07-35865

United States Court of Appeals

for the

Ninth Circuit

BRANDON MAYFIELD, an individual, MONA MAYFIELD, an individual, and SHANE MAYFIELD, SHARIA MAYFIELD, and SAMIR MAYFIELD, individuals, by and through their *guardian ad litem* Mona Mayfield,

Plaintiffs-Appellees,

– against –

UNITED STATES OF AMERICA,

Defendant-Appellant.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON
CASE NO. CV-04-1427-AA

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF OREGON, CENTER FOR CONSTITUTIONAL RIGHTS, ELECTRONIC FRONTIER FOUNDATION, and CENTER FOR DEMOCRACY AND TECHNOLOGY SUPPORTING PLAINTIFFS-APPELLEES URGING AFFIRMANCE

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Amici curiae American Civil Liberties Union of Oregon, the Center for Constitutional Rights, the Electronic Frontier Foundation, and the Center for Democracy and Technology (collectively, "*amici*") submit this brief in support of plaintiffs-appellees Brandon Mayfield, his wife, Mona, and their three school-age children.[1]

STATEMENT OF INTEREST

The American Civil Liberties Union of Oregon, Inc. and the ACLU Foundation of Oregon, Inc. (collectively, "the ACLU of Oregon") is a nonprofit, nonpartisan organization dedicated to the principles embodied in the Bill of Rights. The ACLU of Oregon, founded in 1955, has over 16,000 members. Since its founding, the ACLU of Oregon has been a zealous defender of the protections provided in the Fourth Amendment and has steadfastly defended the rights of persons to be secure from unreasonable searches and seizures. The ACLU of Oregon has appeared as *amicus curiae* in support of motions to suppress evidence obtained through the Foreign Intelligence Surveillance Act in *United States v. Battle*, Nos. 02-399, 05-1055, 2007 WL 3341740 (D. Or. Nov. 9, 2007). It is currently litigating a formal complaint before the Oregon Public Utilities Commission in *ACLU of Oregon v. Verizon Northwest, Inc.*, regarding the reported

[1] *Amici* file this brief with the consent of the parties pursuant to Federal Rule of Appellate Procedure 29.

release of Oregon telephone subscriber calling records to the National Security Agency in violation of Oregon law.

The Center for Constitutional Rights ("CCR") is a national not-for-profit legal, educational, and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Founded in 1966 by attorneys who represented civil rights movements and activists in the South, CCR has over the last four decades litigated significant cases in the areas of constitutional and human rights. Among these is the landmark warrantless wiretapping case *United States v. U.S. District Court ("Keith")*, 407 U.S. 297 (1972). On January 17, 2006, CCR filed a challenge to the National Security Agency's warrantless wiretapping program, *Center for Constitutional Rights v. Bush*, currently pending before Judge Vaughn Walker in the Northern District of California, No. 3:07-cv-1115.

The Electronic Frontier Foundation ("EFF") is a non-profit, member-supported civil liberties organization working to protect free speech and privacy rights in the online world. As part of that mission, EFF has served as counsel or *amicus curiae* in key cases addressing electronic privacy statutes and the Fourth Amendment as applied to the Internet and other new technologies. With more than 12,000 dues-paying members, EFF represents the interests of technology users in both court cases and in broader policy debates surrounding the application of law

in the digital age, and publishes a comprehensive archive of digital civil liberties information at one of the most linked-to web sites in the world, www.eff.org.

The Center for Democracy and Technology ("CDT") is a non-profit public interest organization focused on privacy and other civil liberties issues affecting the Internet and other communications networks. CDT represents the public's interest in an open, decentralized Internet and promotes the constitutional and democratic values of free expression, privacy, and individual liberty.

PRELIMINARY STATEMENT

For over two hundred years, the Fourth Amendment has stood as a bedrock of American liberty. The Constitution protects these core freedoms: freedom from searches without probable cause, freedom from searches without effective review by a neutral magistrate, freedom from secret, generalized searches "in the bedroom, in the business conference, in the social hour, in the lawyer's office – everywhere and anywhere a 'bug' can be placed."[2] But now these freedoms are at risk. Through the backdoor of the USA PATRIOT Act, the government seeks to undermine over two centuries of Fourth Amendment jurisprudence with a statute originally and carefully crafted to deal *only* with foreign intelligence-gathering, *not* criminal law enforcement investigations. That it cannot do.

[2] *Berger v. New York*, 388 U.S. 41, 64-65 (1967) (Douglas, J., concurring).

This case concerns the Foreign Intelligence Surveillance Act ("FISA"),[3] which allows the government to engage in surveillance for foreign intelligence purposes without complying with the ordinary requirements of the Fourth Amendment that apply in criminal proceedings. Prior to enactment of the USA PATRIOT Act in 2001, the government could invoke FISA only where its primary purpose was to gather foreign intelligence information rather than to gather evidence of criminal activity. 50 U.S.C. § 1804(a)(7)(B). The USA PATRIOT Act, however, replaced the primary purpose requirement with a "significant purpose" requirement, dramatically expanding the category of investigations in which the government can rely on FISA. Because of the "significant purpose" amendment, the government can for the first time conduct ordinary law enforcement investigations – including investigations whose *primary* purpose is to gather evidence of criminal activity – without complying with the Fourth Amendment's usual requirements. As a result, the government may now evade Fourth Amendment requirements in a virtually boundless class of ordinary criminal investigations merely by asserting a desire to gather foreign intelligence information from the person it intends to prosecute.

