09-4112-cv

IN THE UNITED STATE COURT OF APPEALS
FOR THE SECOND CIRCUIT

AMNESTY INTERNATIONAL USA, GLOBAL FUND FOR WOMEN, GLOBAL RIGHTS, HUMAN RIGHTS WATCH, INTERNATIONAL CRIMINAL DEFENCE ATTORNEYS ASSOCIATION, THE NATION MAGAZINE, PEN AMERICAN CENTER, SERVICE EMPLOYEES INTERNATIONAL UNION, WASHINGTON OFFICE ON LATIN AMERICA, DANIEL N. ARSHACK, DAVID NEVIN, SCOTT MCKAY, and SYLVIA ROYCE,

Plaintiffs-Appellants,

v.

DENNIS C. BLAIR, in his official capacity as Director of National Intelligence, LT. GEN. KEITH B. ALEXANDER, in his official capacity as Director of the National Security Agency and Chief of the Central Security Service, ERIC H. HOLDER, in his official capacity as Attorney General of the United States,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, each corporate Plaintiff-Appellant certifies that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

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PRELIMINARY STATEMENT

Plaintiffs Amnesty International USA, Global Fund for Women, Global Rights, Human Rights Watch, International Criminal Defense Attorneys Association, The Nation Magazine, PEN American Center, Service Employees International Union, Washington Office on Latin America, Daniel N. Arshack, David Nevin, Scott McKay, and Sylvia Royce appeal from a final judgment of the District Court for the Southern District of New York (Koeltl, J.) entered on August 27, 2009 in accordance with an Opinion and Order issued on August 20, 2009. *Amnesty Int'l USA v. McConnell*, 646 F. Supp. 2d 633 (S.D.N.Y. 2009).

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. Plaintiffs appeal from a final judgment, entered August 27, 2009, granting defendants' motion for summary judgment and denying plaintiffs' motion for summary judgment. Plaintiffs timely filed a notice of appeal on October 1, 2009. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the district court erred in holding, on cross-motions for summary judgment, that plaintiffs lacked standing to challenge the constitutionality of the FISA Amendments Act, despite plaintiffs' objectively reasonable fear that their

communications will be monitored under the Act and uncontroverted evidence that the Act has already caused plaintiffs to suffer concrete injuries.

STATEMENT OF THE CASE

This case is a constitutional challenge to the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801 *et seq.* ("FISA"), as amended by the FISA Amendments Act of 2008, Pub. L. No. 110-261 (2008), *codified at* 50 U.S.C. § 1881a *et seq*. ("FAA" or "Act"). The President signed the FAA into law on July 10, 2008, and plaintiffs commenced this action the same day.

The FAA, which displaced a regulatory framework that had been in place since 1978, effectively eviscerates Americans' right to privacy in their international telephone calls and e-mails. On its face, the Act authorizes surveillance "targeted at" people overseas, surveillance that encompasses acquisition, retention, analysis, and dissemination of Americans' communications with those overseas targets. The Act contemplates not judicially supervised surveillance targeted at specific individuals thought to be engaged in terrorism, but dragnet surveillance conducted –

- without identifying to any judicial officer the people to be surveilled;
- without identifying to any judicial officer the facilities, places, premises, or property to be monitored;
- without observing meaningful limitations on the retention, analysis, and dissemination of acquired information;

- without individualized warrants based on criminal or foreign intelligence probable cause; and

- without prior judicial or even administrative determinations that the targets of surveillance are foreign agents or connected in any way, however tenuously, to terrorism.

While the statute is nominally addressed to surveillance of individuals overseas, it permits the dragnet, suspicionless surveillance of Americans' international communications.

The court below declined to reach the merits of plaintiffs' constitutional challenge, holding that plaintiffs had not satisfied the injury-in-fact requirement of Article III. In so holding, the court erred. Plaintiffs have demonstrated – based on uncontroverted evidence – that the FAA has already caused them to suffer concrete harms. They have also demonstrated – again, based on uncontroverted evidence – an actual and well-founded fear that their communications will be acquired under the FAA in the future. In concluding that plaintiffs lacked standing, the court failed to credit undisputed evidence, failed to appreciate the sweep of the challenged statute, and misapplied controlling case law. The court also advanced an indefensibly restrictive theory of standing that, if endorsed by this Court, will immunize statutes governing electronic surveillance from judicial review and relegate Americans' First and Fourth Amendment rights to the unchecked discretion of the political branches.

For these reasons, this Court should vacate the judgment below and remand the case to the district court for consideration of the merits of plaintiffs' claims.

STATEMENT OF FACTS

The Foreign Intelligence Surveillance Act

In 1978, Congress enacted the Foreign Intelligence Surveillance Act ("FISA") to regulate government surveillance conducted for foreign intelligence purposes. The statute created the Foreign Intelligence Surveillance Court ("FISC") and empowered it to grant or deny government applications for surveillance orders in foreign intelligence investigations. *See* 50 U.S.C. § 1803(a).

Congress enacted FISA after the U.S. Supreme Court held, in *United States v. U.S. Dist. Court for the E. Dist. of Mich.*, 407 U.S. 297 (1972), that the Fourth Amendment does not permit warrantless surveillance in intelligence investigations of domestic security threats. FISA was a response to that decision and to years of in-depth congressional investigation that revealed that the executive branch had engaged in widespread warrantless surveillance of U.S. citizens – including journalists, activists, and members of Congress – "who engaged in no criminal activity and who posed no genuine threat to the national security." S. Rep. No. 95-604(I), at 6 (1977), *reprinted at* 1978 U.S.C.C.A.N. 3904, 3909 (internal quotation marks omitted).

Congress has amended FISA multiple times. In its current form, the statute regulates, among other things, "electronic surveillance," which is defined to include:

> the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs in the United States . . . .

50 U.S.C. § 1801(f)(2).

Before passage of the FAA, FISA generally foreclosed the government from engaging in "electronic surveillance" without first obtaining an individualized and particularized order from the FISC. To obtain an order, the government was required to submit an application that identified or described the target of the surveillance; explained the government's basis for believing that "the target of the electronic surveillance [was] a foreign power or an agent of a foreign power"; explained the government's basis for believing that "each of the facilities or places at which the electronic surveillance [was] directed [was] being used, or [was] about to be used, by a foreign power or an agent of a foreign power"; described the procedures the government would use to "minimiz[e]" the acquisition, retention, and dissemination of non-publicly available information concerning U.S. persons; described the nature of the foreign intelligence information sought and the type of communications that would be subject to surveillance; and certified that a "significant purpose" of the surveillance was to obtain "foreign intelligence

information." *Id*. § 1804(a) (2006). "Foreign intelligence information" was (and still is) defined broadly to include, among other things, information concerning terrorism, national security, and foreign affairs.

The FISC could issue such an order only if it found, *inter alia*, that there was "probable cause to believe that the target of the electronic surveillance [was] a foreign power or an agent of a foreign power," *id*. § 1805(a)(2)(A); and that "each of the facilities or places at which the electronic surveillance [was] directed [was] being used, or [was] about to be used, by a foreign power or an agent of a foreign power," *id*. § 1805(a)(2)(B).

The Bush Administration's Warrantless Surveillance Program

In the fall of 2001, President Bush secretly authorized the National Security Agency ("NSA") to inaugurate a program of warrantless electronic surveillance inside the United States (the "Program"). A-72 (Jaffer Decl. ¶3, Exh. A). President Bush publicly acknowledged the Program after *The New York Times* reported its existence in December 2005. A-72 (Jaffer Decl. ¶4, Exh. B). The President reauthorized the Program repeatedly between 2001 and 2007. A-72 (Jaffer Decl. ¶5, Exh. C).

According to public statements made by senior government officials, the Program involved the interception of e-mails and telephone calls that originated or terminated inside the United States. A-72-73 (Jaffer Decl. ¶6, Exh. D). The

interceptions were not predicated on judicial warrants or any other form of judicial authorization; nor were they predicated on any determination of criminal or foreign intelligence probable cause. Instead, according to then-Attorney General Alberto Gonzales and then-NSA Director General Michael Hayden, NSA "shift supervisors" initiated surveillance when in their judgment there was a "reasonable basis to conclude that one party to the communication [was] a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda." A-72-73 (Jaffer Decl. ¶¶ 6-8, Exhs. D-F).

On January 17, 2007, then-Attorney General Alberto Gonzales publicly announced that a judge of the FISC had effectively ratified the Program and that, as a result, "any electronic surveillance that was occurring as part of the [Program] will now be conducted subject to the approval of the Foreign Intelligence Surveillance Court." A-73 (Jaffer Decl. ¶8, Exh. F). The FISC orders issued in January 2007, however, were modified in the spring of that same year. The modifications reportedly narrowed the authority that the FISC had extended to the executive branch in January. A-73 (Jaffer Decl. ¶9, Exh. G).

The FISA Amendments Act of 2008

President Bush signed the FAA into law on July 10, 2008. The FAA provides legislative sanction for the warrantless surveillance of U.S. citizens' and residents' communications.[1]

While leaving FISA in place insofar as communications known to be purely domestic are concerned, the FAA revolutionizes the FISA regime by allowing the mass acquisition of U.S. citizens' and residents' international communications without individualized judicial oversight or supervision.[2] Under the FAA, the Attorney General and Director of National Intelligence ("DNI") can "authorize jointly, for a period of up to one year . . . the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information." 50 U.S.C. 1881a(a). While the Act prohibits the government from, *inter alia*, "intentionally target[ing] any person known at the time of the acquisition to be located in the United States," *id*. § 1881a(b)(1), an acquisition authorized

[1] While the FAA amended FISA, the provisions of FISA that pre-existed the FAA continue to have effect with respect to foreign intelligence surveillance that does not involve "the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information." 50 U.S.C. § 1881a(a). Throughout this brief, plaintiffs use the term "FISA" to refer to the provisions that govern traditional FISA surveillance as distinguished from the provisions that now govern surveillance under the FAA.

