Stephen K. Dunkle, SBN 227136
SANGER SWYSEN & DUNKLE
125 East De La Guerra Street, Suite C
Santa Barbara, California 93101
Tel: (805) 962-4887, Fax: (805) 963-7311
sdunkle@sangerswysen.com

John T. Philipsborn, SBN 83944
Law Offices of J.T. Philipsborn
Civic Center Building
507 Polk Street, Ste. 350,
San Francisco, CA 94102
Tel: (415) 771-3801, Fax: (415) 771-3218
jphilipsbo@aol.com

Attorneys for *Amicus Curiae*
California Attorneys for Criminal Justice

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

FIRST UNITARIAN CHURCH OF LOS ANGELES; ACORN ACTIVE MEDIA; BILL OF RIGHTS DEFENSE COMMITTEE; CALGUNS FOUNDATION, INC.; CALIFORNIA ASSOCIATION OF FEDERAL FIREARMS LICENSEES, INC.; CHARITY AND SECURITY NETWORK; COUNCIL ON AMERICAN ISLAMIC RELATIONSCALIFORNIA; COUNCIL ON AMERICAN ISLAMIC RELATIONS- OHIO; COUNCIL ON AMERICAN ISLAMIC RELATIONS FOUNDATION, INC.; FRANKLIN ARMORY; FREE PRESS; FREE SOFTWARE FOUNDATION; GREENPEACE, INC.; HUMAN RIGHTS WATCH; MEDIA ALLIANCE; NATIONAL LAWYERS GUILD; NATIONAL ORGANIZATION FOR THE REFORM OF MARIJUANA LAWS, CALIFORNIA CHAPTER; PATIENT PRIVACY RIGHTS; PEOPLE FOR THE AMERICAN WAY; PUBLIC KNOWLEDGE; SHALOM CENTER; STUDENTS FOR SENSIBLE DRUG POLICY; TECHFREEDOM; and UNITARIAN UNIVERSALIST SERVICE COMMITTEE Plaintiffs, v.	Case No. 3:13-cv-03287-JSW ***AMICUS CURIAE* BRIEF OF CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE** Ctrm: 11-19th Floor Judge: Honorable Jeffrey S. White

NATIONAL SECURITY AGENCY and KEITH B. ALEXANDER, its Director, in his official and individual capacities; the UNITED STATES OF AMERICA; DEPARTMENT OF JUSTICE and ERIC H. HOLDER, its Attorney General, in his official and individual capacities; Acting Assistant Attorney General for National Security JOHN P. CARLIN, in his official and individual capacities; FEDERAL BUREAU OF INVESTIGATION and JAMES B. COMEY, its Director, in his official and individual capacities; ROBERT S. MUELLER, former Director of the FEDERAL BUREAU OF INVESTIGATION, in his individual capacity; JAMES R. CLAPPER, Director of National Intelligence, in his official and individual capacities, and DOES 1-100

Defendants.

I. THE INTEREST OF *AMICUS CURIAE*

CACJ is a non-profit California corporation, and a statewide organization of criminal defense lawyers. CACJ is the California affiliate of the National Association of Criminal Defense Lawyers. CACJ is administered by a Board of Directors, and its by-laws state a series of specific purposes including the defense of the constitutional rights of individuals and the improvement of the quality of the administration of criminal law. CACJ's membership consists of approximately 2,000 criminal defense lawyers from around the State of California and elsewhere, as well as members of affiliated professions. For more than thirty years, CACJ has appeared before the United States Supreme Court, the California Supreme Court, and the Courts of Appeal in California on issues of importance to its membership.

The interest which CACJ seeks to uphold in this case is the protection of the constitutional and statutory rights of those accused of criminal offenses and their clients. In particular, CACJ is concerned with maintaining the constitutional right of persons accused of crimes to communicate confidentially with their legal counsel and to prevent the government from eavesdropping on those communications.

II. ARGUMENT

A. The NSA's Activities Are Not Justified By National Security Concerns

When the courts face issues of government intrusion, the government often urges that these are special times or there are special threats. See *Trial of Matthew Lyon* (1798); *Abrams v. United States*, 250 U.S. 616, 617, 40 S. Ct. 17 (1919); *Scales v. United States*, 367 U.S. 203, 81 S. Ct. 1469 (1961) Yet, when viewed in the light of history, these intrusions were not necessitated by these special times or special threats. Looking back on the Alien and Sedition Act, Justice Brennan wrote, ""[a]lthough the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history." *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964).

