No. 19-16066

In the
United States Court of Appeals for the Ninth Circuit

CAROLYN JEWEL, *ET AL.*,
Plaintiffs-Appellants,
v.
NATIONAL SECURITY AGENCY, *ET AL.*,
Defendants-Appellees.

On Appeal from the
United States District Court for
the Northern District of California

Brief *Amicus Curiae* of Free Speech Coalition, Free Speech Defense and Education Fund, Gun Owners Foundation, Gun Owners of America, Conservative Legal Defense and Education Fund, Downsize DC Foundation, DownsizeDC.org, California Constitutional Rights Foundation, Constitution Party National Committee, and Restoring Liberty Action Committee in Support of Appellants' Petition for Rehearing and Petition for Rehearing *En Banc*

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DISCLOSURE STATEMENT

The *amici curiae* herein, Free Speech Coalition, Free Speech Defense and Education Fund, Gun Owners Foundation, Gun Owners of America, Conservative Legal Defense and Education Fund, Downsize DC Foundation, DownsizeDC.org, California Constitutional Rights Foundation, Constitution Party National Committee, and Restoring Liberty Action Committee, through their undersigned counsel, submit this Disclosure Statement pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A). These *amici curiae* are non-stock, nonprofit corporations, none of which has any parent company, and no person or entity owns them or any part of them.

The *amici curiae* are represented herein by Jeremiah L. Morgan, who is counsel of record; William J. Olson, and Robert J. Olson, of William J. Olson, P.C., 370 Maple Avenue West, Suite 4, Vienna, Virginia 22180-5615. These *amici* are also represented herein by Joseph W. Miller of Joseph Miller Law Offices, LLC, P.O. Box 83440, Fairbanks, Alaska 99708; Patrick M. McSweeney of McSweeney, Cynkar, & Kachouroff, PLLC, 3358 John Tree Hill Rd., Powhatan, Virginia 23139; Gary G. Kreep of California Constitutional Rights Foundation, 932 D Street, Suite 2, Ramona, California 92065; and James

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s/Jeremiah L. Morgan
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INTEREST OF *AMICI CURIAE*[1]

Free Speech Coalition, Free Speech Defense and Education Fund, Gun Owners Foundation, Gun Owners of America, Conservative Legal Defense and Education Fund, Downsize DC Foundation, DownsizeDC.org, and California Constitutional Rights Foundation are nonprofit organizations, exempt from federal taxation under sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code. Restoring Liberty Action Committee is an educational organization. Each is dedicated, *inter alia*, to the correct construction, interpretation, and application of law. The Constitution Party National Committee is a national political party committee registered with the Federal Election Commission dedicated to adherence to the U.S. Constitution.

Several of these *amici* filed an *amicus curiae* brief in a prior appeal in this case in 2015, and then again in 2019:

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

[1] All parties have consented to the filing of this brief *amicus curiae*. No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than these *amici curiae*, their members or their counsel contributed money that was intended to fund preparing or submitting this brief.

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

Additionally, several of these *amici* also filed *amicus curiae* briefs in other federal Fourth Amendment cases involving government surveillance of different types, including the following:

- United States v. Antoine Jones, 565 U.S. 400 (2012) Petition Stage: http://lawandfreedom.com/site/constitutional/USvJones_amicus.pdf (May 16, 2011); Merits Stage: http://lawandfreedom.com/site/constitutional/USvJones_Amicus_Merits.pdf (Oct. 3, 2011);

- Clapper v. Amnesty International USA, 568 U.S. 398 (2013); http://lawandfreedom.com/site/constitutional/ClappervAmnestyIntl_Amicus.pdf (Sept. 24, 2012);

- Cotterman v. United States, 571 U.S. 1156 (2014); http://lawandfreedom.com/site/constitutional/Cotterman_v_US_Amicus.pdf (Sept. 9, 2013);

- United States v. Wurie (consolidated with Riley v. California), 573 U.S. 373 (2014); http://www.lawandfreedom.com/site/constitutional/Wurie%20DDCF%20Amicus%20Brief.pdf (Apr. 9, 2014);

- Wikimedia v. National Security Agency, 857 F.3d 193 (4th Cir. 2017); http://lawandfreedom.com/wordpress/wp-content/uploads/2016/02/Wikimedia-amicus-brief.pdf (Feb. 24, 2016); and

- Carpenter v. United States, 138 S. Ct. 2206 (2018); http://lawandfreedom.com/wordpress/wp-content/uploads/2017/08/Carpenter-amicus-brief.pdf (Aug. 14, 2017).

Late last month, certain of these *amici* filed an *amicus curiae* brief in the U.S. Supreme Court in a pending merits case that will address issues highly similar to those in this case:

- FBI v. Fazaga, U.S. Supreme Court No. 20-828; http://www.lawandfreedom.com/wordpress/wp-content/uploads/2021/09/FBI-v-Fazaga-Amicus-Brief-Final.pdf (Sept. 28, 2021).

