

Nos. 11-15468 & 11-15535

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

AL-HARAMAIN ISLAMIC FOUNDATION, INC., et al.,

Plaintiffs, Appellees and Cross-Appellants,

vs.

BARACK H. OBAMA, President of the United States, et al.,

Defendants, Appellants and Cross-Appellees.

**MOTION OF APPELLEES AND CROSS-APPELLANTS
FOR RECONSIDERATION OF MAY 22, 2012 ORDER
VACATING SCHEDULED ORAL ARGUMENT**

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INTRODUCTION

This motion seeks reconsideration of the Court's order of May 22, 2012, which states in pertinent part: "Argument in this case scheduled for June 1, 2012 in Pasadena, California, is vacated pending the Supreme Court's decision in *Clapper v. Amnesty Int'l*, No. 11-1025." We respectfully ask the Court to vacate that order and hear oral argument on June 1, 2012, or as soon thereafter as is practicable for the Court, because the question presented in *Clapper* is unrelated to the issues on this appeal.

DISCUSSION

THIS COURT SHOULD VACATE THE ORDER OF MAY 22, 2012 AND HEAR ORAL ARGUMENT EXPEDITIOUSLY BECAUSE THE QUESTION PRESENTED IN *CLAPPER* IS WHOLLY UNRELATED TO THE ISSUES PRESENTED ON THIS APPEAL.

The plaintiffs in this case obtained a judgment awarding statutory liquidated damages and attorney's fees for warrantless electronic surveillance in violation of the Foreign Intelligence Surveillance Act of 1978 (FISA). The plaintiffs have established their Article III standing with publicly-available evidence of their *actual surveillance* during a 204-day period in 2004. On appeal, the defendants raise four issues: (1) whether FISA waives federal sovereign immunity, (2) whether FISA preempts the state secrets privilege, (3) whether the evidence is sufficient to prove plaintiffs' actual surveillance, and (4) whether the district court erred in awarding counsel's full

attorney's fees.

In *Clapper*, the United States Supreme Court has granted a writ of certiorari on an issue that is not presented on this appeal. The plaintiffs in *Clapper* challenge the constitutionality of Section 1881a of the FISA Amendments Act of 2008 (FAA), which establishes procedures for authorizing certain types of surveillance targeting non-United States persons located outside the United States—a category that does not include the plaintiffs in the present case. The *Clapper* plaintiffs seek injunctive relief and a declaration that Section 1881a is unconstitutional—whereas the plaintiffs in the present case have recovered only damages and attorney's fees. Most significantly, in *Clapper* the Court of Appeals held that, although the plaintiffs in that case cannot prove *actual surveillance*, they possess Article III standing based on (1) their fear of future surveillance, and (2) expenditures they have incurred to protect their communications. (See *Amnesty Intern. USA v. Clapper*, 638 F.3d 118 (2d Cir. 2011).

Upon granting a writ of certiorari, the Supreme Court specified the question presented in *Clapper* as follows: “Whether respondents lack Article III standing to seek prospective relief because they proffered no evidence that the United States would imminently acquire their international communications using Section 1881a-authorized surveillance and did not show that an injunction prohibiting Section 1881a-authorized surveillance would likely redress their purported injuries.” (See <http://www.supremecourt.gov/qp/11-01025qp.pdf>.)

The question presented in *Clapper* is thus wholly unrelated to the issues presented on the defendants' appeal in the present case. The Supreme Court's decision in *Clapper* will have no effect on the disposition of the present case. Thus, there is no reason to delay the adjudication of this appeal pending the decision in *Clapper*, which would only add another year or more to the six-plus years that this case has been in litigation.

It makes sense for the Court to have vacated the oral argument date for *Center for Constitutional Rights v. Obama*, No. 11-15956, which involves theories of Article III standing similar to those in *Clapper*. It does not, however, make sense in the present case, where Article III standing is based on proof of *actual past surveillance* rather than the fear of future surveillance and expenditures to protect communications asserted in *Clapper*.

CONCLUSION

For the foregoing reasons, we ask that this Court reconsider the order of May 22, 2012 and hear oral argument on June 1, 2012, or as soon thereafter as is practicable for the Court.

May 22, 2012

Respectfully submitted,

/s/ Jon B. Eisenberg

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9th Circuit Case Number(s)

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