As the district court held:

[3] 50 U.S.C. § 1801 *et seq.*, amended by Section 218 of the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

> [A] seemingly minor change in wording has a dramatic and significant impact on the application of FISA. A warrant under FISA now issues if "a significant purpose" of the surveillance is foreign intelligence. Now, for the first time in our Nation's history, the government can conduct surveillance to gather evidence for use in a criminal case without a traditional warrant, as long as it presents a non-reviewable assertion that it also has a significant interest in the targeted person for foreign intelligence purposes.

Mayfield v. United States, 504 F. Supp. 2d 1023, 1036 (D. Ore. 2007). This weakening of the Fourth Amendment cannot be squared with over two centuries of Fourth Amendment jurisprudence. "Since the adoption of the Bill of Rights in 1791, the government has been prohibited from gathering evidence for use in a prosecution against an American citizen in a courtroom unless the government could prove the existence of probable cause that a crime has been committed." *Id.* at 1036-37. But with the USA PATRIOT Act, that is no longer the case.

The Mayfield case highlights the dangers of allowing the Executive branch to rely on foreign intelligence procedures where its primary intent is criminal prosecution. Brandon Mayfield – a U.S. citizen, a former Army officer with an honorable discharge, and a practicing Oregon lawyer – found himself, his wife and their three children under extraordinarily intrusive surveillance by federal agents. The agents secretly entered their family home, recorded their most intimate conversations, and followed them to and from the children's school, Mr. Mayfield's law office, family activities, and their place of worship. The FBI secretly and repeatedly entered Mr. Mayfield's home and law office, inspected,

copied, and seized personal documents, legal files, computer hard drives, even the children's homework. On one occasion one of the Mayfield children cowered in a bedroom closet while federal agents searched the home.

The government's primary – perhaps even exclusive – purpose in monitoring the Mayfield family was to criminally prosecute Mr. Mayfield. Did the FBI have criminal probable cause? No. Did the FBI have a traditional criminal warrant? No. Did the FBI ever give notice? No. The Mayfields are not alone. Today the government claims the unprecedented right to subject any number of Americans to secret and invasive searches of their homes, offices, personal belongings, telephone calls, and e-mails, without criminal probable cause, notice, or a traditional criminal warrant.

According to the government, if even the primary purpose of a search and seizure is law enforcement, traditional Fourth Amendment requirements no longer apply. There is no end point to this argument. No doubt if a search and seizure were merely "relevant" to foreign intelligence gathering, the government would argue that the USA PATRIOT Act controls.

It takes little imagination to foresee the place to which the government's argument will take the country. In a large number of cases, the criminal probable cause requirement will be gone. The particularity requirement will be significantly relaxed. The notice requirement will be severely limited. In

these cases, the traditional Fourth Amendment protections that apply in criminal investigations will be replaced by FISA's relaxed standards.

"[G]iven the way in which almost any activity can be said to relate, at least remotely, to foreign affairs or foreign policy making, the potential scope of [a foreign intelligence] exception to the warrant requirement is boundless, and thus a substantial danger to the values the Fourth Amendment was fashioned to protect." *Zweibon v. Mitchell*, 516 F.2d 594, 654 (D.C. Cir. 1975). Similarly, given the way any number of searches or seizures "can be said to relate, at least remotely," to foreign intelligence, the scope of the government's surveillance powers under the USA PATRIOT Act is signficantly expanded "and thus a substantial danger to the values the Fourth Amendment was fashioned to protect." *Id.*

The district court correctly recognized the threats to liberty and the Fourth Amendment posed by the "significant purpose" amendment to FISA. The decision should be affirmed.

ARGUMENT

I. FISA Does Not Provide The Protections That The Fourth Amendment Requires With Respect to Law Enforcement Investigations

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or

things to be seized." U.S. Const. amend. IV. "The security of one's privacy against arbitrary intrusion by the police – which is at the core of the Fourth Amendment – is basic to a free society." *Berger v. New York*, 388 U.S. 41, 53 (1967) (citation omitted).

As the government notes, many courts have found that FISA is constitutional as to investigations whose primary purpose is to gather foreign intelligence. As explained below, however, FISA's less protective standards are plainly *not* constitutional with respect to investigations whose primary purpose is to gather evidence of criminal activity. In fact, with respect to investigations whose primary purpose is to gather evidence of criminal activity, FISA's standards are substantially *less* protective than what the Fourth Amendment requires.