ARGUMENT

I. The Panel's Opinion Contradicts this Court's Earlier Decision in *Fazaga v. FBI*, Necessitating Rehearing.

The memorandum opinion issued by the panel on August 17, 2021 affirming the district court's dismissal of appellants' claims contradicts the basis for the decision of this court issued only a year ago in *Fazaga v. FBI,* 965 F.3d 1015, 1043-52 (9th Cir. 2020). In that July 20, 2020 *Fazaga* opinion, the court concluded that:

> in enacting FISA, Congress displaced the common law dismissal remedy created by the *Reynolds* state secrets privilege as applied to electronic surveillance within FISA's purview….
> 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 now being challenged was cursory, constituting less than a page in Lexis Reports, ignoring many of the complex legal issues raised by litigation that has been pending since 2008. The panel did not consider important issues, including how to examine classified information, and the application of the state secrets privilege, as detailed by Appellants. *See* Appellants' Petition for Rehearing and Petition for Rehearing En Banc ("Pet. Rehear.") 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*, 2021 U.S. App. LEXIS 24497 at *4 (9th Cir. 2021). 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*. at *5.

The panel's naked ruling on standing allowed it to ignore the principles set out in this Court's *Fazaga* decision one year ago, as well as the clear and abundant public evidence that Appellants' 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 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 plaintiff. 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 exceed the bounds of 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 Appellants' remarkable tenacity over 13 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.

II. The U.S. Supreme Court Is Currently Considering Not Just One, but Two Cases Which Will Almost Certainly Establish Principles Which Will Resolve the Legal Issues in This Case.

In the first week of the Supreme Court's new October Term 2021, the Court heard oral argument in *United States v. Zubaydah* to answer a question that is almost guaranteed to have a bearing in the outcome of the present case:

> 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.]

Similar to the application of FISA in this case, the question in *Zubaydah* is whether the congressionally established procedure to review allegations of unlawful surveillance in FISA can be negated by the state-secrets evidentiary privilege.

Additionally, on November 8, 2021, the Supreme Court is scheduled to hear oral argument in the previously discussed *Fazaga* case. The question presented in that case lies at the core of this case as well:

> 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).]

While these *amici* urge the court to grant Appellants' petition, in the alternative, these *amici* would urge the court to await the High Court's merits consideration of *Zubaydah* or *Fazaga* before ruling on the petition.

III. Shutting the Courthouse Door to Well-Grounded Claims of Unconstitutional Dragnet Warrantless Surveillance by the Federal Government Jeopardizes our Republican Form of Government.

Although "there is no single 'correct' way to design a republican government,"[2] 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, No. 39* at 194. Thus, the term encompasses two essential attributes: popular sovereignty and political accountability. As Justice Alito has noted: "Liberty requires accountability."[3]

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[2] *Evenwel v. Abbott*, 136 S. Ct. 1120, 1140 (2016) (Thomas, J., concurring in the judgment).

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

Thus, our republican form of government is undermined by the panel's recent 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 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. Such lawlessness erodes the faith of the American people in all branches of government. Two points should be considered. First, since government surveillance is generally conducted in secret, the American People must depend on federal law enforcement to curtail illegal surveillance programs. As shown in Section III.A, *infra*, there is no reason to believe federal law enforcement has ever or will ever constrain intelligence agencies. Second, as shown in Section III.B, *infra*, the failure of the Executive, Legislative, and Judicial Branches to protect the people may be understandable based on the raw power that surveillance gives to "Deep State" operatives — power that can and has been used to corrupt the American political process.

A. The FBI and Department of Justice Cannot Be Trusted to Follow the Law, to Say Nothing of Enforcing Compliance by NSA and Other "Deep State" Agencies.

Just two days after most of these *amici* filed their *amicus* brief in the U.S. Supreme Court in *FBI v. Fazaga*, on September 30, 2021, Michael Horowitz, Inspector General of the U.S. Department of Justice, issued a third scathing report about the manner in which the FBI has been filing applications with the Foreign Intelligence Surveillance Court ("FISC") to surveil U.S. Persons.[4]

The first report was issued in December 2019 and addressed the FBI's "Crossfire Hurricane" investigation. That earlier report "identified fundamental and serious errors in the agents' conduct of the FBI's factual accuracy review procedures … with regard to all four FISA applications … [including] follow[ing] its [own] policies." Management Advisory Memorandum at 1.[5]

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[4] U.S. Department of Justice Inspector General, "Audit of the Federal Bureau of Investigation's Execution of Its Woods Procedures for Applications Filed with the Foreign Intelligence Surveillance Court Relating to U.S. Persons," Audit Report 21-129 (Sept. 2021).