In 1928, the United States Supreme Court faced the issue of wire-tapping in the special times that now do not seem so special, or at least not so special as to allow the kind of government wiretapping that occurred there. The case, *Olmstead v. United States*, 277 U.S. 438 (1928), is more significant for its dissent in which Justice Brandeis took a grounded approach based on the foundation of the Constitution itself. He said

> [t]he makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings, and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone-the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.

Olmstead v. United States, 277 U.S. 438, 478-479

In addition to the federal constitutional rights protecting privacy, individual states afford protection against unjustified government intrusion. In California, the constitutional protection of the right of privacy is directed at protecting against the "four mischiefs" of: "(1) 'government snooping' and the secret gathering of personal information; (2) the overbroad collection and retention of unnecessary personal information by government and business interests; (3) the

improper use of information properly obtained for a specific purpose, for example, the use of it for another purpose or the disclosure of it to some third party; and (4) the lack of a reasonable check on the accuracy of existing records." *White v. Davis* (1975) 13 Cal.3d 757, 775 (1975).

These are values which are intruded upon by the taping of actual wires at the time of *Olmstead* and by the NAS's omnivorous consumption of data from all sources in our times. And Justice Brandeis went further to see so clearly that it really does not depend on a despot or a despotic mindset by the government agents. He saw that the threat to liberty in the name of a good cause was much more subtle and, yet, much more threatening. Justice Brandeis famously explained,

> Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding.

We can assume for the sake of this argument that the women and men of the NAS are well meaning. It is plain from their actions that they are people of zeal. But to the extent that they urge upon this court that their activities are not an intrusion under the Constitution of the United States shows that, at least in this, they are without understanding. It is up to the court to be on guard to protect liberty even though the Government's purposes may be characterized as beneficent.

B. The Sixth Amendment Right to Counsel Provides that the Accused Have the Right to Communicate with Counsel Without Government Interference Including Eavesdropping

Members of various professions are affected by the NSA program. The legal profession is just one in which a privilege attaches to communications between professionals and clients.[1]

[1] Federal Rule of Evidence 501 and the case law recognize a privilege applying to confidential communications between lawyers and their clients (*United States v. Martin*, 278 F3d 988, 999–1000 (9th Cir. 2002)), psychotherapists and patients (*Jaffee v. Redmond*, 518 US 1, 11 (1996)), and clergy and communicants (*In re Grand Jury Investigation*, 918 F2d 374, 384 (3rd. Cir. 1990)). The California Evidence Code recognizes a privilege applying to confidential

The NSA program intrudes upon all aspects of the legal profession including civil litigation, particularly in cases in which the government is a party. However, criminal defendants and their attorneys are uniquely impacted by government surveillance.

Federal law protects attorney-client privilege and work product. The attorney-client privilege protects confidential communications between a client and an attorney from disclosure: "(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection be waived." *United States v. Graf*, 610 F3d 1148, 1156 (9th Cir. 2010). The work product doctrine protects the privacy of attorneys' thought processes, and prevents parties from borrowing the wits of their adversaries. *Hickman v. Taylor*, 329 U.S. 495, 516 (1947); *Holmgren v. State Farm Mut. Auto. Ins. Co.* (9th Cir. 1992) 976 F2d 573, 576 (9th Cir. 1992).

The need for confidential communications between attorneys and clients has also been recognized in custodial settings. *Ching v. Lewis*, 895 F.2d 608, 610 (9th Cir. 1990); *Mann v. Reynolds*, 46 F.3d 1055, 1061 (10th Cir., 1995). The Ninth Circuit stated, "[t]his apparently arbitrary policy of denying a prisoner contact visits with his attorney prohibits effective attorney-client communication and unnecessarily abridges the prisoner's right to meaningful access to the courts." *Ching v. Lewis*, 895 F.2d 608, 610 (9th Cir. 1990); see also, *Bach v. Illinois*, 504 F.2d 1100, 1102 (7th Cir., 1974), recognizing an inmate's need for confidentiality in communications with counsel. The Tenth Circuit described the protection of the right of incarcerated individuals to have access to the legal system, noting that: "The opportunity to communicate privately with an attorney is an important part of that meaningful access [to the courts]." *Mann v. Reynolds*, 46 F.3d 1055, 1061 (10th Cir., 1995); relying on *Ching v. Lewis* 895 F.2d 608, 609 (9th Cir., 1990).