A. FISA Does Not Require A Showing Of Criminal Probable Cause

"FISA now permits the Executive Branch to conduct surveillance and searches of American citizens without satisfying the [criminal] probable cause requirements of the Fourth Amendment." *Mayfield*, 504 F. Supp. 2d at 1039. The Fourth Amendment requires that the government demonstrate probable cause to believe that "the evidence sought will aid in a particular apprehension or conviction for a particular offense." *Dalia v. United States*, 441 U.S. 238, 255 (1979) (internal quotations and citation omitted). FISA does not. FISA only requires that the government have probable cause to believe that the surveillance

target is a foreign power or agent of a foreign power, whether or not there is any reason to believe that anyone committed any offense. *See* 50 U.S.C. § 1805(a)(3)(A).

The government admits that FISA does not require it to advance any reason whatsoever – let alone probable cause – to believe that its surveillance will yield information about a particular criminal offense. Defs. Br. 57 ("We do not mean to suggest, of course, that FISA requires [criminal] probable cause . . . it does not . . . ."). Thus, there can be no dispute that FISA dispenses with the central protection of the Fourth Amendment – probable cause of a crime – that for over two hundred years has been required in every law enforcement search and seizure.

B. FISA Does Not Require The Government To Obtain A Traditional Warrant Before Conducting Surveillance

Nor are FISA surveillance orders traditional warrants within the meaning of the Fourth Amendment. *See, e.g., In re Sealed Case,* 310 F.3d 717, 741 (U.S. For. Int. Surv. Ct. Rev. 2002) (acknowledging that FISA orders "may not be . . . 'warrant[s]' contemplated by the Fourth Amendment.").

To conduct surveillance in a criminal investigation, the FBI must obtain the prior authorization of a neutral, detached magistrate who has the authority to determine whether the requirements of Rule 41 or Title III have been satisfied. *See* Fed. R. Crim. P. 41 (governing physical searches in criminal

investigations); 18 U.S.C. § 2518 (governing electronic surveillance in criminal investigations); *see also Johnson v. United States*, 333 U.S. 10, 13-14 (1948). But unlike a regular district court assessing a criminal wiretap application, the Foreign Intelligence Surveillance Court ("FISC") has, at best, minimal authority to review whether the FBI has satisfied the requirements of FISA.

The government satisfies most of FISA's requirements simply by certifying that the requirements are met. *See* 50 U.S.C. § 1804(a)(7) (enumerating necessary certifications); 50 U.S.C. § 1823(a)(7) (same). While certain (but not all) of these certifications must be accompanied by "a statement of the basis for the certification," 50 U.S.C. § 1804(a)(7)(E), 50 U.S.C. § 1823(a)(7)(E), the FISC is not to scrutinize such statements, but rather to defer to the government's certification unless it is "clearly erroneous on the basis of the statement made under § 1804(a)(7)(E)," *id*. § 1805(a)(5).[4] As the FISA Court of Review has acknowledged, "this standard of review is not, of course, comparable to a probable cause finding by the judge." *In re Sealed Case*, 310 F.3d at 739 (citation omitted); *see also United States v. Duggan*, 743 F.2d 59, 77 (2d Cir. 1984) (government's "primary" purpose certification is "subjected to only minimal scrutiny by the courts"); *id*. ("The FISA Judge . . . is not to second-guess the executive branch

[4] For surveillance targets who are not United States persons, the FBI's certifications are not reviewed even for clear error. *See* 50 U.S.C. § 1805(a)(5).

official's certification that the objective of the surveillance is foreign intelligence information.").

The contrast between this procedure and the judicial oversight provided by Title III is stark. To obtain a Title III surveillance order, the government must provide the court with "a full and complete statement of the facts and circumstances relied upon by the applicant[] to justify his belief that an order should be issued." 18 U.S.C. § 2518(1)(b). The court may "require the applicant to furnish additional testimony or documentary evidence in support of the application." *Id*. § 2518(2). The government cannot meet any of the statute's substantive requirements merely by certifying that it has met them. To the contrary, with respect to most of the statute's substantive requirements, the statute requires the court to find probable cause to believe that they are satisfied. *See id*. § 2518(3).

In short, FISA – unlike Title III and the Fourth Amendment protections applicable in criminal proceedings – authorizes intrusive surveillance without a traditional warrant or sufficient prior judicial review for criminal searches.

C. Targets of FISA Surveillance Do Not Ordinarily Receive Notice – Even After The Fact – That Their Privacy Was Compromised

FISA does not require the government to provide notice to targets of FISA surveillance unless it initiates a criminal prosecution that relies on evidence obtained through FISA. *Mayfield*, 504 F. Supp. 2d at 1039. The Mayfield family was not notified of the FISA surveillance of their home, e-mail accounts, telephone communications, or Mr. Mayfield's law office until months after the surveillance took place and only when the government decided to prosecute Mr. Mayfield.