[2] Throughout this brief, plaintiffs describe communications as "international" if they either originate or terminate (but not both) outside the United States.

under the FAA may nonetheless sweep up the international communications of U.S. citizens and residents. Indeed, the Attorney General and the DNI may authorize a mass acquisition under § 1881a – an acquisition encompassing thousands or even millions of communications – even if they know in advance that *all* of the communications to be acquired under the program will originate or terminate inside the United States.

Before authorizing surveillance under § 1881a – or, in some circumstances, within seven days of authorizing such surveillance – the Attorney General and the DNI must submit to the FISC an application for an order (hereinafter, a "mass acquisition order"). *Id*. at §§ 1881a(a), (c)(2). To obtain a mass acquisition order, the Attorney General and DNI must provide to the FISC "a written certification and supporting affidavit" attesting that the FISC has approved, or that the government has submitted to the FISC for approval, procedures ("targeting procedures") reasonably designed to (I) ensure that the acquisition is "limited to targeting persons reasonably believed to be located outside the United States," and (II) "prevent the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States." *Id*. § 1881a(g)(2)(A)(i). The certification and supporting affidavit must attest that the FISC has approved, or that the government has submitted to the FISC for approval, procedures ("minimization procedures")

that meet the definition of "minimization procedures" under 50 U.S.C. §§ 1801(h) or 1821(4). The certification and supporting affidavit must also attest, *inter alia*, that the Attorney General has adopted "guidelines" to ensure compliance with the limitations set out in § 1881a(b); that the targeting procedures, minimization procedures, and guidelines are consistent with the Fourth Amendment; and that "a significant purpose of the acquisition is to obtain foreign intelligence information." *Id*. at § 1881a(g)(2)(A)(iii)-(vii).

A mass surveillance order is intended to be a kind of blank check, which once obtained will suffice to cover – without further judicial authorization – whatever surveillance the government may choose to engage in, within broadly drawn parameters, for a period of up to one year. Accordingly, the Act does not require the government to demonstrate to the FISC that its surveillance targets are foreign agents, engaged in criminal activity, or connected even remotely with terrorism. Indeed, the statute does not require the government to identify its surveillance targets at all. Moreover, the statute expressly provides that the government's certification is not required to identify the facilities, telephone lines, e-mail addresses, places, premises, or property at which its surveillance will be directed. *Id*. at § 1881a(g)(4). Thus, the government may obtain a mass acquisition order without identifying the people (or even the group of people) to be surveilled; without specifying the facilities, places, premises, or property to be

monitored; without specifying the particular communications to be collected; without obtaining individualized warrants based on criminal or foreign intelligence probable cause; and without making even a prior administrative determination that the acquisition relates to a particular foreign agent or foreign power. A single mass acquisition order may be used to justify the surveillance of communications implicating thousands or even millions of U.S. citizens and residents. A single mass acquisition order could seek, for example:

- All telephone and e-mail communications to and from countries of foreign policy interest – for example, Russia, Venezuela, or Israel – including communications made to and from U.S. citizens and residents;

- All telephone and e-mail communications to and from the leaders of the Pakistani lawyers' movement for democracy, with the specific purpose of learning whether those leaders are sharing information with American journalists and, if so, what information is being shared, and with which journalists; or

- All telephone and e-mail communications of European attorneys who work with American attorneys on behalf of prisoners held at Guantánamo, including communications in which the two sets of attorneys share information about their clients and strategize about litigation.

To effect such surveillance under the FAA, the government would have to "target" people overseas, but that targeting of people overseas would involve the collection of countless Americans' private communications.

Equally striking is the Act's failure to place meaningful limits on the government's retention, analysis, and dissemination of information that relates to U.S. citizens and residents. While the Act requires the government to adopt

"minimization procedures" that are "reasonably designed . . . to minimize the acquisition and retention, and prohibit the dissemination of nonpublicly available information concerning unconsenting United States persons," the statute contemplates minimization procedures that are generic and programmatic rather than tailored to the surveillance of individualized targets. Moreover, the statute does not prescribe specific minimization procedures, does not give the FISA court any authority to oversee the implementation of the procedures, and specifically allows the government to retain and disseminate information – including information relating to U.S. citizens and residents – if the government concludes that it is "foreign intelligence information." *Id*. at § 1881a(e) (referencing 50 U.S.C. §§ 1801(h)(1), 1821(4)(A)). Again, the statute defines the phrase "foreign intelligence information" broadly to include, among other things, all information concerning national security and foreign affairs.

The role of the FISC in authorizing and supervising surveillance conducted under the FAA is "narrowly circumscribed." *In re Proceedings Required by § 702(i) of the FISA Amendments Act of 2008*, No. Misc. 08-01, slip op. at 3 (For. Int. Surv. Ct. Aug. 27, 2008) (internal quotation marks omitted).[3] Unlike the judiciary's traditional Fourth Amendment role – as a gatekeeper for particular acts of surveillance – the judicial role under the FAA is simply to bless in advance the

[3] This opinion is available at http://www.aclu.org/pdfs/safefree/fisc_decision.pdf.

vaguest parameters, under which the government is then free to conduct surveillance for up to one year. The FISC does not consider individualized and particularized surveillance applications, does not make individualized probable cause determinations, and does not supervise the implementation of the government's targeting or minimization procedures.

Plaintiffs' Complaint and Motion for Summary Judgment

Plaintiffs commenced this action on July 10, 2008, contending that the FAA unconstitutionally impaired their privacy and free speech rights. Plaintiffs alleged, in particular, that the statute violated the First and Fourth Amendments, as well as Article III and the principle of separation of powers, by authorizing the government to conduct dragnet, warrantless surveillance of Americans' international communications. Plaintiffs sought a declaration that the law is unconstitutional and an order permanently enjoining its use. In support of their motion for summary judgment, plaintiffs submitted nine declarations, including two expert declarations. The government opposed plaintiffs' motion and cross-moved for summary judgment, but without submitting any evidence. Accordingly, the factual record below consisted entirely of evidence submitted by plaintiffs and not challenged by defendants.[4]

[4] SPA-34 ("In opposing the plaintiffs' motion for summary judgment, and in responding to the plaintiffs' Statement of Undisputed Facts pursuant to Local Rule 56.1 . . . the Government [made] no reference to any evidence except that

The undisputed record below shows: Plaintiffs are attorneys and human rights, labor, legal, and media organizations whose work requires them to engage in sensitive and sometimes privileged telephone and e-mail communications with colleagues, clients, journalistic sources, witnesses, experts, foreign government officials, and victims of human rights abuses located outside the United States. A-68. Because of the nature of their communications and the identities and geographic location of the individuals with whom they communicate, plaintiffs reasonably believe that their communications will be acquired, analyzed, retained, and disseminated under the FAA.

Some of the plaintiffs communicate by telephone and e-mail with people the United States government believes or believed to be associated with terrorist organizations. A-137-139 (Royce Decl. ¶¶3-6) (discussing Royce's communications in relation to her representation of Mohammedou Ould Salahi, a prisoner held at Guantánamo Bay); A-133 (Mariner Decl. ¶8) (discussing Mariner's communications with individuals who were previously held in CIA custody abroad); A-143-144 (Walsh Decl. ¶6) (discussing WOLA staff members' communications with individuals charged under El Salvador's anti-terrorism legislation); A-166-170 (McKay Decl. ¶¶ 5,7,9, 11-12) (discussing McKay's

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submitted by the plaintiffs. . . . At oral argument, the government clarified that it was accepting the factual submissions of the plaintiffs as true for purposes of these motions.").

communications in relation to his representation of Sami Omar Al-Hussayen and Khalid Sheik Mohammed).[5]

Some of the plaintiffs communicate by telephone and e-mail with political and human rights activists who oppose governments that are supported economically or militarily by the United States. A-127-128 (Klein Decl. ¶¶ 6-7) (discussing Klein's communications with foreign political activists and political groups in, among other countries, Colombia); A-143-144 (Walsh Decl. ¶ 6) (discussing WOLA staff members' communications with leaders of protest movements in El Salvador).

Some of the plaintiffs communicate by telephone and e-mail with people located in geographic areas that are a special focus of the U.S. government's counterterrorism or diplomatic efforts. A-133 (Mariner Decl. ¶8) (discussing Mariner's communications with people in the Middle East, North Africa, Central Asia, and South Asia); A-143, 146-147 (Walsh Decl. ¶¶5, 11) (discussing WOLA staff members' communications with people in, among other countries, Colombia, Cuba, and Venezuela); A-161-162 (Hedges Decl. ¶¶ 4, 7) (discussing Hedges'

[5] All of the facts described here were cited in plaintiffs' Statement of Undisputed Facts, A-66-70, or Supplemental Statement of Undisputed Facts, A-156-159, and supported with admissible evidence. For ease of reference, however, the citations supplied here are citations to the underlying evidence, not to the Statement of Undisputed Facts or Supplemental Statement of Undisputed Facts.

communications with contacts in Iran, Syria, Libya, Kosovo, Bosnia, Sudan, and Palestine).

