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July 20, 2007

Ms. Cathy Catterson  
Clerk, United States Court of Appeals for the Ninth Circuit  
95 Seventh Street  
San Francisco, CA 94103

Re: *Hepting v. United States*, No. 06-17137  
(Consolidated with Nos. 06-17132, 06-36083)  
**(Scheduled for oral argument on August 15, 2007)**

Dear Ms. Catterson:

Pursuant to Federal Rule of Appellate Procedure 28(j), we respectfully call this Court's attention to *ACLU v. NSA*, \_\_\_ F.3d \_\_\_, 2007 WL 1952370 (6th Cir. July 6, 2007).

In *ACLU*, plaintiffs who claimed to make international communications targeted by the Terrorist Surveillance Program (TSP) challenged the constitutionality of the TSP and an alleged data-mining program, whose existence has been the subject of media speculation, but has never been officially confirmed or denied. The district court enjoined the TSP as unconstitutional, but dismissed plaintiff's data-mining challenge. The Sixth Circuit vacated the district court's ruling invalidating the TSP, and directed that the case be dismissed for lack of jurisdiction. *Id.* at \*68.

The court held that the "proof needed either to make or negate" a showing that any plaintiff "has actually been wiretapped" by the TSP is protected by the state secrets privilege. Because the privilege prevents plaintiffs from "show[ing] that they have been or will be subjected to surveillance personally, they clearly cannot establish standing." See *id.* at \*5, \*7 (lead opinion); see also *id.* at \*34, \*38 (concurring opinion) (plaintiffs are "prevented from establishing standing because of the state secrets privilege," and, without "evidence that they are personally subject to the TSP," "plaintiffs cannot establish standing for any of their claims"). This supports our arguments that the *Hepting* plaintiffs lack standing to bring their content "dragnet" claims. See Gov. Br. 26-36; Gov. Reply 16-20. Indeed, since (unlike the TSP) the Government has denied any content "dragnet" program, plaintiffs' here face an even more difficult burden than the plaintiffs in *ACLU*.

The Sixth Circuit also unanimously affirmed the district court's dismissal of plaintiffs' data-mining claim. The court held that, like plaintiffs' TSP challenge, the state secrets privilege barred plaintiffs' claims based on a purported data-mining program. See *id.* at \*34 (lead opinion); *ibid.* (concurrency); see *id.* at \*68 (partial dissent); cf. *ACLU v. NSA*, 438 F. Supp. 2d 754, 765 (E.D. Mich. 2006). This ruling supports our argument that the state secrets privilege bars the communication records claims in *Hepting*. See Gov. Br. 25-26; Gov. Reply 14 & n.1.

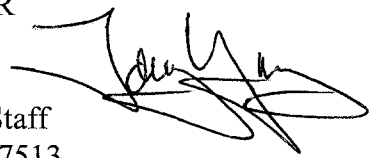
Respectfully submitted,

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