The Fourth Amendment, in contrast, requires that the subject of a search be notified that the search has taken place. *See Wilson v. Arkansas*, 514 U.S. 927 (1995) (the common-law "knock-and-announce" principle informs Fourth Amendment reasonableness inquiry); *Miller v. United States*, 357 U.S. 301, 313 (1958) ("The requirement of prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage and should not be given grudging application."). While in some contexts the government is permitted to delay the provision of notice, *see, e.g.*, *United States v. Donovan*, 429 U.S. 413, 429 n.19 (1977) (delayed-notice provisions of Title III supply a constitutionally adequate substitute for contemporaneous notice), the Supreme Court has never upheld a statute that, like FISA, authorizes the government to search a person's home or intercept her communications without *ever* informing her that her privacy has been compromised. To the contrary, in *Berger*, the Supreme Court struck down a state

eavesdropping statute in part because the law did not make any provision for notice. *Berger*, 388 U.S. at 60.

The lack of notice in FISA investigations is particularly problematic because notice is withheld as a categorical rule, and not upon an individualized showing of necessity. *See Richards v. Wisconsin*, 520 U.S. 385, 393-94 (1997) (rejecting categorical exception to knock-and-announce principle for searches executed in connection with felony drug investigations); *see also Berger*, 388 U.S. at 60 (striking down state eavesdropping statute in part because law "has no requirement for notice as do conventional warrants, nor does it overcome this defect by requiring some showing of special facts").

Except in the few investigations that end in criminal prosecutions, FISA targets *never* learn that their homes or offices have been searched or that their communications have been intercepted. Most FISA targets have no way of challenging the legality of the surveillance or obtaining any remedy for violations of their constitutional rights. *See Franks v. Delaware*, 438 U.S. 154, 168-72 (1978) (the subject of an allegedly illegal search must be afforded an opportunity to challenge the propriety of the search in a proceeding that is both public and adversarial).[5]

[5] "Other abuses, such as the search incident to arrest, have been partly deterred by the threat of damage actions against offending officers, the risk of adverse publicity, or the possibility of reform through the political process. These

Even those FISA targets who are prosecuted and receive notice that their privacy was compromised have no meaningful opportunity to obtain a remedy for violations of their constitutional rights. As in this case, surveillance targets are routinely denied access to FISA surveillance applications and underlying affidavits. *See* 50 U.S.C. § 1806(f); *United States v. Nicholson*, 955 F. Supp. 588, 592 (E.D. Va. 1997). Having no access to the factual allegations in these documents severely handicaps an individual's ability to argue that the surveillance orders violate the Fourth Amendment. The courts have never upheld similar restrictions in criminal prosecutions based on evidence obtained under Title III or Rule 41.

D. FISA's Particularity Requirements Are Less Stringent Than The Fourth Amendment Demands In Law Enforcement Investigations

Because the duration of FISA intercepts are longer than those permitted by Title III, FISA surveillance in criminal investigations violates the Fourth Amendment's particularity requirement. *Mayfield*, 504 F. Supp. 2d at 1040.

The Fourth Amendment prohibits the government from conducting intrusive surveillance unless it first obtains a warrant describing with particularity

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latter safeguards, however, are ineffective against lawless wiretapping and 'bugging' of which their victims are totally unaware." *United States v. U.S. District Court for Eastern District of Michigan, Southern Division ("Keith")*, 407 U.S. 297, 325 (1972) (Douglas, J., concurring).

the things to be seized as well as the place to be searched. *See Berger*, 388 U.S. 41 at 58 (Fourth Amendment particularity requirement is intended to prevent the government's reliance on "general warrants" that allow "the seizure of one thing under a warrant describing another"); *see also Maryland v. Garrison*, 480 U.S. 79, 84 (1987) ("The manifest purpose of [the] particularity requirement was to prevent general searches. By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit.").

The importance of the particularity requirement "is especially great in the case of eavesdropping." *Berger*, 388 U.S. at 56. As the Supreme Court explained: "By its very nature eavesdropping involves an intrusion on privacy that is broad in scope. . . . [T]he indiscriminate use of such devices in law enforcement raises grave constitutional questions under the Fourth and Fifth Amendments, and imposes a heavier responsibility on this Court in its supervision of the fairness of procedures." *Id*. (internal quotation marks omitted); *see also id.* at 63 ("Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices.") (internal quotation marks omitted); *United States v. Smith*, 321 F. Supp. 424, 429 (C.D.Cal. 1971) ("Electronic surveillance is perhaps

the most objectionable of all types of searches in light of the intention of the Fourth Amendment.").

With respect to eavesdropping devices and wiretaps, the particularity requirement demands not simply that the government describe in detail the communications it intends to intercept, but also that the duration of the intercept be strictly limited. *See Berger*, 388 U.S. at 58-60. In *Berger*, the Supreme Court struck down a state eavesdropping statute in part because it authorized surveillance orders with terms of up to two months. *See Berger*, 388 U.S. at 44 n.1. The Court noted:

> [A]uthorization of eavesdropping for a two-month period is the equivalent of a series of intrusions, searches and seizures pursuant to a single showing of probable cause. Prompt execution is also avoided. During such a long and continuous (24 hours a day) period the conversations of any and all persons coming into the area covered by the device will be seized indiscriminately and without regard to their connection with the crime under investigation.