All of the plaintiffs exchange information that constitutes "foreign intelligence information" within the meaning of the FAA. A-139-140 (Royce Decl. ¶ 8); A-133 (Mariner Decl. ¶ 8); A-143-147 (Walsh Decl. ¶¶ 5-6, 8-9, 11); A-127 (Klein Decl. ¶¶ 5-6); A-162 (Hedges Decl. ¶ 7); A-166-167, 169-170 (McKay Decl. ¶ 5, 7, 12).

The undisputed record shows that the FAA injures plaintiffs by disrupting their ability to engage in confidential communications that are integral to their professional activities. A-139-140 (Royce Decl. ¶¶ 7-9); A-133-135 (Mariner Decl. ¶¶ 9-11); A-144-148 (Walsh Decl. ¶¶ 7, 9-13); A-127-128 (Klein Decl. ¶¶ 7-9). John Walsh, the Senior Associate responsible for Andes and Drug Policy at plaintiff Washington Office on Latin America ("WOLA"), states:

> I and my colleagues at WOLA depend on our ability to communicate confidentially via telephone and e-mail to forge strong relationships with individuals and organizations abroad. These relationships, and the communications they engender, are essential to our ability to provide insightful and well-grounded analysis to Congress, the administration, the media, and the broader public. Especially in countries in which politics and violence are intertwined, the confidentiality of our international communications is integral to our research, advocacy, and coalition-building work.

A-144 (Walsh Decl. ¶ 7).

The FAA compromises plaintiffs' ability to locate witnesses, cultivate sources, gather information, communicate confidential information to their clients, and to engage in other legitimate and constitutionally protected communications. A-140 (Royce Decl. ¶ 9); A-134 (Mariner Decl. ¶ 10); A-145-148 (Walsh Decl. ¶¶ 9-13); A-128 (Klein Decl. ¶ 9); A-163 (Hedges Decl. ¶¶ 8-9); A-168-169 (McKay Decl. ¶¶ 10-11); A-176, 180-181 (Gillers Decl. ¶¶ 10, 12, 23). The challenged law has serious ramifications for those of the plaintiffs who are journalists. Naomi Klein, an investigative reporter and regular contributor to *The Nation* magazine, explains that many of her sources live under repressive governments that the United States supports economically and militarily:

> Some of my sources will decline to share information with me if they believe that their communications are being monitored by the United States. In some cases they fear that the United States itself will retaliate against them for their political activities – for example, by placing them on "watch lists" and refusing them visas should they try to visit the United States. More often, though, they fear that the United States will share information about them with their own governments, and that their own governments will retaliate against them as a result.

A-128 (Klein Decl. ¶8); *see also* A-163 (Hedges Decl. ¶ 8).

The challenged law has particularly serious consequences for those of the plaintiffs who are attorneys. A-138-140 (Royce Decl. ¶¶6-9); A-167-169, 171 (McKay Decl. ¶¶ 8-11, 14); A-176-181 (Gillers Decl. ¶¶ 10-23). Sylvia Royce, a defense attorney, explains that the challenged law impairs her ability to represent her client at Guantánamo because, among other things, it forces her to limit the

information she shares with experts, witnesses, and co-counsel who reside outside of the United States. As Ms. Royce explains:

> The risk that the government will monitor my communications with co-counsel puts me in a dilemma: I would like to have an open exchange of views on legal strategy with my co-counsel, but I have a duty not to allow client confidences and legal strategy to be captured by persons outside the attorney-client relationship, and least of all by the U.S. government, which in this case is the opposing party.

A-139 (Royce Decl. ¶ 7); *see also* A-167-168 (McKay Decl. ¶ 8).

The challenged law compels plaintiffs to take costly and burdensome measures to protect the confidentiality of sensitive and privileged communications. A-134 (Mariner Decl. ¶ 10) (stating that she will have to resort to time-consuming, costly, and sometime dangerous travel abroad to gather information in person that she would have otherwise gathered by telephone or e-mail); A-128 (Klein Decl. ¶9); A-163 (Hedges Decl. ¶¶ 8-9); A-167-169, 171 (McKay Decl. ¶¶ 8, 10-11, 14). Some of the plaintiffs have already forgone communications that are particularly sensitive. A-163 (Hedges Decl. ¶¶ 8-9); A-167-169 (McKay Decl. ¶¶ 8, 10). Plaintiff Scott McKay explains that he and his colleagues now find themselves "faced with a choice between asking experts, investigators or witnesses to share sensitive information over the phone or by e-mail or, alternatively, forgoing the information altogether," a situation that has a "real effect on [their] ability to properly represent [their] clients." A-168-169 (McKay Decl. ¶ 10).

The record establishes that plaintiffs' concerns are not merely subjective, and that the measures they have taken to protect the privacy of their communications are not discretionary. Plaintiffs submitted the expert declaration of Professor Stephen Gillers, a nationally known legal ethicist. Professor Gillers describes the attorney-plaintiffs' dilemma in these terms:

> Because of the status of their clients, the identity and location of witnesses and sources, and the breadth of the FAA authority, Ms. Royce and Mr. McKay have good reason to believe that the persons abroad with whom they must communicate to satisfy their professional obligations will be or are targets of the authority granted the government under the FAA. . . . Under these circumstances, the lawyer plaintiffs have *an ethical obligation* to limit their telephonic and electronic communications with persons abroad to routine and non-sensitive information.

A-178 (Gillers Decl. ¶ 16) (emphasis added).

Thus, the undisputed record establishes that plaintiffs reasonably fear that the FAA will be used to acquire their communications; that the statute has already compelled them to take costly and burdensome measures to protect the privacy of their communications; and that the measures they have taken are not simply prudent and reasonable responses to the threat presented by the statute but, at least in some instances, required by codes of professional conduct.

The District Court's Decision

The district court held that plaintiffs lacked standing to challenge the FAA. SPA-18. The court acknowledged that plaintiffs' evidence of injury was

undisputed, SPA-34-35, but it held nonetheless that plaintiffs had failed to satisfy the injury-in-fact requirement, SPA-43-44.

The court held, first, that plaintiffs had failed to establish an actual and well-founded fear of harm because they had not shown that they were "subject to" the statute they challenged. SPA-59. The court reached that conclusion because the statute does not directly regulate the plaintiffs' conduct and (in its view) did not "require [them] to do anything." SPA-59. The court also found relevant, and perhaps dispositive, that the challenged statute does not directly authorize surveillance but rather permits the FISC to do so. SPA-49. Notwithstanding the undisputed factual record, the district court concluded that plaintiffs' fear that their communications would be acquired under the challenged law was merely speculative. SPA-44.

The district court also rejected plaintiffs' second asserted basis for standing – that the statute had already caused them to suffer concrete injuries. Plaintiffs had pointed to the measures they have taken to protect the confidentiality of their communications – including travelling abroad to gather information that they would otherwise have gathered by e-mail or telephone, and forgoing certain particularly sensitive communications altogether. In the district court's view, plaintiffs' second asserted injury was a "repackaged version" of the first, SPA-65, and in any event the injuries that plaintiffs had already suffered amounted only to

the kind of "subjective chill" that the courts had found insufficient in earlier cases, SPA-65-67.

Having found that plaintiffs lacked standing, the court granted summary judgment to defendants. SPA-80.

SUMMARY OF ARGUMENT

The district court erred in holding that plaintiffs lacked standing. The undisputed factual record shows that plaintiffs have suffered two separate injuries, each sufficient to satisfy the injury-in-fact requirement. First, plaintiffs demonstrated – based on undisputed evidence – that they have already suffered concrete harms because of the enactment of the FAA. Second, plaintiffs demonstrated – again, based on undisputed evidence – an actual and well-founded fear that the FAA will be used to acquire their communications in the future.

In holding that plaintiffs lacked standing, the court failed to credit undisputed evidence, failed to appreciate the sweep of the challenged statute, and misapplied controlling case law. The court also advanced an indefensibly restrictive theory of standing that, if endorsed by this Court, will immunize statutes governing electronic surveillance from judicial review and relegate Americans' First and Fourth Amendment rights to the unchecked discretion of the political branches.

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT PLAINTIFFS LACK STANDING.

To satisfy the standing requirements of Article III, plaintiffs must establish that (i) they have suffered a "concrete and particularized" injury that is "actual or imminent" rather than "conjectural" or "hypothetical"; (ii) there is a causal connection between their injury and the challenged statute or conduct, such that the injury is "fairly traceable" to the defendant's alleged violation; and (iii) it is "likely" that their injury would be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *see also Connecticut v. Am. Elec. Power Co., Inc.*, 582 F.3d 309, 339 (2d. Cir. 2009). This Court reviews the district court's grant of summary judgment *de novo*. *Vt. Right to Life Comm. v. Sorrell*, 221 F.3d 376, 381 (2d Cir. 2000).

The district court erred in holding that plaintiffs had failed to satisfy the injury-in-fact requirement, because plaintiffs have demonstrated two distinct injuries, each of which is independently sufficient to satisfy Article III.[6] First,

[6] The district court's analysis focused exclusively on the injury-in-fact requirement, and accordingly plaintiffs focus on that requirement here. Plaintiffs' undisputed evidence, however, also establishes causation and redressability. Plaintiffs' affidavits demonstrate that their injuries flow from the FAA, because it is the FAA that exposes them to an increased risk of surveillance and it is the FAA that compels them to take immediate measures to protect the confidentiality of their communications. The same affidavits establish that plaintiffs' injuries would

plaintiffs have demonstrated that the challenged statute has already caused them to suffer professional and economic harms. Second, they have demonstrated an actual and well-founded fear that the statute will be used to acquire their communications in the future. The district court conflated plaintiffs' two injuries, SPA-65 (stating that one asserted injury was a "repackaged version" of the other), but it was wrong to do so. The injuries are analytically distinct and the courts have traditionally treated them as distinct. *See, e.g., Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 73-74 (1978) (expressly distinguishing injury based on "immediate effects" of statute that permitted nuclear facilities to be constructed from injury based on "present apprehension" of future nuclear accident); *Am. Elec. Power Co.*, 582 F.3d at 317-18 (expressly distinguishing "current injuries resulting from climate changes" from "future injuries resulting from the increased carbon dioxide emissions and concomitant global warming"). In keeping with the jurisprudence of the Supreme Court and this Court, plaintiffs address the two injuries separately below.

