept. 11, 2021).

does not include preventing all evildoing. Even though every sovereign state has the right to protect its people from an imminent attack, a state which assumes the duty to protect against any and all wrongdoing, requires it to know what everyone is saying and doing so it can know what they might do. Whenever a state takes on this role and assumes a responsibility that it does not have, mischief results. Here, that mischief includes extraordinary violations of the Fourth Amendment property and privacy rights of the American People. In at least some circumstances when this Court has considered challenges to such abuses, it has stopped them cold. *See United States v. Jones*, 565 U.S. 400 (2012).[26] Therefore, the Deep State requires that every effort be made to avoid federal court review. Sometimes that avoidance is based on a skewed understanding of standing. Sometimes that avoidance is based on an expansion of the common law State Secrets privilege. Both occurred below.

The dystopian movie "Minority Report" demonstrates what happens when a government seeks to prevent crime, establishing a specialized police department termed "Precrime," with the authority to apprehend or even kill "criminals" before they have

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[26] Although it is true that the government is not "physically occup[ing] [the] private property" of Petitioners, as was the case in *United States v. Jones*, it is nonetheless trespassing upon Petitioners by surreptitiously intercepting and copying their communications data. While the seizure and search of Plaintiffs' property may not be visible to the naked eye, the government's invasion is no less a trespass on Plaintiffs' "papers."

even committed a crime. In the movie, the police act based on predictive foreknowledge of "precogs." Since 9/11, the federal government — which it should be remembered has no constitutional police power whatsoever — acts based on the predictive interpretation of data collected by surveillance. That approach did not work well in the movie, and it does not work well in real life.

IV. A CONFLICT EXISTS WITHIN THE NINTH CIRCUIT BETWEEN ITS DECISION BELOW AND ITS EARLIER DECISIONS IN *FAZAGA* AND *ZUBAYDA*.

The rules of this Court identify that one of the factors supporting granting a writ of certiorari is a decision of a court of appeals "in conflict with the decision of another United States court of appeals on the same important matter...." U.S. Supreme Court Rule 10(a). The rules assume that the circuit courts will ensure uniformity of their decisions within their circuit, but in this case, the Ninth Circuit failed that duty, resulting in a conflict within that circuit itself.

The district court below dismissed the complaint after analyzing the petitioners' standing, as well as the state secrets privilege and the risk to national security of allowing the case to proceed. *See Jewel v. NSA*, 2019 U.S. Dist. LEXIS 217140, at *26-50 (N.D. Ca. 2019). The memorandum opinion issued by the Ninth Circuit on August 17, 2021 affirming that dismissal addressed only appellants' claims based on standing, declining to address the state secrets ruling of the district court which contradicted the basis for a Ninth

Circuit decision issued only a year previously in *Fazaga v. FBI,* 965 F.3d 1015, 1043-52 (9th Cir. 2020) — a case now awaiting a decision from this Court. In that July 20, 2020 *Fazaga* opinion, the Ninth Circuit concluded that:

> In sum, the plain language, statutory structure, and legislative history demonstrate that **Congress intended FISA to displace the state secrets privilege and its dismissal remedy with respect to electronic surveillance**. Contrary to the Government's contention, **FISA's § 1806(f) procedures are to be used** when an aggrieved person affirmatively challenges, in any civil case, the legality of electronic surveillance or its use in litigation, whether the challenge is under FISA itself, the Constitution, or any other law. [*Fazaga* at 1044, 1052 (emphasis added).]

Issued more than nine months after argument, the panel opinion for which review is now being requested was cursory, constituting less than a page in Lexis Reports, ignoring most of the thorny legal issues that had been litigated since 2008. The panel did not address how to handle classified information, or the application of the state secrets privilege. *See* Appellants' Petition for Rehearing and Petition for Rehearing En Banc at 8, 16. The panel more asserted than concluded that the Jewel Appellants "failed to set forth sufficient evidence of particularized injuries in fact...." *Jewel v. NSA*, 856 Fed. Appx. at 641. In one sentence, the panel concluded that the district court

"did not abuse its discretion in excluding evidence at summary judgment," and went on to say that "even considering the excluded evidence," standing was not established. *Id*. Later, rehearing was denied without dissent.

The panel's naked ruling on standing allowed it to ignore the principles set out in the Ninth Circuit's *Fazaga* decision one year previously, as well as the clear and abundant public evidence that Petitioners' property and privacy interests were violated by the NSA's seizure and search of all domestic phone calls (*Fazaga* at 11) and Internet records (*id.* at 13). It is widely understood from whistleblower testimony that the NSA either coerced or conspired with AT&T to install a splitter to copy Internet communications and metadata in the AT&T Folsom Street Facility in San Francisco (*id*. at 14-15).

Although due to its extreme brevity there is no way to know on what the panel's standing conclusion was based, it might have been based on the erroneous notion that standing requires the Government expressly to concede that it illegally spied on the Petitioners. Or, it could be based on the theory that if everyone's communications are being unlawfully intercepted by what has come to be known as the "Deep State," then no one has had a particularized injury sufficient to establish standing. If true, the atextual judicial term "particularized injury" is being twisted to establish a standard which exceeds the Constitution's Article III "case" or "controversy" standard, and thereby violate the "duty of the judicial department to say what the law is." *Marbury v.*

Madison, 5 U.S. 137, 177 (1803). If Petitioners' remarkable tenacity over many years of litigation is allowed by this Court to go for naught, the American public will reasonably conclude that the federal courts are choosing to exempt government surveillance from the limitations of the U.S. Constitution.

During the first week of the Supreme Court's new October Term 2021, the Court heard oral argument in *United States v. Zubaydah* to answer the following issue:

> Whether the [U.S. Court of Appeals for the 9th Circuit] erred when it rejected the United States' assertion of the state-secrets privilege based on the court's own assessment of potential harms to the national security, and required discovery to proceed further under 28 U.S.C. 1782(a) against former Central Intelligence Agency contractors on matters concerning alleged clandestine CIA activities. [*Zubaydah* Petition for Certiorari at I.]

On November 8, 2021, this Court heard oral argument in the *FBI v. Fazaga* case. The question presented is:

> Whether **Section 1806(f) displaces the state-secrets privilege** and authorizes a district court to resolve, *in camera* and *ex parte,* the merits of a lawsuit challenging the lawfulness of government surveillance by considering the privileged evidence. [*Fazaga* Petition for Certiorari at I (emphasis added).]

Although these *amici* urge the court to grant Appellants' petition, in the alternative, these *amici* would urge the court to hold this petition and await this Court's decision in *Zubaydah* or *Fazaga* before considering this petition. This request is consistent with the position taken by Petitioners. *See* Pet. at 42.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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