Id. at 59. Title III, which Congress enacted shortly after *Berger* was decided, limits the term of surveillance orders to 30 days. 18 U.S.C. § 2518(5). FISA, by contrast, authorizes surveillance terms up to 120 days. 18 U.S.C. § 1805(e)(1)(B).

This Court has confirmed that, in the context of criminal investigations, the 30-day limitation is constitutionally required. In *United States v. Koyomejian*, 970 F.2d 536 (9th Cir. 1992), the Court examined the legality of silent video surveillance in a domestic criminal investigation. The Court held that

neither Title III nor FISA speaks to such surveillance but that warrants authorizing silent video surveillance must nonetheless be limited to terms of no more than 30 days. *See id*. at 542 ("we look to Title [III] for guidance in implementing the [F]ourth [A]mendment in an area that Title [III] does not specifically cover" (internal quotation marks omitted)); *id*. (holding that warrant authorizing silent video surveillance "must not allow the period of surveillance to be longer than is necessary to achieve the objective of the authorization, or in any event longer than thirty days") (internal quotation marks and brackets omitted)); *id.* at 542 (Kozinski, J., dissenting) (agreeing with majority's reasoning with respect to 30-day limitation).

In short, FISA's surveillance orders of up to 120 days – twice the duration that the Supreme Court found constitutionally unacceptable in *Berger*, and four times the *maximum* duration that this Court found constitutionally permissible in *Koyomejian* – plainly violate the Fourth Amendment if applied in criminal investigations.

II. The "Significant Purpose" Amendment Is Unconstitutional Because It Allows The Government To Use FISA In Ordinary Law Enforcement Investigations

As made clear above, FISA's requirements fall well short of the Fourth Amendment protections required in criminal proceedings. For this reason FISA was originally and carefully limited *only* to instances where the "purpose" of

the investigation was foreign intelligence, *not* criminal investigation. And for this reason numerous federal courts distinguish between the constitutional safeguards that apply in criminal investigations and foreign intelligence investigations. Because safeguards in FISA are less protective than what the Fourth Amendment demands in criminal investigations, courts have permitted the government to rely on FISA *only* where the government's primary purpose is foreign intelligence gathering.

Today we have a very new statute, one that throws FISA into the heartland of the Fourth Amendment: criminal investigations and prosecutions. Contrary to the government's view, the new FISA runs into a wall of precedent forbidding this dramatic and dangerous expansion of executive power.

A. Even Courts That Have Recognized That Standards For Foreign Intelligence Surveillance May Differ From Criminal Standards Have Permitted Relaxed Protections *Only* Where the Government's Purpose is Foreign Intelligence Gathering, Not Criminal Investigation

Pre-FISA, some courts recognized a foreign intelligence exception to the warrant requirement in criminal cases, but these courts still held that such an exception would apply only where the government's primary purpose was gathering foreign intelligence, not conducting criminal investigations. For example, in *United States v. U.S. District Court for Eastern District of Michigan, Southern Division ("Keith")*, 407 U.S. 297 (1972), the central issue before the

Supreme Court was whether the government's warrantless wiretaps of individuals with no connection to a foreign power were lawful as a reasonable exercise of the President's authority to protect national security. The Court wrote:

> We are told . . . that these surveillances are directed primarily to the collecting and maintaining of intelligence with respect to subversive forces, *and are not an attempt to gather evidence for specific criminal prosecutions*. It is said that this type of surveillance should not be subject to traditional warrant requirements which were established to govern investigation of criminal activity, not ongoing intelligence gathering.

Keith, 407 U.S. at 318-19 (emphasis added). The Court rejected these arguments, reasoning that the President's domestic security role "must be exercised in a manner compatible with the Fourth Amendment." *Id*. at 320. The Court acknowledged, however, that surveillance for intelligence purposes may implicate different concerns than surveillance for law enforcement purposes:

> The gathering of security intelligence is often long range and involves the interrelation of various sources and types of information. The exact targets of such surveillance may be more difficult to identify than in surveillance operations against many types of crime . . . . Often, too, the emphasis of domestic intelligence gathering is on the prevention of unlawful activity or the enhancement of the Government's preparedness for some possible future crisis or emergency. Thus, the focus of domestic surveillance may be less precise than that directed against more conventional types of crime.
>
> Given those potential distinctions between Title III criminal surveillances and those involving the domestic security, Congress may wish to consider protective standards for the latter which differ from those already prescribed for specified crimes in Title III.