A. Plaintiffs have satisfied the injury-in-fact requirement because they have already suffered "specific present objective harm" as a result of the FAA.

Plaintiffs have satisfied the injury-in-fact requirement by demonstrating, through uncontroverted evidence, that the challenged statute has already caused

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be redressed by the relief that they seek – principally, an injunction prohibiting the government from conducting surveillance under the challenged statute.

them to suffer professional and economic harms. The district court held that these were "subjective harms" insufficient to support standing. In so holding, the court failed to credit undisputed evidence and misapplied controlling law.

Plaintiffs' uncontroverted evidence establishes that the FAA has caused plaintiffs concrete injuries by compelling them to take costly and burdensome measures to protect the confidentiality of their international communications. *See, e.g.*, A-163 (Hedges Decl. ¶¶ 8-9); A-167-169, 171 (McKay Decl. ¶¶ 8, 10-11, 14). In some instances, the statute has compelled them to forgo certain particularly sensitive communications altogether. *See, e.g.*, A-163 (Hedges Decl. ¶¶ 8-9); A-167-169 (McKay Decl. ¶¶ 8, 10). Some of the plaintiffs are compelled to travel long distances, at considerable expense, to collect information in person that they would otherwise have been able to collect over the phone or by e-mail. *See, e.g.*, A-163 (Hedges Decl. ¶ 9); A-168-169 (McKay Decl. ¶ 10). In some instances, third parties have refused to share information with plaintiffs because of the risk that the government may be monitoring their communications. *See, e.g.*, A-128 (Klein Decl. ¶ 8-9); A-130-140 (Royce Decl. ¶ 8). As a result, the challenged statute has compromised plaintiffs' ability to locate witnesses, cultivate sources, gather information, communicate confidential information to their clients, and to engage in other legitimate and constitutionally protected communications. *See,*

e.g., A-163 (Hedges Decl. ¶¶ 8-9); A-168-171 (McKay Decl. ¶¶ 10-11, 13-14); A-176, 180-181 (Gillers Decl. ¶¶ 10, 12, 23).

The district court, citing *Laird v. Tatum*, 408 U.S. 1 (1972), said that these injuries amounted only to "subjective chill" insufficient to satisfy Article III. SPA-65. *Laird*, however, did not involve the kinds of injuries asserted here. *Laird* involved a challenge to a program under which the Army collected "information about public activities that were thought to have at least some potential for civil disorder." *Id*. at 6. The plaintiffs asserted that the possibility that the program would be abused – specifically, the possibility that "in some future civil disorder of some kind, the Army [would] come in with its list of troublemakers" – discouraged them from exercising their expressive and associational rights. *Id*. at 8 n.5. There was no evidence that the surveillance at issue was being conducted pursuant to unlawful means; in fact, the record demonstrated that "the information gathered [was] nothing more than a good newspaper reporter would [have been] able to gather by attendance at public meetings and the clipping of articles from publications available on any newsstand." *Id*. at 9. The plaintiffs also conceded that they had not in fact been "cowed and chilled" by the threat of Army surveillance. *Id*. at 14 n.7.

On those facts, the Court held that the plaintiffs lacked standing. While it noted that governmental action "may be subject to constitutional challenge even

though it has only an indirect effect on the exercise of First Amendment rights," the Court held that the plaintiffs had failed to demonstrate that they had suffered *any* present or future harm as a result of the challenged surveillance program. *Id*. at 12-13. It held that plaintiffs could not establish standing by pointing to the "mere existence, *without more*, of a governmental investigative and data-gathering activity that is alleged to be broader in scope than is reasonably necessary." *Id*. at 10 (emphasis added).

Laird turned on the plaintiffs' failure to demonstrate *any* injury; it did not purport to set out a new (and virtually prohibitive) standing rule for challenges to government surveillance. Indeed, *Laird* expressly distinguished allegations of "subjective chill," which it held were insufficient to support standing, from allegations of "specific present objective harm," which it indicated *would* be sufficient. *Id*. at 13-14 ("Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm."); *see also United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 (1973) (stating that plaintiffs who allege "specific and perceptible harm that distinguishe[s] them from other citizens" will have presented a cognizable injury); *Bordell v. Gen. Elec. Co.*, 922 F.2d 1057, 1061 (2d. Cir. 1991) (interpreting *Laird* to mean that a plaintiff "must proffer *some*

objective evidence to substantiate his claim that the challenged conduct has deterred him from engaging in protected activity" (emphasis added)).

Two years after *Laird* was decided, Justice Marshall, writing as Circuit Judge, underscored the same distinction in *Socialist Workers Party v. Att'y Gen.*, 419 U.S. 1314 (1974). There, the Court of Appeals had vacated a district court's order enjoining the FBI from attending or monitoring an organization's national convention. Though Justice Marshall denied the petition to stay the appellate court's order, he first ruled that the controversy was justiciable because the plaintiffs' allegations about FBI surveillance were much more specific than those presented in *Laird*. To establish standing, Justice Marshall held, it was sufficient that "the applicants ha[d] complained that the challenged investigative activity [would] have the concrete effects of dissuading some [Young Socialist Alliance] delegates from participating actively in the convention and lead[] to possible loss of employment for those who are identified as being in attendance." *Id*. at 1319.

Plaintiffs here have demonstrated the kinds of "specific present objective harms" that *Laird* and *Socialist Workers Party* made clear are sufficient to support standing. Unlike the *Laird* plaintiffs, plaintiffs here have pointed to specific instances in which their professional work has been compromised because of the statute. Unlike the *Laird* plaintiffs, plaintiffs here have demonstrated that they have already suffered economic harm because of the statute. And whereas in *Laird*

the plaintiffs had not altered their conduct at all because of the challenged program, plaintiffs here have altered their conduct in ways that are not only prudent and reasonable but, at least in some instances, obligatory under codes of professional conduct.

Accordingly, plaintiffs here do not complain of the "mere existence, *without more*, of a governmental investigative and data-gathering activity." 408 U.S. at 9 (emphasis added). They have alleged – and substantiated through uncontroverted affidavits – the kinds of "specific present objective harms" that *Laird* indicated are sufficient to support standing.

In finding that *Laird* foreclosed plaintiffs' suit, the district court stated that it was "unnecessary to decide" whether plaintiffs could satisfy Article III without showing that their injuries stemmed from government conduct that was "regulatory, proscriptive, or compulsory in nature." SPA-67-68 (quoting *Laird*, 408 U.S. at 11). The district court implicitly decided that question, however, by requiring plaintiffs to demonstrate that they were "subject to" the statute they challenged. *See* SPA-56 ("the cases are clear that an actual and well-founded fear of enforcement depends upon a reasonable showing that the plaintiff is *subject to* the challenged law or regulation" (emphasis added)); *see also* SPA 49, 51, 54, 55, 73. In holding that plaintiffs lacked standing because the challenged statute did not directly regulate their conduct, the court erred. As Justice Marshall explained in

Socialist Workers Party, the *Laird* Court's use of the phrase "regulatory, proscriptive, or compulsory" was meant to "distinguish[] earlier cases, not set[] out a rule for determining whether an action is justiciable or not." *Socialist Workers Party*, 419 U.S. at 1318.

The Supreme Court's jurisprudence since *Laird* and *Socialist Workers Party* confirms that plaintiffs can satisfy the injury-in-fact requirement without establishing that the policy, practice, or statute they challenge is expressly addressed to them or directly regulates their conduct. In *Meese v. Keene*, 481 U.S. 465 (1987), for example, the Court held that a state legislator who wanted to screen three Canadian documentaries on environmental topics had standing to challenge the government's labeling of the films as "political propaganda" under the Foreign Agents Registration Act of 1938. *Id.* at 467-68. The Court reached this conclusion even though neither the Act nor the government's determination that the films were propaganda required plaintiff to do anything or regulated his conduct, and even though the entity regulated by the Act – the National Film Board of Canada – was not a party to the litigation. *See, e.g.*, *id.* at 473. It was enough, the Court held, that the plaintiff might suffer reputational harm from screening films that the government had determined to be propaganda. *Id.* at 473-74; *see also Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1096 (10th Cir. 2006) (en banc) ("*Meese* demonstrates that, in some cases, First Amendment plaintiffs can assert

standing based on a chilling effect on speech even where the plaintiff is not subject to criminal prosecution, civil liability, regulatory requirements, or other 'direct effect[s].'").

United States v. SCRAP is to the same effect. In that case an environmental group sued to enjoin the Interstate Commerce Commission from allowing railroads to collect a surcharge on freight rates. 412 U.S. at 678. The plaintiffs' asserted injuries stemmed from the anticipated impact of the rate increase on the use of recyclable goods which the plaintiffs alleged would ultimately interfere with their use of natural resources. *Id.* at 678. The Interstate Commerce Commission did not have any authority to regulate the plaintiffs and had not issued any order directed at the plaintiffs, and the plaintiffs did not contend that the order they challenged compelled them to do anything. The Court nonetheless found that they had standing. *Id.* 686-89. The crucial fact, the Court reasoned, was that plaintiffs had "alleged a specific and perceptible harm that distinguished them from other citizens who had not used the natural resources that were claimed to be affected." *Id*. at 689.

