

1 STUART F. DELERY
 Principal Deputy Assistant Attorney General
 2 JOSEPH H. HUNT
 Director, Federal Programs Branch
 3 ANTHONY J. COPPOLINO
 Deputy Branch Director
 4 tony.coppolino@usdoj.gov
 5 MARCIA BERMAN
 Senior Trial Counsel
 6 marcia.berman@usdoj.gov
 U.S. Department of Justice
 7 Civil Division, Federal Programs Branch
 8 20 Massachusetts Avenue, NW, Rm. 7132
 Washington, D.C. 20001
 9 Phone: (202) 514-2205; Fax: (202) 616-8470
 Attorneys for the Government Defs. in their Official Capacity

11 **UNITED STATES DISTRICT COURT**
 12 **NORTHERN DISTRICT OF CALIFORNIA**
 13 **SAN FRANCISCO DIVISION**

13	_____)	
14	CAROLYN JEWEL, <i>et al.</i> ,)	Case No. 3:08-cv-04373-JSW
15	Plaintiffs,)	
16	v.)	
17	NATIONAL SECURITY AGENCY, <i>et al.</i> ,)	
18	Defendants.)	
19	_____)	Case No. 07-cv-00693-JSW
20	<i>In re National Security Agency</i>)	
21	<i>Telecommunications Records Litigation</i>)	DEFENDANTS' ADDITIONAL
22	(M:06-cv-1791))	BRIEFING ADDRESSING <i>CLAPPER v.</i>
23	<u>This Document Relates To:</u>)	<i>AMNESTY INTERNATIONAL</i>
24	VIRGINIA SHUBERT, <i>et al.</i> ,)	
25	Plaintiffs,)	
26	v.)	Judge Jeffrey S. White
27	BARACK OBAMA, <i>et al.</i>)	Courtroom 11, 19 th Floor
28	Defendants.)	

Defendants' Additional Briefing Addressing *Clapper v. Amnesty Int'l*
Jewel v. National Security Agency (08-cv-4373-JSW)
Shubert v. Obama (07-cv-00693-JSW) (M:06-cv-1791)

1 Pursuant to the Court’s Order of February 27, 2013 (Dkt. No. 138), the Government
2 defendants submit this additional briefing on the United States Supreme Court’s recent decision
3 in *Clapper v. Amnesty International USA*, -- S. Ct. --, 2013 WL 673253 (Feb. 26, 2013).
4

5 The Supreme Court held in *Clapper* that the plaintiff-respondents did not have standing
6 to challenge a provision of the 2008 amendments to the Foreign Intelligence Surveillance Act
7 (“FISA”), which established new statutory authority for U.S. government surveillance directed at
8 the communications of non-U.S. citizens located abroad. 50 U.S.C. § 1881a. The plaintiffs in
9 *Clapper* were attorneys and human rights and other organizations whose work allegedly required
10 them to communicate with individuals located abroad who plaintiffs believed were likely targets
11 of surveillance under § 1881a. The plaintiffs sued the Government challenging the legality of
12 § 1881a the day it was enacted, and based their standing on their alleged fear that the
13 Government would, under § 1881a, intercept their sensitive international communications which
14 they claimed were necessary to carrying out their jobs, and that they therefore had to take costly
15 and burdensome measures to protect the confidentiality of those communications. 2013 WL
16 673253, at *6.
17

18 The Court found that the plaintiffs’ alleged fear was dependent on a chain of speculative
19 contingencies and could not, therefore, support their standing. *Id.* at *8. The case was decided at
20 the summary judgment stage—the stage at which, the Court emphasized, the plaintiffs could no
21 longer rely on their allegations but were required to set forth specific facts proving their standing.
22 *Id.* at *9. The plaintiffs, however, had “no actual knowledge of the Government’s § 1881a
23 targeting practices,” *id.*, nor did they “offer any evidence that their communications have been
24 monitored under § 1881a, a failure that substantially undermines their standing theory.” *Id.* at
25
26
27

1 *8.

2 The *Clapper* decision supports the entry of summary judgment for the Government
3 defendants in the instant *Jewel* and *Shubert* cases for at least two related reasons. First, *Clapper*
4 reaffirms that, at the summary judgment stage, a plaintiff bears the burden of establishing
5 standing through the submission of actual evidence, not speculation about present or future
6 injuries. In this case, any such evidence is properly protected by the Government's state secrets
7 privilege assertion. Second, *Clapper* strongly indicates that reliance on *in camera* proceedings to
8 establish whether or not a person has been subject to surveillance, as plaintiffs have proposed
9 here, would inherently reveal national security information and thus would be improper.

10
11 The principal import of the *Clapper* decision to the pending cross-motions for summary
12 judgment in this litigation is footnote 4 on page *9 of the opinion. In that footnote, the Court
13 addressed the suggestion, made at oral argument, that the standing issue could be resolved by the
14 Government's revealing in an *in camera* proceeding whether it was surveilling the plaintiffs'
15 communications and what procedures it was using to do so. The Court flatly rejected this
16 suggestion. The Court first noted that it is the *plaintiffs'* burden to establish their standing by
17 pointing to specific facts, "not the Government's burden to disprove standing by revealing details
18 of its surveillance priorities." "Moreover," the Court explained, "this type of hypothetical
19 disclosure proceeding would allow a terrorist (or his attorney) to determine whether he is
20 currently under U.S. surveillance simply by filing a lawsuit challenging the Government's
21 surveillance program. Even if the terrorist's attorney were to comply with a protective order
22 prohibiting him from sharing the Government's disclosures with his client, the court's
23 postdisclosure decision about whether to dismiss the suit for lack of standing would surely signal
24 to the terrorist whether his name was on the list of surveillance targets." *Id.* at n.4 *9.