Keith, 407 U.S. at 322. This discussion, though addressed to surveillance of domestic groups, gave credence to the idea that the executive branch might permissibly conduct foreign intelligence surveillance under different standards from those governing ordinary criminal investigations.[6]

After *Keith*, several circuit courts recognized a foreign intelligence exception to the Fourth Amendment's warrant requirement. Critically, these courts emphasized that the exception was limited to *intelligence* surveillance, and could not be relied on as a justification for disregarding ordinary Fourth Amendment requirements in *criminal* investigations. In *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980), for instance, the Fourth Circuit recognized a foreign intelligence exception to the warrant requirement but strictly limited the exception to cases in which "the surveillance is conducted primarily for foreign intelligence reasons." *Id.* at 915 (internal quotation marks omitted); *see also id*. at 916 ("The exception applies only to foreign powers, their agents, and their collaborators. Moreover, even these actors receive the protection of the warrant requirement if

[6] Similarly, a year earlier, in *United States v. Smith*, the Central District of California held that "in wholly domestic situations there is no national security exemption from the warrant requirement of the Fourth Amendment," 321 F. Supp. at 429, but reserved the question whether another argument might prevail in cases involving foreign powers, *id*. at 428.

the government is primarily attempting to put together a criminal prosecution.").[7]

The Court explained:

> [O]nce surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and . . . individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution.

Id. at 915. Other circuits that acknowledged a foreign intelligence exception to the warrant requirement before FISA's enactment adopted similar reasoning. *See, e.g.*, *United States v. Butenko*, 494 F.2d 593, 606 (3d Cir. 1974) ("Since the primary purpose of these searches is to secure foreign intelligence information, a judge, when reviewing a particular search must, *above all*, be assured that this was in fact its primary purpose and that the accumulation of evidence of criminal activity was incidental."); *United States v. Brown*, 484 F.2d 418, 426 (5th Cir. 1973).

Each of these cases involved surveillance conducted before FISA was enacted – that is, before there was any statutory basis for a primary purpose restriction. Thus the basis for the restriction was found not in the statute but in the Constitution. The Fourth Circuit made this abundantly clear:

> [T]he executive can proceed without a warrant only if it is attempting primarily to obtain foreign intelligence from foreign powers or their assistants. We think that the unique role of the executive in foreign affairs and the separation of powers will

[7] While *Truong* was not decided until 1980, it involved surveillance that took place before FISA's enactment in 1978. 629 F.2d at 915 n.4.

> not permit this court to allow the executive less on the facts of this case, *but we are also convinced that the Fourth Amendment will not permit us to grant the executive branch more*.

Truong, 629 F.2d at 916 (emphasis added).

In sum, all the pre-FISA era cases make clear that, whether or not there is a foreign intelligence exception to the Fourth Amendment's warrant requirement, the government is bound by the strict requirements of the Fourth Amendment when its purpose is criminal investigation or prosecution.

B. The Pre-USA PATRIOT Act Cases Support Plaintiffs, Not the Government

The government claims that, "[u]ntil this case, the federal courts have been unanimous in holding that the balance struck by Congress in FISA meets that constitutional test." Defs. Br. 35-36. This statement is, to put it mildly, misleading. The government simply ignores that courts upheld FISA *prior* to the USA PATRIOT Act precisely *because* FISA used to be limited to foreign intelligence investigations.

The old FISA applied only when "the purpose" of the search was to obtain foreign intelligence. Courts considering FISA's constitutionality generally interpreted "purpose" as "primary purpose," consistent with the holding of various circuit courts that the Constitution does *not* permit the government to rely on the foreign intelligence exception where its primary purpose is to gather evidence of criminal activity. *See, e.g., Johnson*, 952 F.2d at 572 ("the investigation of

criminal activity *cannot be the primary purpose* of the surveillance"; FISA may "*not* be used as an end-run around the Fourth Amendment's prohibition of warrantless searches") (emphasis added); *United States v. Pelton*, 835 F.2d 1067, 1075-76 (4th Cir. 1987) (interpreting "purpose" to mean "primary purpose"); *United States v. Badia*, 827 F.2d 1458, 1464 (11th Cir. 1987); *Duggan*, 743 F.2d at 77.

This Court recognized a foreign intelligence exception to the Fourth Amendment's ordinary requirements, *United States v. Cavanagh*, 807 F.2d 787, 790 (9th Cir. 1987), but never held that the government may rely on the exception where its primary purpose is to gather evidence of criminal activity, *see United States v. Sarkissian*, 841 F.2d 959 (9th Cir. 1988). Although the government attempts to rely on those cases here, the district court correctly recognized that "those cases are not persuasive as to whether the Ninth Circuit would adopt the reasoning of *In Re Sealed Case*." *Mayfield*, 504 F. Supp. 2d at 1041.