The Supreme Court enunciated these same principles in *Duke Power Co*. In that case, environmental groups and individuals who lived within close proximity of proposed nuclear facilities brought suit against the U.S. Nuclear Regulatory Commission and an investor-owned public utility in order to enjoin the

construction of the facilities. 438 U.S. at 67. Plaintiffs asked that the court declare unconstitutional the Price-Anderson Act, the statute that both permitted the construction of the facilities and limited the monetary damages that plaintiffs would receive in the event of a nuclear accident. *Id*. Although the challenged Act was not addressed to plaintiffs, did not regulate their activities, and did not directly compel them to take any particular action, the Court held that plaintiffs had standing. Plaintiffs had established a cognizable injury, the Court held, by pointing to the "environmental and aesthetic consequences of the thermal pollution of the two lakes in the vicinity of the disputed power plants." *Id*. at 73.

This Court's cases, too, show that plaintiffs can establish standing without demonstrating that the government action they challenge directly regulates their conduct. *Baur v. Veneman*, 352 F.3d 625 (2d Cir. 2003), for example, involved an individual citizen's challenge to the government's purported failure to appropriately regulate the processing of "downed" cattle. The challenged regulations were not addressed to the plaintiff and did not directly regulate his activity. *Id*. at 628. The only entities that were subject to the regulations were those involved in the production and processing of beef. *Id*. This Court nonetheless held that plaintiff had standing because the government's failure to properly regulate the processing of downed cattle indirectly exposed plaintiff to a

higher risk of contracting disease. *Id*. at 632-36; *see also Apter v. Richardson*, 510 F.2d 351 (7th Cir. 1975).[7]

The district court's conclusion that plaintiffs' injuries were "subjective" seems to have stemmed principally, or perhaps entirely, from its determination that these injuries were in some sense self-inflicted or discretionary. SPA-71 (observing that plaintiffs' injuries "ar[o]se from the plaintiffs' *choices* to incur expenditures and costs" (emphasis added)); SPA-77 ("plaintiffs' reluctance to engage in their desired speech is *self-imposed*" (emphasis added)). As plaintiffs' uncontroverted declarations show, however, the FAA *compels* plaintiffs to incur these expenditures and costs – and to take other measures to protect the confidentiality of their communications. A-167, 168-69, 171 (McKay Decl. ¶¶ 8, 10-11, 14) (describing costly measures taken to comply with ethical obligation to maintain confidentiality of client communications); A-134 (Mariner Decl. ¶ 10) (stating that she will have to resort to time-consuming, costly, and sometimes dangerous travel abroad to gather information in person that she would have otherwise gathered by telephone or e-mail); *see also* A-128 (Klein Decl. ¶ 9); A-

[7] The district court cited *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007), but in that case only one judge of the three-judge panel took the position that plaintiffs could establish standing without showing that the challenged conduct was "regulatory, proscriptive, or compulsory" with respect to them. *Compare ACLU v. NSA*, 493 F.3d at 664 (Batchelder, J.) *with id*. at 693 n.3 (Gibbons, J., concurring) *and id*. at 701 (Gilman, J., dissenting).

163 (Hedges Decl. ¶ 9). On this record, there was no basis for the district court to find that plaintiffs' injuries were self-inflicted or purely subjective.

Indeed, the expert declaration of Professor Stephen Gillers establishes that some of the plaintiffs would violate ethical rules and expose themselves to possible bar discipline if they failed to take the measures that the district court characterized as merely discretionary. Professor Gillers' declaration states, in part:

> The government asserts that Ms. Royce and Mr. McKay cannot show with certainty that any of their communications have been or will be intercepted. But their ethical obligations do not depend on any such proof. It is triggered by the *risk* that the communications will be intercepted. Or to put it another way, the duty is to *safeguard* confidential information. The ethical violation is complete if a lawyer does not take appropriate measures to safeguard confidential information proportionate to the risk of discovery, even if, as it happens, the lawyer's failure does not result in certain discovery. . . .
>
> The question for me here is whether [] Ms. Royce and Mr. McKay have good reason to believe that their communications with their clients or third parties abroad in connection with client matters will be intercepted, thereby requiring them to avoid electronic means of communication, including the telephone and e-mail, to impart or receive sensitive information that is within MR 1.6 [pertaining to the duty to protect confidential information]. My opinion is that the lawyers have good reason for this belief because of the status of their clients, the identity and location of witnesses and sources, and the broad authority that the FAA grants the government. *The lawyers' decision to avoid electronic means of communication is not discretionary. It is obligatory.*

A-178, 180-181 (Gillers ¶¶ 17, 23) (emphasis in second paragraph added). Again, all of plaintiffs' declarations – including the expert declaration of Professor Gillers, which the district court failed even to acknowledge – were uncontroverted.

There is a formalistic sense, of course, in which plaintiffs' injuries are "self-inflicted." At least theoretically, plaintiffs could have declined to take measures to protect the confidentiality of their communications and simply suffered the consequences, including, in the case of the attorney plaintiffs, violation of controlling ethical rules and exposure to possible bar discipline. Where a defendant's conduct puts a plaintiff to this kind of "choice," however, the plaintiff has standing to challenge that conduct.

The Supreme Court's decision in *Meese* is once again instructive. Again, in that case a state legislator sued to enjoin application of a statute that would have required the National Film Board of Canada to register certain documentaries as "political propaganda." 481 U.S. at 467-68. While the statute did not impose any obligation on the plaintiff, the plaintiff feared that he would suffer reputational harm if he were to screen films that the government had labeled "political propaganda." *Id.* at 473. The Court recognized that plaintiff could avoid the feared injury by simply declining to screen the films. *Id.* at 475. It found, however, that plaintiff nonetheless had standing because "the Act 'puts the plaintiff to the Hobson's choice of foregoing the use of the three Canadian films for the exposition of his own views or suffering an injury to his reputation.'" *Id.* (quoting approvingly the district court decision).

The Supreme Court's decisions in *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000), and *SCRAP* also supply useful guidance. In *Laidlaw*, environmental organizations brought suit under the Clean Water Act against a corporation that they alleged was exceeding statutory limits on the discharge of certain pollutants. The plaintiffs' asserted injury consisted of their cessation of certain activities – for example swimming, camping, and birdwatching – for fear of exposure to pollution discharged by defendant. *Id*. at 182. The Court found the injuries were not self-inflicted but reasonable responses to the threat of exposure to contaminated water. *Id*. at 183-84. In *SCRAP*, similarly, plaintiffs' injuries consisted principally of their decision to forgo the use of certain natural resources – "forests, streams, mountains, and other resources" – because of the defendants' allegedly unlawful actions. *Id.* at 685. The Court held that plaintiffs who had curtailed their use of natural resources in response to the defendants' challenged policy had standing to challenge that policy. *Id*.[8]

[8] *See also Pacific Capital Bank, N.A. v. Connecticut*, 542 F.3d 341, 350 (2d Cir. 2008) (rejecting as "untenable" defendants' contention that plaintiffs' compliance with its reasonable interpretation of a challenged statute was "purely a matter of . . . choice"); *Fla. State Conf. of the NAACP v. Browning*, 522 F.3d 1153, 1166 (11th Cir. 2008) (holding that organizations representing the interests of Florida's minority communities had standing to challenge voter registration statute that forced them to choose between noncompliance with the statute and "divert[ing] scarce time and resources" to complying with it); *Ozonoff v. Berzak*, 744 F.2d 224 (1st Cir. 1984) (holding that applicant for government employment had standing to challenge loyalty-oath requirement that forced him to choose

In *Meese*, *Laidlaw*, and *SCRAP*, plaintiffs were found to have standing where they were confronted with a choice between subjecting themselves to immediate harm – by curtailing their use of resources or ceasing to engage in protected activity – and exposing themselves to the possibility of future harm. Plaintiffs here are confronted with an analogous "choice." They can continue to engage in e-mail and telephone communications with sources, witnesses, and others overseas – in which case they risk exposing sensitive and privileged information to government surveillance and risk violating professional codes; or they can take costly and burdensome measures to protect their sensitive and privileged information from government surveillance. *Meese, Laidlaw,* and *SCRAP* – all of which postdate *Laird* – make clear that plaintiffs confronted with this kind of dilemma have satisfied the injury-in-fact requirement.

Here, plaintiffs have taken measures in reasonable response to government conduct that they allege is unlawful. Plaintiffs' declarations explain in detail why they believe that the measures they have taken to safeguard the confidentiality of their communications are prudent and reasonable. The declaration of an independent expert states that the measures that plaintiffs have taken are, at least in some instances, ethically required. The government failed to submit countervailing evidence, and indeed at oral argument it expressly conceded all of

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between curtailing his political activities and possible denial of employment in the future).

the facts asserted by plaintiffs and their expert. SPA-34. The question for the district court, then, was whether plaintiffs who have taken what are undisputedly reasonable measures to mitigate harm from government conduct that they allege is unlawful have satisfied the injury-in-fact requirement. *Meese*, *Laidlaw*, and *SCRAP* make clear that the answer is yes.

B. Plaintiffs have established injury-in-fact by demonstrating an actual and well-founded fear that their communications will be monitored under the FAA.

Plaintiffs have also established injury-in-fact by demonstrating an actual and well-founded fear that their communications will be acquired under the FAA in the future. The district court, however, found that plaintiffs had not established an objectively reasonable fear because they had failed to demonstrate that they were "subject to" the statute they challenged. In setting out this requirement – and in concluding that plaintiffs had failed to satisfy it – the district court failed to credit undisputed evidence, failed to appreciate the sweep of the challenged statute, and misapplied controlling case law.