Even thought this matter is in federal court, California attorneys have to abide by ethical

---

communications between lawyers and clients (§ 952), physicians and patients (§992), psychotherapists and patients (§ 1012), and clergy and parishioners (§ 1032).

duties imposed in their own jurisdiction. California appellate courts have recognized that government eavesdropping on private communications between the accused and their attorneys violates the Fourth, Fifth Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 1, 7 and 15 of the California Constitution. *Barber v. Mun. Court*, 24 Cal. 3d 742 (1979); *Morrow v. Superior Court*, 30 Cal. App. 4th 1252, 1259 (1994). While this is not controlling precedent for the purposes of this Honorable Court, these opinions, nevertheless, provide context as to how California criminal defense attorneys and their clients are impacted by a rule so disparate from their practice.

Lawyers in California are required to protect the confidences of clients not only by California Evidence Code § 955 ["When lawyer required to claim privilege"], but also under Business & Professions Code § 6068(e), which requires lawyers: "To maintain inviolate the confidence, and at every peril to himself or herself preserve the secrets, of his or her client". By definition, in California, the client is the holder of the attorney-client privilege. See California Evidence Code § 953(a). But the issues that we are addressing here are raised in part because the attorney client privilege covers matters which are confidential because they involve one lawyer talking to one client. By definition, the one lawyer/one client confidential exchange is not shared in or with a group. Also, by definition, information provided to a lawyer in confidence, but then divulged to a third party, may no longer be deemed privileged, or protected. California Evidence Code Section 912.

The public policy behind the attorney-client privilege has been discussed in many places. As the U.S. Supreme Court put it in *Upjohn Co. v. United States*, the attorney-client privilege was designed to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The rule of confidentiality "recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client." *Id*. Long ago, the Court held that a lawyer's assistance can only be safely and readily provided "when free from consequences or the apprehension of disclosure." *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888).

See also the Comment, "Applying the Attorney-Client and Work Product Privileges to Allied Party Exchange of Information in California (1988) 36 U.C.L.A. Law Review 151. There, the author noted: "It would be somewhat naive in today's world of complex, multiple-party legal endeavors to believe that participants do not share privileged information." *Id*. at p. 151.

Appellate courts in California have repeatedly warned prosecutors[2] in California about infringing upon the Sixth Amendment right to counsel by obtaining confidential communications between the accused and their lawyers. *Barber v. Mun. Court*, 24 Cal. 3d 742 (1979); *Morrow v. Superior Court*, 30 Cal. App. 4th 1252 (1994). In *Barber v. Municipal Court*, 24 Cal. 3d 742 (1979), an undercover police officer was among the co-defendants who were charged with trespassing at the Diablo Canyon nuclear facility. When the other defendants learned that their co-defendant was actually a government agent, they moved to dismiss the charges on the ground that the undercover officer's attendance at attorney-client privileged meetings of the defense attorneys and their clients in which defense strategy was discussed constituted outrageous government conduct in violation of the Sixth Amendment right to counsel. The trial court denied the motion to dismiss. The California Supreme Court reversed, holding that "[t]he right under California law to communicate privately with counsel was violated when a government agent in an undercover capacity was present at confidential attorney-client meetings." *Barber v. Mun. Court*, 24 Cal. 3d 742, 756 (1979).

In *Morrow v. Superior Court* (1994) 30 Cal.App.4th 1252, the prosecutor used her investigator to eavesdrop on a courtroom conversation between a defendant and his attorney. The defendant filed a motion to dismiss. The prosecutor and the investigator invoked their privilege against self-incrimination when called to testify at the hearing on the motion. The trial judge denied the motion on the ground that prejudice had not bee demonstrated. The Court of

