



July 27, 2007

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

**RE: *Hepting, et al. v. AT&T Corp., et al*, No. 06-17132
(Consolidated with Nos. 06-17137, 06-36083)
(Scheduled for oral argument on August 15, 2007)**

**Response to Appellants' FRAP 28(j) Submission regarding *ACLU v. NSA*,
2007 WL 1952370 (6th Cir. July 6, 2007).**

Dear Ms. Catterson:

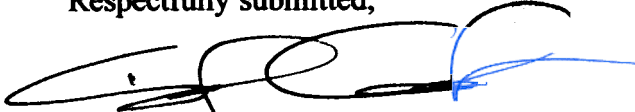
Appellees hereby respond to the Government's July 20, 2007 letter regarding *ACLU v. NSA*, 2007 WL 1952370 (6th Cir. July 6, 2007). Initially, Appellees respectfully submit that Judge Gilman's dissent is the better-reasoned opinion on standing and on the merits of the interception claims. Regardless, the *ACLU* decision has little applicability to *Hepting*.

In *ACLU*, plaintiffs relied solely on the President's admissions concerning the portion of the government's warrantless surveillance that he called the Terrorist Surveillance Program (TSP) to claim an asserted "well founded belief" that they were individually targeted for surveillance. The lead opinion in *ACLU* held that this argument did not suffice to establish standing.

In *Hepting*, by contrast, the plaintiffs claim that they and the other class members are actually subject to much broader dragnet, suspicion-less mass surveillance extending to domestic communications. They have supported their claim with undisputed, non-state secret evidence that their communications were intercepted. See SER 1-136.

Finally, the Government's letter erroneously implies that *ACLU* affirmed the district court's dismissal of the data mining claim on the merits. In fact, the plurality held "this standing analysis applies equally [to data mining], and the plaintiffs' cross-appeal must be dismissed for lack of jurisdiction." *Id.* at *34; *see also* *1, n.2.

Respectfully submitted,



Cindy Cohn, Esq.
Counsel for *Hepting* appellees.

cc: Paul Clement; Gregory Garre; Peter Keisler; Douglas Letter
Michael Kellogg; Jon B. Eisenberg; Bradford Berenson

CERTIFICATE OF SERVICE

I, Leticia Perez, hereby certify that I am over the age of 18 years, not a party to the cause. My business address is 454 Shotwell Street, San Francisco, California, 94110.

On July 27th, 2007, I caused the foregoing document:

**RESPONSE TO APPELLANT'S FRAP 28(j) SUBMISSION REGARDING
ACLU v. NSA, 2007 WL 1952370 (6th Circ. July 6, 2007) to be served on:**

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by delivering them to Federal Express for delivery the next day.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 27th day of July, 2007, at San Francisco, California.



Leticia Perez