Where First Amendment rights are at stake, plaintiffs can satisfy the injury requirement by demonstrating an "actual and well-founded fear" of future harm. *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 101 (2d. Cir. 2003); *Vt. Right to Life*, 221 F.3d at 382. The "actual and well-founded fear" test is more lenient than the one that applies outside the First Amendment context, *Am. Booksellers Found.*,

342 F.3d at 101, in recognition of the fact that "free expression [is] of transcendent value to all society, and not merely to those exercising their rights," *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965); *see also Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 392-93 (1988); *Am. Booksellers Found.*, 342 F.3d at 101. Even outside the First Amendment context, however, a plaintiff threatened with injury need not await the consummation of that injury before bringing suit. *Davis v. Fed. Election Comm.*, 128 S.Ct. 2759, 2769 (2008) ("[T]he injury required for standing need not be actualized."). It is enough that she demonstrate a "*realistic danger* of sustaining direct injury as a result of the statute's operation or enforcement." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (emphasis added). As this Court has observed, this is a "low threshold." *Ross v. Bank of Am., N.A. (USA)*, 524 F.3d 217, 222 (2d Cir. 2008).[9]

Plaintiffs have demonstrated an actual and objectively reasonable fear that their international communications will be acquired under the FAA. As an initial matter, the statute plainly authorizes the acquisition of plaintiffs' international communications. On its face, the statute authorizes the government to monitor *any*

[9] In the district court, the government questioned whether plaintiffs' standing should be evaluated under the "actual and well-founded fear" standard that applies in First Amendment cases or the "realistic danger" standard that applies in other contexts. SPA-41 n.12. While this Court has made clear that the standard to be applied in the First Amendment context is less stringent than the standard to be applied in other contexts, *Am. Booksellers Found.*, 342 F.3d at 101, plaintiffs have satisfied both standards here and accordingly the difference between the two is not material.

international communication as long as (i) the government's surveillance "targets" are non-U.S. persons outside the United States; and (ii) the programmatic purpose of any particular surveillance program is to gather "foreign intelligence information." In the court below, the parties disagreed about the significance of the statute's minimization requirements – that is, the statute's restrictions on the government's use, retention, and dissemination of acquired communications – but not even the government proposed that these requirements protected plaintiffs' communications against interception in the first instance. To the contrary, the government expressly acknowledged that plaintiffs' communications could be intercepted under the law. *See* Defs' Memo. in Opp. to Pls' Mot. for Summary J. and in Support of Defs' Cross-Mot. for Summary J. at 33 (acknowledging that Americans' communications can be acquired as an "incident" to surveillance targets approved under the FAA).

In the court below, plaintiffs established not only that the FAA *could* be used to monitor their international communications, but that their communications were *likely* to be monitored under it. Uncontroverted record evidence establishes that some of the plaintiffs communicate by telephone and e-mail with people whom the U.S. government believes or believed to be associated with terrorist organizations. A-166-167, 169-170 (McKay Decl. ¶¶3, 5-7, 11-12). Some of them communicate with political and human rights activists who oppose governments

that are supported economically and militarily by the United States. A-127-128 (Klein Decl. ¶¶ 6-7); A-143-144 (Walsh Decl. ¶ 6). Some of them communicate with people located in geographic areas that are a special focus of the U.S. government's counterterrorism or diplomatic efforts. A-161-162 (Hedges Decl. ¶¶ 4, 7); A-166-167, 169-170 (McKay Decl. ¶¶ 5, 12). And all of the plaintiffs exchange information that constitutes foreign intelligence information within the meaning of the FAA. A-162 (Hedges Decl. ¶7); A-166-167, 169-170 (McKay Decl. ¶¶ 5, 7, 12). Plaintiffs asserted that these factors, in combination, made it likely that the FAA would be used to monitor their communications, *see, e.g.*, A-137 (Royce Decl. ¶ 5); A-127 (Klein Decl. ¶ 6); A-179-180 (Gillers Decl. ¶ 21), and the government did not offer evidence to the contrary, SPA-34. In finding that plaintiffs had not established an actual and well-founded fear of harm, the district court simply failed to credit plaintiffs' undisputed evidence.

To the extent that the court found plaintiffs' fears of surveillance to be unreasonable, SPA-59, the court also failed to appreciate the sweep of the challenged statute. Whereas both FISA and the Bush administration's warrantless wiretapping program involved surveillance predicated on individualized suspicion, the statute challenged here lacks an individualized suspicion requirement altogether, and as a result it permits *dragnet* surveillance. Indeed, in advocating for the passage of the FAA, executive branch officials expressly requested the

authority to conduct dragnet surveillance. *See, e.g.*, Letter from Att'y Gen. Michael Mukasey and Director of National Intelligence Mike McConnell to Hon. Harry Reid (Feb. 5, 2008) (arguing that the intelligence community should not be prevented "from targeting a particular group of buildings or a geographic area abroad").[10]

In debating the proposed legislation, moreover, legislators noted that the statute would supply the government with authority to sweep up the communications not just of surveillance targets overseas but of countless Americans as well. For example, in debating a proposed bill that was a predecessor to the FAA (and which contained substantially similar provisions), Sen. Feingold stated:

> Even the administration's illegal warrantless wiretapping program, as described when it was publicly confirmed in 2005, at least focused on particular al-Qaida terrorists. But what we are talking about now is different. This is the authority to conduct a huge dragnet that will sweep up innocent Americans at home, combined with an utter lack of oversight mechanisms to prevent abuse.

154 Cong. Rec. S568 (Feb. 4, 2008). Similarly, during debates over the FAA, Rep. Speier stated:

> It is fundamentally untrue to say that Americans will not be placed under surveillance after this bill becomes law. The truth is, any American will subject their phone and e-mail conversations to the broad government surveillance web simply by calling a son or

[10] This letter is available at http://www.justice.gov/archive/ll/docs/letter-ag-to-reid020508.pdf.

> daughter studying abroad, sending an e-mail to a foreign relative, even calling an American company whose customer service center is located overseas.

154 Cong. Rec. H5770 (June 20, 2008).

In finding that plaintiffs' fears of surveillance were unreasonable, the district court failed to appreciate the breadth of the surveillance authority that the FAA grants. The FAA permits the mass acquisition of international communications, including Americans' international communications. That crucial fact, which the district court failed even to acknowledge, dramatically increases the likelihood that plaintiffs' communications will be acquired under the statute. The district court found relevant that the FAA is not "directed at" plaintiffs. SPA-75 ("[p]laintiffs have not shown that the challenged statute is directed at them"); SPA-44 (finding relevant that an order under the FAA "cannot *target* the plaintiffs" (emphasis added)). But the statute's targeting provisions have no bearing whatsoever on the question of plaintiffs' standing, because it is the likely *acquisition* of plaintiffs' communications – as distinct from the *targeting* of plaintiffs themselves for surveillance – that causes plaintiffs' injury. Again, the government did not even attempt to controvert plaintiffs' showing that they reasonably fear that their communications will be acquired under the statute.

The district court's conclusion that plaintiffs do not have a "palpable basis for believing" that their communications will be acquired under the FAA, SPA-62,

was error. While plaintiffs could not show to a certainty that their communications will be monitored, their fear that their communications would be monitored was founded on a reasonable interpretation of the statute – indeed, on an interpretation that the government did not seriously dispute – and on facts, substantiated in detailed declarations, that the government effectively conceded. Plaintiffs' fear, in other words, was both actual and objectively reasonable. This was sufficient to satisfy Article III. *Pacific Capital*, 542 F.3d at 350 ("If a plaintiff's interpretation of a statute is 'reasonable enough' and under that interpretation the plaintiff 'may legitimately fear that it will face enforcement of the statute,' then the plaintiff has standing to challenge the statute.") (quoting *Vt. Right to Life Comm.*, 221 F.3d at 383). It was *not* necessary for plaintiffs to show that their communications would certainly be acquired in the future, or even that that there was a high probability that they would be acquired. Plaintiffs satisfied the injury requirement by establishing a heightened risk of harm.

This Court's decision in *Baur*, discussed above, makes plain that a heightened risk of harm is sufficient to satisfy the injury requirement. Again, that case involved an individual citizen's challenge to the government's purported failure to appropriately regulate the processing of "downed" cattle. The Court held that the plaintiff satisfied the injury requirement by alleging that the government's conduct had exposed him to "an enhanced risk" of contracting a serious

neurological disease. *Baur*, 352 F.3d at 628. Significantly, the plaintiff did not – and could not – allege that he would certainly contract the disease, or even that it was likely he would. Instead he alleged that he was "injured by the risk" of contracting an illness. *Id.* at 630. This Court held that plaintiff had standing even though the injury identified by plaintiff was "by nature probabilistic," *id*. at 634, the injury was "widely shared," *id*. at 635, there was no evidence that the disease that plaintiff feared was present in the United States at all, *id*. at 638, and the likelihood that the plaintiff himself would consume contaminated meat was "exceedingly remote," *id*. at 641.