[5] U.S. Department of Justice Inspector General, "Management Advisory Memorandum for the Director of the Federal Bureau of Investigation Regarding the Execution of Woods Procedures for Applications Filed with the Foreign Intelligence Surveillance Court Relating to U.S. Persons," Audit Division 20-047 (March 2020) ("Management Advisory Memorandum").

The second report issued March 2020 more broadly reviewed applications involving counterintelligence and counterterrorism investigations from October 2014 through September 2019. It appears from the report that the IG is operating in an advisory role, seeking to ensure that laws and rules are followed prospectively, with no sanctions imposed on unlawful behavior by scores of FBI and DOJ personnel. Given that limited role, the report modestly concluded only that the IG staff "do not have confidence that the FBI has executed its Woods Procedures in compliance with FBI policy" which were designed to achieve the FBI's policy to be "'scrupulously accurate.'" *Id*. at 3.

The second IG report contained two recommendations: that the FBI monitor future actions and enhance training, and that the FBI inventory Woods Files for all FISA applications submitted to the FISC in all pending investigations. There is no hint that anyone would be held to account. *Id*. at 9. Indeed, the American People reading that report realize that there is almost no accountability within the FBI, the Department of Justice, and the other government agencies conducting surveillance. Although these law enforcement agencies can be ruthless in pursuing those who exhibit resistance to whatever may

be the ruling orthodoxy at the moment, they act as if the law applies only to American citizens, but not to the ruling class.

The March 2020 IG report again demonstrated the laxness with which the FBI and the Justice Department treat surveillance of American citizens even when they know their activities are being approved and monitored by the Foreign Intelligence Surveillance Court. Based on that public track record, there is every reason to believe that the same FBI and Justice Department treat surveillance of American citizens under the upstream data collection program under review in this case with even less concern for the property rights[6] and privacy rights of Americans.

B. Government Surveillance Empowers the "Deep State" to Gather the Information Necessary to Intimidate the Executive, Legislative, and Judicial Branches from Enforcing Constitutional Protections Against Government Surveillance.

The U.S. Justice Department, which applies an equal standard to all Americans, can be a force for good. However, if the Justice Department, and

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[6] Although Appellants may have entrusted their communications to necessary commercial third parties, they continue to enjoy a robust property interest in those communications from being diverted to government agents. *See United States v. Jones*, 565 U.S. 400 (2012) (restoring to primacy the original "property" basis of the Fourth Amendment). *See Ex parte Jackson*, 96 U.S. 727, 733 (1878).

what has been called "the nation's premiere law enforcement agency," the FBI, is politicized, it can be abused in ways that undermine our constitutional republic.

On September 21, 2021, an Op Ed in the *Wall Street Journal* rang out with the call: "Abolish the FBI."[7] 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 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. [Emphasis added.]

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[7] Coleman Jenkins, Jr., "Abolish the F.B.I.," *Wall Street Journal* (Sept. 22, 2021).

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 (D-NY) to Rachel Maddow:

> "Let me tell you: you take on the Intelligence Community — they have six ways from Sunday of getting back at ya."[8]

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 Intelligence Community … look at the Russian hacking, without the Intelligence Community we wouldn't have discovered it.… [The Rachel Maddow Show (emphasis added).]

This is not a new problem. Ronald Kessler's book, The Secrets of the FBI, details Director Hoover's special Official and Confidential files on elected

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

and appointed government officials kept in his office. An article in *The Daily Beast* explains how these files were used:

> "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."
>
> Lawrence J. Heim, who was in the Crime Records Division, confirmed to me that the bureau sent agents to tell members of Congress that Hoover had picked up derogatory information on them.
>
> "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).]

From the era of Hoover to the circumstances existing today as described by Senator 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 for anything they do.[9]

CONCLUSION

For the reasons set out in Appellants' Petition for Rehearing and Rehearing *En Banc* and the reasons set out above, these *amici* urge the Court to either grant the Petition or to hold it pending Supreme Court disposition of the two related merits cases now before it.

Respectfully submitted,

/s/ Jeremiah L. Morgan

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[9] Twenty-nine years ago, FBI sniper Lon Horiuchi killed Vicky Weaver at Ruby Ridge, Idaho, while holding her baby. "The FBI initially claimed that killing Mrs. Weaver was justified and then later covered up key details and claimed it was accidental. FBI chief Louis Freeh pretended his agents had done nothing seriously wrong.... [T]he feds paid a $3 million wrongful death settlement to the Weaver family." J. Bovard, "Ruby Ridge and the FBI License to Kill," *JimBovard.com* (Aug. 22, 2021).

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of Free Speech Coalition, *et al.*, in Support of Appellants' Petition for Rehearing and Petition for Rehearing *En Banc*, was made, this 12th day of October 2021, by the Court's Case Management/ Electronic Case Files system upon the attorneys for the parties.

/s/Jeremiah L. Morgan
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