In *Sarkissian*, a pre-PATRIOT Act case, the defendant challenged a district court's refusal to suppress evidence obtained under FISA, arguing that the government's purpose was criminal investigation and its surveillance should therefore have been authorized under Title III, not FISA. The Court disagreed on the facts, holding that "[r]egardless of whether the test is one of purpose or primary purpose, . . . it is met in this case." *Id*. at 964. What this Court found irrelevant

was *not* that the government may choose to use FISA-derived information for a criminal prosecution, but rather that the government "may *later* choose to prosecute." *Sarkissian*, 841 F.2d at 965 (emphasis added). The difference is critical, because the primary purpose test is addressed not to the *use* of FISA evidence, but rather to the *predicate* for the surveillance. It is one thing to say, as the *Sarkissian* Court did, that the government "may later choose to prosecute" a person based on FISA evidence; FISA has always allowed the government to do this, *see* 50 U.S.C. § 1801(h)(3), and the primary purpose test has nothing to say about the matter. It is another thing altogether to say that the government may *initiate* FISA surveillance with the primary purpose of collecting evidence toward a criminal prosecution. Not one of the pre-PATRIOT Act cases sanctioned such an end-run around Fourth Amendment requirements that apply in criminal investigations.

Ironically, when the government first urged the Supreme Court to recognize an intelligence exception to the Fourth Amendment's warrant requirements, it argued "that these surveillances are directed primarily to the collecting and maintaining of intelligence with respect to subversive forces, and are *not* an attempt to gather evidence for specific criminal prosecutions." *Keith*, 407 U.S. at 318-19 (emphasis added); *see also Smith*, 321 F. Supp. at 428 ("The government has emphasized that the purpose of the surveillance involved was *not*

to gather evidence for use in a criminal prosecution but rather to provide intelligence information needed to protect against the illegal attacks of such organizations.") (emphasis added; internal quotation marks omitted). These same arguments were used to uphold the constitutionality of the old FISA. But now, relying on the significant purpose amendment, the government seeks to apply vastly lower foreign intelligence standards even to searches whose primary purpose is criminal investigation and prosecution. No longer need the government comply with the exacting notice and particularity requirements of traditional criminal warrants. As long as the government says that a significant purpose of the search is foreign intelligence (a statement reviewed for clear error), all of the traditional Fourth Amendment requirements for criminal investigations no longer apply. The district court was correct to find the amendment unconstitutional.

C. *In Re Sealed Case* Was Wrongly Decided, As Were The Few Cases That Relied On It

In August 2002, the seven judges of the FISC published a decision for the first time and unanimously rejected new procedures proposed by the Attorney General to govern all FISA surveillance targeting United States persons (the "2002 Procedures").[8] The 2002 Procedures authorized the FBI to rely on FISA even where its primary purpose was law enforcement. The FISC refused to endorse the

[8] "United States person" is defined in 50 U.S.C. § 1801(i).

2002 Procedures as proposed, finding that they were designed to allow the FBI to evade the Fourth Amendment in criminal investigations and that they were inconsistent with FISA's minimization provisions. *See In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F.Supp.2d 611, 623 (U.S. For. Int. Surv. Ct. 2002) ("*In re All Matters*") ("The 2002 procedures appear to be designed to amend the law and substitute the FISA for Title III electronic surveillances and Rule 41 searches.").[9] The FISA Court reasoned that the 2002 Procedures would create perverse organizational incentives and mean that

> criminal prosecutors will tell the FBI when to use FISA (perhaps when they lack probable cause for a Title III electronic surveillance), what techniques to use, what information to look for, what information to keep as evidence and when use of FISA can cease because there is enough evidence to arrest and prosecute. . . . [T]he Department's criminal prosecutors [will have] every legal advantage conceived by Congress to be used by U.S. intelligence agencies to collect foreign intelligence information, including:
>
> - a foreign intelligence standard instead of a criminal standard of probable case;
>
> - use of the most advanced and highly intrusive techniques for intelligence gathering;
>
> - surveillances and searches for extensive periods of time; based on a standard that the U.S. person is only using or about to use the places to be surveilled and searched,

[9] The decision was informed by the "alarming number of instances" in which the government had abused its FISA surveillance authority. *In re All Matters*, 218 F.Supp.2d at 620.

> without any notice to the target unless arrested and prosecuted, and, if prosecuted, no adversarial discovery of the FISA applications and warrants.

Id. at 624.

The FISA Court of Review convened for the first time in its history to hear the government's appeal in a secret *ex parte* proceeding. *In re Sealed Case,* 310 F.3d 717, 719 (U.S. For. Int. Surv. Ct. Rev. 2002).[10] In November 2002, the FISA Court of Review reversed and upheld the constitutionality of FISA as amended by the PATRIOT Act, but conceded that "the constitutional question presented by this case – whether Congress' disapproval of the primary purpose test is consistent with the Fourth Amendment – has no definitive jurisprudential answer." *Id.* at 746. The Court of Review first addressed whether FISA orders are warrants within the meaning of the Fourth Amendment. The Court acknowledged the significant differences between FISA's procedural requirements and those of Title III, noting that "to the extent the two statutes diverge in constitutionally relevant areas . . . a FISA order may not be a 'warrant' contemplated by the Fourth Amendment." *Id.* at 741. The Court declined to decide the issue, however, instead proceeding directly to the question of whether FISA searches are reasonable, *id.* at 742, concluding:

[10] The FISA Court of Review did accept an amicus brief from the ACLU and civil rights groups, and another amicus brief from the National Association of Criminal Defense Lawyers.