To succeed in establishing a cognizable injury, the *Baur* Court noted, a plaintiff must show only a "credible threat of harm." *Id*. (citing *Laidlaw*, 528 U.S. at 190). In concluding that the plaintiff had made that showing, the Court underscored that the government's conduct subjected the plaintiff to a "present, immediate risk of exposure" to contaminated beef. *Id.* at 640. It was not necessary for the plaintiff to demonstrate that the feared harm would actually come to fruition. "The relevant injury for standing purposes may be *exposure* to a sufficiently serious risk of medical harm – not the anticipated medical harm itself." *Id.* at 641 (emphasis added).[11]

[11] Judge Pooler dissented, but principally because in her view Baur had not demonstrated "that he face[d] any objective danger greater than that faced by any other American consumer of meat." *Id*. at 648. Here, the government has not

Baur should guide the Court here. Like Baur, plaintiffs have alleged a "present, immediate risk" of harm, and they have demonstrated a "credible threat" that that harm will come to fruition. To the extent there are differences between this case and *Baur*, those difference weigh in plaintiffs' favor. Unlike the plaintiff in *Baur*, plaintiffs here do not complain of an injury that is shared by the public at large; their undisputed declarations differentiate them from the general public both in the sensitivity of their communications, and the likelihood that those communications will be monitored under the statute. And unlike in *Baur*, the likelihood of harm cannot fairly be characterized as "exceedingly remote." Again, the challenged statute permits the government to acquire *any* international communication, and plaintiffs have made clear, through uncontroverted declarations, that they engage in precisely the kinds of communications that are likely to be targeted.[12]

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disputed that plaintiffs are distinct from the public at large because of the locations and identities of the people with whom they communicate, the substance of their communications, and the nature of their professional work.

[12] Plaintiffs demonstrated a substantial risk that their communications will be acquired under the FAA – a risk that stems from the scope of the statute, the identities and locations of those with whom they communicate, and the nature and substance of their communications. Notably, however, plaintiffs would have satisfied the injury-in-fact requirement even if they had shown only a marginally increased risk of such surveillance. *See, e.g.*, *SCRAP*, 412 U.S. at 689 n.14 ("The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation." (internal quotation marks omitted));

The district court appears to have found relevant that there is an "intervening" step between plaintiffs' injuries and the statute they challenge. SPA-49 ("the FAA does not authorize surveillance but rather authorizes the FISC to do so pursuant to the procedures set forth in the statute"); SPA-46 ("The intervening role carved out for the Judicial Branch in the FAA makes the plaintiffs' assertion of standing on the basis of their fear of surveillance uniquely attenuated."). Again, plaintiffs need not show that the harm they fear will certainly come to fruition – only that they reasonably fear that it will. The minimal role reserved for the FISC under the FAA does not mitigate or eliminate plaintiffs' injuries.

Plaintiffs are not deprived of standing simply because their injuries are one (or more) step removed from the government conduct they challenge. *See, e.g.*, *Baur*, 352 F.3d at 641 (holding that plaintiffs had standing to challenge regulations even though "a chain of contingencies" separated the challenged regulations from the feared injury); *Heldman v. Sobol*, 962 F.2d 148, 156 (2d Cir. 1992) ("a plaintiff does not lack standing simply by virtue of the indirectness of his or her injury"); *Pacific Capital*, 542 F.3d at 350 (stating that standing is not defeated by the existence of an "intermediate link" between the challenged conduct and the injury). The First Circuit addressed the "intervening step" issue directly in *Ozonoff v.*

Am. Elec. Power Co., 582 F.3d at 341 ("The injury-in-fact necessary for standing need not be large, an identifiable trifle will suffice." (internal quotation marks omitted)); *Baur*, 352 F.3d at 637 ("the injury in fact requirement . . . is qualitative, not quantitative, in nature" (internal quotations omitted)).

Berzak, 744 F.2d 224 (1st Cir. 1984). In that case, an applicant for a job with the World Health Organization challenged a statutory requirement that he undergo a "loyalty check." The government contended that the applicant's asserted injury – the possibility that he would be denied a job – was "too speculative" because "[he] might choose not to proceed with his WHO job application; that, in any case, the FBI may not investigate him; that the Loyalty Board would likely clear him . . .; and that, even if not, WHO might still offer him the job." *Id.* at 229. Then-Judge Breyer, writing for the Court, recognized that plaintiff's injury was not certain to occur, but he expressly rejected the argument that plaintiff's injury was "too speculative." *Id.*[13]

Indeed, the Supreme Court has recognized standing even where there were multiple "intervening" steps between a challenged policy and the consummation of threatened harm to plaintiffs. In *SCRAP*, for example, the Court characterized the link between defendants' conduct and plaintiffs' feared injury in the following way:

[13] Judge Breyer's conclusion was based in large part on the fact that plaintiff's fear of future harm compelled him to change his own behavior immediately. *See id*. at 229-30 ("the issue is not whether Dr. Ozonoff will likely be denied the job, but whether the [loyalty check requirement] reasonably leads him to believe he must conform his conduct to its standards"). As discussed above, *see* Section I.A, plaintiffs are similarly situated: Their fear that their communications will be acquired by the government in the future compels them to change their own behavior immediately.

> [According to plaintiffs, a] general rate increase would allegedly cause increased use of nonrecyclable commodities as compared to recyclable goods, thus resulting in the need to use more natural resources to produce such goods, some of which resources might be taken from the Washington area, and resulting in more refuse that might be discarded in national parks in the Washington area.

SCRAP, 412 U.S. at 688. Despite the many degrees of separation between plaintiffs' asserted injury and the defendants' challenged conduct, the Court held that plaintiffs had satisfied the injury-in-fact requirement.

The district court relied heavily on two cases from other circuits – *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007) and *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375 (D.C. Cir. 1984) – but these cases are inapposite. *See* SPA-49. *ACLU v. NSA* involved a challenge to the Bush administration's warrantless wiretapping program, which did not involve dragnet surveillance of Americans' international communications but rather particularized surveillance of individual targets believed to be associated with al Qaeda. 493 F.3d at 648. Plaintiffs' communications are far more likely to be acquired under a statute that permits dragnet surveillance – including surveillance directed at entire geographic areas – than under a program of individualized surveillance that focuses solely on the communications of terrorism suspects, and plaintiffs' uncontroverted affidavits make clear that the consequences to plaintiffs of dragnet surveillance are far graver. A-134-35 (Mariner Decl. ¶ 11); A-179-80 (Gillers Decl. ¶ 21). Moreover, in *ACLU v. NSA*, the government argued that the question whether plaintiffs'

communications were likely to be acquired under the challenged program could not be answered without the disclosure of information protected by the state secrets privilege. Gov't's Memo. of Points and Auths. in Supp. of Mot. to Dismiss or, in the Alternative, for Summ. J. at 25, *ACLU v. NSA*, No. 06-10204 (E.D. Mich. May 26, 2006) (contending that, because of the state secrets privilege, the government would be "unable to present facts that would bear upon the question of standing – for example, by showing that [plaintiffs] . . . have no reasonable fear of being targeted"). Here, by contrast, the government has not invoked the state secrets privilege and has not controverted plaintiffs' assertion that their communications are likely to be acquired under the statute.[14]

United Presbyterian Church involved what the D.C. Circuit characterized as a challenge to "the constitutionality of the entire national intelligence-gathering system." 738 F.2d at 1381. The plaintiffs contended that their First Amendment activities had been chilled, but the D.C. Circuit found that plaintiffs' injuries were

[14] *ACLU v. NSA* is distinguishable, but it is also fundamentally inconsistent with precedents of the Supreme Court and this Court. In *ACLU v. NSA*, two judges found that plaintiffs' inability to show that their communications had been monitored under the challenged program was fatal to their ability to establish standing. 493 F.3d at 673-74 (Batchelder, J.) (holding that plaintiffs could not pursue Fourth Amendment claim without showing that their communications had been monitored); *id*. at 688-93 (Gibbons, J.) (holding that plaintiffs could not pursue any claim without showing that their communications had been monitored). As discussed above, however, and as precedent from both the Supreme Court and this Court makes clear, plaintiffs need not demonstrate that the harm they fear has come to fruition; it is enough that they demonstrate an actual and well-founded fear that it will.

purely subjective. *Id.* at 1378. In that case, however, plaintiffs failed to establish that the harms they had suffered were anything other than discretionary and self-imposed. *Id*. Here, by contrast, plaintiffs have submitted detailed declarations explaining that the challenged Act has compelled them to take costly and burdensome measures to protect the privacy of their communications. An independent expert has explained that the injuries that the district court characterized as "self-imposed" are not simply prudent and reasonable responses to the challenged law but, at least in some instances, ethically required. The government has failed to controvert any of this evidence. As discussed above, plaintiffs have demonstrated the kinds of "specific, present, objective harms" that the Supreme Court and this Court have said are sufficient to support standing.

II. THE DISTRICT COURT'S ANALYSIS WOULD EFFECTIVELY INSULATE STATUTES GOVERNING FOREIGN INTELLIGENCE SURVEILLANCE FROM JUDICIAL REVIEW.

For the reasons discussed above, plaintiffs have standing to litigate this action, and the district court's contrary ruling is sufficient basis for vacating the judgment below. This Court should recognize, however, that the consequences of allowing the district court's opinion to stand would reach well beyond the instant case. To endorse the district court's restrictive theory of standing would effectively immunize statutes governing foreign intelligence surveillance from

judicial review and relegate Americans' First and Fourth Amendment rights to the unchecked discretion of the political branches.

Under the district court's restrictive theory, plaintiffs can challenge a statute authorizing electronic surveillance only if they can show that the statute directly regulates their conduct, SPA-37, identifies them on its face, SPA-27-28, or has already been used to acquire their communications, SPA-30. But innocent Americans whose communications are acquired as a result of the government's foreign intelligence surveillance activities will never be able to show any of these things. Surveillance statutes do not directly regulate the conduct of those whose communications fall within their ambit. Nor do they ordinarily identify, on their face, a discrete category of targets. *See, e.g.*, 18 U.S.C. § 2516 (authorizing surveillance of any person in relation to investigation of enumerated offenses).