[2] The premise advanced in the "Thornburgh Memo" that federal prosecutors are exempt from state ethical rules pursuant to the Supremacy Clause has been rejected by the courts. *United States v. Ferrara*, 847 F.Supp. 964, 968–70 (D.D.C.1993), aff'd, 54 F.3d 825 (D.C.Cir.1995); *In re Doe*, 801 F.Supp. 478, 484–87 (D.N.M.1992); *United States v. Lopez*, 765 F.Supp. 1433, 1445–50 (N.D.Cal.1991), vacated, 989 F.2d 1032 (9th Cir.), amended and superseded, 4 F.3d 1455 (9th Cir.1993)

Appeal reversed, holding that where "the prosecutor orchestrates an eavesdropping upon a privileged attorney-client communication in the courtroom and acquires confidential information, the court's conscience is shocked and dismissal is the appropriate remedy." *Morrow v. Superior Court*, 30 Cal.App.4th 1252, 1261 (1994).

In addition to violating the Sixth Amendment right to counsel, the *Morrow* court found that the prosecutorial eavesdropping violated the Fourth, Fifth and Fourteenth Amendments, and Article I, Sections 1, 7 and 15 of the California Constitution. "Here, the prosecutor's and investigator's actions violated each of these constitutional provisions (*Barber v. Municipal Court*, *supra*, 24 Cal.3d 742, 750-751; *Boulas v. Superior Court* (1986) 188 Cal.App.3d 422, 429-432 [23 Cal.Rptr. 487].)" *Morrow v. Superior Court*, 30 Cal. App. 4th 1252, 1259 (1994).

In *People v. Shrier*, 190 Cal. App. 4th 400 (2010), the government appealed from a superior court's order denying their motion to reinstate a felony complaint which had been dismissed by a magistrate who found that intentional eavesdropping by special agents of the Department of Justice while criminal defendants and their counsel were reviewing evidence at the Attorney General's office required dismissal. The Court of Appeal found that the agents conduct was "deplorable" and required suppression, but that dismissal was not required under the circumstances. *People v. Shrier*, 190 Cal. App. 4th 400, 418-419 (2010). The Court of Appeal stated that Department of Justice special agents "are not permitted to unilaterally eviscerate constitutional and statutory rights in their zeal to obtain incriminating evidence." *People v. Shrier*, 190 Cal. App. 4th 400, 419 (2010).

In *People v. Superior Court (Laff)*, 25 Cal. 4th 703 (2001), documents were seized from two attorneys suspected of criminal conduct pursuant to a search warrant. The attorneys requested that the trial court conduct an in camera review of the documents to determine whether they were privileged. The court sealed the documents but refused to conduct an in camera review unless the prosecutor paid one-half of the cost of the services of a special master. The prosecution argued to the California Supreme Court that they should have access to documents seized from the attorneys pursuant to a search warrant prior to filing charges. The California Supreme Court rejected this argument, stating that "[p]ermitting unfettered access to

attorney-client communications, simply because there is no pending proceeding at which testimony can be compelled, would violate the policies supporting the privilege as well as the statutory and ethical obligations of attorneys to maintain client confidences." *People v. Superior Court (Laff)*, 25 Cal. 4th 703, 715 (2001).

Furthermore, the NSA's mass collection of confidential communications between criminal defendants and their attorneys sends a message to criminal defendants that they cannot trust defense counsel to protect their confidences and that no defense materials are beyond the reach of the prosecution. The Supreme Court of California, in *Barber v. Municipal Court* (1979) 24 Cal. 3d 742, 756, stated:

> Whether or not the prosecution has directly gained any confidential information which may be subject to suppression, the prosecution has been aided by its agent's conduct. Petitioners have been prejudiced in their ability to prepare their defense. They no longer feel they can freely, candidly, and with complete confidence discuss their case with their attorney.

The NSA's data collection program undermines the role of the criminal defense lawyer as is well established in this state and violates the constitutional rights of criminal defendants by sending a messages that not even attorney-client privileged communications are off limits to government agents.

III. CONCLUSION

For the above reasons, CACJ joins in support of granting the motion for partial summary judgment.

Dated: December 20, 2013

Respectfully submitted,

Stephen K. Dunkle
John T. Philipsborn

By: /s/ Stephen K. Dunkle
Stephen K. Dunkle
Attorney for Amicus Curiae,
California Attorneys for Criminal Justice

CERTIFICATE OF SERVICE

I certify that all counsel of record who has consented to electronic notification is being served on December 20, 2013 with a copy of this document via the Court's CM/ECF system.

/s/ Stephen K. Dunkle