> [W]e think the procedures and government showings required under FISA, if they do not meet the minimum Fourth Amendment warrant standards, certainly come close. We, therefore, believe firmly []. . . that FISA as amended is constitutional because the surveillances it authorizes are reasonable.

Id. at 746. Because the Court of Review ruled in the government's favor, no party could appeal the decision to the Supreme Court.[11]

For the reasons set forth in this brief at § I *supra*, in the opinion by the FISC in *In re All Matters*, and in the lower court opinion in this case, *In Re Sealed Case* is plainly wrong. The "two fundamental premises underlying [*In Re Sealed Case*] are contradictory" because it "determined both that FISA never contained a purpose requirement, and that in altering the purpose requirement, Congress did not undermine the validity of searches conducted pursuant to FISA." *Mayfield*, 504 F. Supp. 2d at 1041. *In Re Sealed Case* also disregarded "the appropriate balance between intelligence gathering and criminal law enforcement." *Id.* at 1042. And it simply ignored "the constitutionally required interplay between Executive action, Judicial decision, and Congressional enactment . . . . Prior to the [USA PATRIOT Act] amendments, the three branches of government operated

[11] In response to the Court of Review's decision, the Department of Justice implemented sweeping institutional changes, including doubling the number of attorneys responsible for filing FISA applications and creating a FISA unit within the FBI General Counsel's office. *See* Transcript, *Dept. of Justice Press Conference Re: Foreign Intelligence Surveillance Court of Review* (Nov. 18, 2002). The Attorney General characterized the surveillance powers granted by the PATRIOT Act as "revolution[ary]." *Id.*

with thoughtful and deliberate checks and balances . . . . These constitutional checks and balances effectively curtail overzealous executive, legislative, or judicial activity regardless of the catalyst for overzealousness." *Id.* *In re Sealed Case* gave little weight to these "bedrock principles that the framers believed essential." *Id.*

The few decisions that rely on the reasoning of *In Re Sealed Case*, *see* Defs. Br. 42-43, are wrong for the same reasons that *In Re Sealed Case* is wrong. Those opinions are also distinguishable. This case is *not* challenging FISA surveillance where the government's primary purpose *is* to conduct foreign intelligence. *Cf. United States v. Mubayyid*, 521 F. Supp. 2d 125, 140 (D. Mass. 2007) (FISA amendment irrelevant because "as a practical matter, . . . the Court is convinced that the *primary purpose* of the surveillance [at issue in that case] remained obtaining foreign intelligence information.") (emphasis added); *United States v. Holy Land Found. for Relief and Dev.*, No. 3:04-CR-240-G, 2007 WL 2011319, at *5 n.4 (N.D. Tex. July 12, 2007) ("[T]he court makes no finding that the primary purpose of the government's FISA surveillance *was* the procurement of evidence to support criminal charges instead of the obtainment of foreign intelligence information.") (emphasis in original).[12] Instead, this facial challenge

[12] The government also cites *United States v. Abu-Jihaad*, No. 3-07CR57, 2008 WL 219172 (D. Conn. Jan. 24, 2008), which relies largely on a pre-PATRIOT Act case in its analysis, *Duggan*, 743 F.2d 59, and should not control the analysis here.

seeks to strike down the significant purpose amendment that allows the government to rely on FISA surveillance where its primary purpose is routine criminal investigation, an end-run around the Fourth Amendment that the Constitution forbids.

III. The Significant Purpose Amendment Should Be Facially Invalidated.

Amici agree with the Mayfields that the "significant purpose" amendment to FISA can and should be facially invalidated. The government's argument comes down to this: even if FISA violates the Constitution, it is *possible* that some searches under FISA will comport with the Fourth Amendment; therefore FISA cannot be *facially* invalidated. Defs. Br. at 52-58. The argument is absurd. In the government's view, Congress could pass a law authorizing "the seizure of any person without cause," but because some citizens under the statute may nevertheless be seized with probable cause pursuant to a valid warrant, the statute is not facially unconstitutional. Thankfully, no court in the last two decades has ever given the standard articulated in *United States v. Salerno*, 481 U.S. 739, 745 (1987) this absurd gloss. For the reasons set forth in § V of appellees' brief, the "significant purpose" amendment should be invalidated on its face.

CONCLUSION

Fourth Amendment rights "belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart."[13] *Amici* respectfully urge the Court to affirm the decision below and declare Section 218 of FISA unconstitutional on its face.

Respectfully submitted,

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[13] *Brinegar v. United States*, 228 U.S. 160, 180 (1949) (Jackson, J., dissenting).

CERTIFICATE OF COMPLIANCE

I, Elora Mukherjee, counsel for *amici* herein, certify pursuant to Federal Rule of Appellate Procedure 29(d) and Ninth Circuit Rule 32-1 that the attached amicus brief is proportionally spaced, has a type face of 14 points or more and contains 7,000 words or less.

Date: March 14, 2008

_____
Elora Mukherjee

Counsel for *Amici Curiae*