More fundamentally, while an electronic surveillance statute may describe – in the broadest terms – a class of individuals whose communications may be monitored under the statute, *see, e.g.*, 50 U.S.C. §§ 1801-1812 (governing electronic surveillance of suspected "foreign agents" and "foreign powers") – many of those whose rights are implicated by the government's electronic surveillance activities are not the government's targets but rather those, like plaintiffs here, whose communications may be acquired in the course of surveillance targeted at others. Under the district court's reasoning, innocent

people whose communications are acquired "incidentally" simply do not have the right to seek judicial review of what may be – and is, in this case – a sweeping invasion of their constitutionally protected privacy rights.

Nor will innocent people whose communications are acquired under the government's foreign intelligence authorities be able to demonstrate to a certainty that their communications were acquired. Whereas statutes governing law enforcement surveillance include notice requirements, *see, e.g.*, 18 U.S.C. § 2518(8)(d) (requiring government to notify, within 90 days of expiry of wiretap order, those whose communications were acquired pursuant to the order), statutes governing foreign intelligence surveillance do not, *see In re Sealed Case*, 310 F.3d 717, 741 (For. Int. Surv. Ct. 2002) (observing that FISA does not include a general notice provision); 50 U.S.C. § 1841 *et seq.* (pen registers in foreign intelligence investigations); 50 U.S.C. § 1861 (compulsory process for "tangible things" in foreign intelligence investigations); 18 U.S.C. § 2709 (national security letters). Those who are prosecuted on the basis of evidence derived from foreign intelligence surveillance may be notified that their communications were acquired. *See, e.g.*, 50 U.S.C. § 1806(c) (requiring that government notify criminal defendant of FISA surveillance if evidence derived from such surveillance is to be introduced at trial). This is small comfort, however, to the millions of Americans whose communications are being acquired but who are not engaged in criminal activity.

Under the logic of the district court's opinion, those innocent Americans are told that their privacy rights can be vindicated, if at all, by third parties who face criminal prosecution – and by those third parties only if the government, in its discretion, decides to introduce surveillance-derived evidence at trial.[15]

The Supreme Court has said before that the Fourth Amendment's protection against unreasonable searches and seizures is more than a mere trial right. Unlike (for example) the Fifth Amendment's privilege against self-incrimination, which can be violated only at trial, the Fourth Amendment "functions differently . . . and a violation of the Amendment is fully accomplished at the time of an unreasonable governmental intrusion." *United States v.Verdugo-Urquidez*, 494 U.S. 259, 264 (1990); *see also In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 177, 199 (2d Cir. 2008). But the district court's reasoning would effectively turn plaintiffs' right against unconstitutional government surveillance into a right that can be enforced only at trial, because the only people who will learn that their

[15] To plaintiffs' knowledge, the government has not notified any criminal defendant that it intends to introduce FAA-derived evidence at trial. Nor has the government ever notified any criminal defendant that he or she was monitored under the Bush Administration's warrantless wiretapping program; to the contrary, it has refused to disclose this information even to defendants who affirmatively asked for it. *See, e.g.*, *United States v. Stewart*, --- F.3d ----, 2009 WL 3818860, *33 (2d Cir. 2009); *United States v. Aref*, 533 F.3d 72, 76 (2d Cir. 2008). In civil litigation, the government has asserted that the identities of those who were was monitored under the warrantless wiretapping program is a state secret, *see, e.g.*, *ACLU v. NSA*, 493 F.3d at 650, at 6, 26, even where plaintiffs already had evidence that their communications had been monitored, *see Al -Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190, 1197-1201 (9th Cir. 2007).

communications have been acquired under the government's foreign intelligence authorities are those who are prosecuted on the basis of surveillance-derived evidence. Notably, even those who are prosecuted on the basis of such evidence have only a limited ability to challenge the constitutionality of the government's surveillance activities, because they are not afforded access to the warrant and affidavits that supplied the basis for the surveillance. *See, e.g., United States v. Sattar*, 2003 WL 22137012, at *6 (S.D.N.Y., Sept. 15, 2003) ("The Government represents that it is unaware of any court ever ordering disclosure . . . and the defendants cite no such case to the Court.").

As plaintiffs' detailed declarations show, the government's surveillance activities have consequences that extend far beyond the government's surveillance targets, and far beyond those who are prosecuted on the basis of surveillance-derived evidence. This ought not to be surprising. More than forty years ago, the Supreme Court recognized that "[f]ew threats to liberty exist which are greater than that posed by the use of eavesdropping devices." *Berger v. New York*, 388 U.S. 41, 63 (1967). And in debating the FAA, some members of Congress recognized the danger presented by a statute that permits the government unfettered access to Americans' international communications. For example, Senator Cardin stated:

> [F]ormidable, though incalculable, is the chilling effect which warrantless electronic surveillance may have on the constitutional

> rights of those who were not targets of surveillance, but who perceived themselves, whether reasonably or unreasonably, as potential targets. Our Bill of Rights is concerned not only with direct infringements on constitutional rights, but also with Governmental activities which effectively inhibit exercise of these rights. The exercise of political freedom depends in large measure on citizens' understanding that they will be able to be publicly active and dissent from official policy within lawful limits, without having to sacrifice the expectation of privacy they rightfully hold. Warrantless electronic surveillance can violate that understanding and impair that public confidence so necessary to an uninhibited political life.

Cong. Rec. S574 (Feb. 4, 2008).

If not strictly supervised by the judiciary, the government's foreign intelligence surveillance activities may present a profound threat to our democracy. *Cf*. Intelligence Activities and the Rights of Americans, Book II, Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, United States Senate, S. Rep. No. 94-755, at 96 (1976) ("Unless new and tighter controls are established by legislation, domestic intelligence activities threaten to undermine our democratic society and fundamentally alter its nature."). But to endorse the district court's restrictive theory of standing – that is, to say that plaintiffs can challenge the FAA only if they can show that the challenged statute directly regulates their conduct, that it targets them on its face, or that their communications have been monitored under it

– would effectively immunize statutes governing foreign intelligence surveillance from judicial review.[16]

It would also decide in the guise of justiciability the substantive question presented by this lawsuit. The central question presented by this lawsuit is whether the FAA violates the constitutional rights of Americans who are not the targets of the government's surveillance activities but whose communications the statute permits the government to acquire, analyze, retain, and disseminate. If the candid answer is that Americans no longer have a constitutionally protected right to privacy in their international communications, this is a substantive conclusion that

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[16] While the FISC has a role in overseeing certain kinds of foreign intelligence surveillance, that role is "narrowly circumscribed." *In re Proceedings Required by § 702(i) of the FISA Amendments Act of 2008*, No. Misc. 08-01, slip op. at 3 (FISA Ct. Aug. 27, 2008) (internal quotation marks omitted); *see also Stewart*, 2009 WL 3818860, at *29 (observing that FISA applications are "subjected to only minimal scrutiny by the courts" (internal quotation marks omitted)).

The FISC's oversight of FAA surveillance is uniquely feeble. While the FAA invests the FISC with jurisdiction to examine the lawfulness of targeting and minimization procedures, 50 U.S.C. § 1881a(i), the FISC has stated that "it is not required, in the course of this [1881(a)(i)] review . . . to . . . conduct a facial review of the constitutionality of the statute," *In re Proceedings Required by § 702(i) of the FISA Amendments Act of 2008*, at 10.

When the FISC considers the lawfulness of specific targeting and minimization procedures, it does so *in camera* and *ex parte*. 50 U.S.C. § 1881a(k). And Americans whose communications may be acquired by the government in connection with FAA surveillance directed at targets overseas do not have the right to appear before the FISC at all. *See generally In re Proceedings Required by § 702(i) of the FISA Amendments Act of 2008*. The FISC's *in camera*, *ex parte*, and narrowly circumscribed review of targeting and minimization procedures is not a substitute for meaningful adversarial review of the broader statutory scheme.

the courts should pronounce after consideration of the merits. *See* Erwin Chemerinsky, *Federal Jurisdiction* § 2.3.1 (4th ed. 2003); Gene R. Nichol, Jr., *Abusing Standing: A Comment on* Allen v. Wright, 133 U. Pa. L. Rev. 635, 650-51 (1985). This Court should not depart from its own precedents, as well as those of the Supreme Court, to find in Article III a basis for relegating Americans' First and Fourth Amendment rights to the vicissitudes of the political branches.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully ask this Court to vacate the judgment below and remand the case to the district court for consideration of the merits.

Respectfully submitted,

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December 16, 2009

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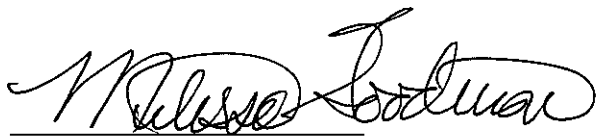

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December 16, 2009

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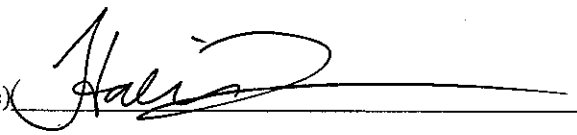
(Your Signature) 

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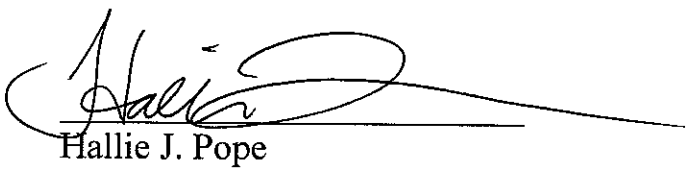

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