1 Footnote 4 bears directly on the issues currently before the Court. First, the pending
2 cross-motions are for summary judgment, as was the motion at issue in *Clapper*. Thus, as the
3 Supreme Court affirmed, plaintiffs here must set forth specific facts establishing their standing—
4 *i.e.*, facts establishing that the Government has surveilled their communications as alleged in the
5 complaint. This plaintiffs cannot do without information that is properly subject to the state
6 secrets privilege. *See* Government Defendants’ Second Motion to Dismiss and For Summary
7 Judgment, Opposition to Plaintiffs’ Motion for Partial Summary Judgment at 25-26 (Dkt. No.
8 102); Government Defendants’ Reply in Support of Second Motion to Dismiss and For
9 Summary Judgment at 11 (Dkt. No. 119) (“Defs.’ Reply”).¹

11 Second, and directly pertinent to plaintiffs’ pending partial motion for summary
12 judgment, the Supreme Court has rejected the path forward that plaintiffs here propose—that the
13 Government disclose in an *in camera* proceeding conducted pursuant to 50 U.S.C. § 1806(f)
14 whether plaintiffs have been surveilled and under what authority. *See* Plaintiffs’ Motion for
15

16

17 ¹ The differences between the allegations of injury in *Clapper* and in the instant *Jewel*
18 and *Shubert* actions are not material to the disposition of the standing issue at this stage of this
19 litigation. The alleged injury in *Clapper* was based on speculative fear of future surveillance
20 under the new § 1881a of the FISA, as well as present ongoing injuries based on costs plaintiffs
21 asserted they were incurring in order to avoid the feared surveillance; as noted, the Supreme
22 Court found this insufficient at the summary judgment stage in the absence of actual evidence of
23 surveillance. The plaintiffs in the instant *Jewel* and *Shubert* actions allege that the NSA, under
24 presidential authorization after the September 11 attacks, has been engaging in “dragnet”
25 surveillance activities that allegedly encompass both the content of, and records concerning,
26 plaintiffs’ past and present electronic communications. As in *Clapper*, this case is now also at
27 the summary judgment stage, and if plaintiffs cannot sustain their burden to establish standing—
28 which they cannot without properly privileged information—their claims cannot proceed. *See*
Jewel v. NSA, 673 F.3d 902, 911-12 (9th Cir. 2011) (accepting plaintiffs’ allegations of injury as
true at the motion to dismiss stage, but noting that a failure of proof may doom standing on
summary judgment).

1 Partial Summary Judgment Rejecting the Government Defendants’ State Secrets Defense at 18-
2 19 (Dkt. No. 83). Footnote 4 confirms that, rather than replace the state secrets privilege,
3 reliance on the procedures set forth in § 1806(f) would be inimical to the proper application of
4 the privilege because an *in camera* proceeding under § 1806(f) would inherently risk disclosing
5 whether plaintiffs have been subject to surveillance and the circumstances of any such
6 surveillance—disclosures that could result in extraordinary damage to national security. Defs.’
7 Reply at 45-47. Thus, application of § 1806(f) in this case would risk the very harms the
8 privilege is intended to prevent. *Id.* Footnote 4 strongly indicates that the use of *in camera*
9 proceedings that might risk the disclosure of national security information is not a proper way to
10 establish standing. Accordingly, the Court should reject plaintiffs’ contention that *in camera*
11 proceedings may be used to litigate the question of standing (as well as the merits of their
12 claims), and find that the state secrets privilege requires dismissal of this case.
13
14

15 CONCLUSION

16 For the foregoing reasons, as well as those set forth in the Government Defendants’
17 Second Motion to Dismiss and For Summary Judgment, its reply brief, and at oral argument, the
18 Court should grant the Government defendants’ motion and deny Plaintiffs’ Motion for Partial
19 Summary Judgment.
20

21 Respectfully Submitted,

22 STUART F. DELERY
23 Principal Deputy Assistant Attorney General

24 JOSEPH H. HUNT
25 Director, Federal Programs Branch

26 s/ Anthony J. Coppolino
27 ANTHONY J. COPPOLINO

28 Defendants’ Additional Briefing Addressing *Clapper v. Amnesty Int’l*
Jewel v. National Security Agency (08-cv-4373-JSW)
Shubert v. Obama (07-cv-00693-JSW) (M:06-cv-1791)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Deputy Branch Director
tony.coppolino@usdoj.gov

s/ Marcia Berman
MARCIA BERMAN
Senior Trial Counsel
marcia.berman@usdoj.gov
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, NW, Rm. 7132
Washington, D.C. 20001
Phone: (202) 514-2205
Fax: (202) 616-8470
*Attorneys for the Government Defendants
Sued in their Official Capacities*