No. 11-1025

IN THE

Supreme Court of the United States

JAMES R. CLAPPER, JR.,
DIRECTOR OF NATIONAL INTELLIGENCE, ET AL.,

Petitioners,

—v.—

AMNESTY INTERNATIONAL USA, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

Charles S. Sims
Matthew J. Morris
Proskauer Rose LLP
1585 Broadway
New York, NY 10036
(212) 969-3000

Jameel Jaffer
Counsel of Record
Steven R. Shapiro
Alexander A. Abdo
Mitra Ebadolahi
American Civil Liberties
Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500
jjaffer@aclu.org

Arthur N. Eisenburg
Christopher T. Dunn
New York Civil Liberties
Union Foundation
125 Broad Street
New York, NY 10004
(212) 607-3300

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, the corporate disclosure statement included in the Brief in Opposition, BIO at ii, is incorporated by reference.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION, STATUTES & RULES

ADMINISTRATIVE & LEGISLATIVE MATERIALS

OTHER AUTHORITIES

INTRODUCTION

This case involves a constitutional challenge to the FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 ("FAA" or "Act"), a statute that invested the government with sweeping new authority to collect Americans' international communications from telecommunications switches and other facilities inside the United States. The Act permits the government to collect these communications *en masse*—without having to demonstrate or even assert to any court that any party to any of the communications is a terrorist, an agent of a foreign power, or a suspected criminal.

Plaintiffs are lawyers, journalists, human rights researchers, and others whose communications are very likely to be monitored under the Act and who, in reasonable response to the substantial risk of surveillance under the FAA, and in order to comply with rules of professional conduct, have been compelled to take costly and burdensome measures to protect the confidentiality of information that is sensitive or privileged. The court of appeals held that, because the risk of surveillance is real, and because plaintiffs' response to it is entirely reasonable, plaintiffs have standing to challenge the Act. That decision was correct, and this Court should affirm.

STATEMENT

I. The Foreign Intelligence Surveillance Act

In 1975, Congress established a committee, chaired by Senator Frank Church, to investigate allegations of "substantial wrongdoing" by the federal intelligence agencies in their conduct of

surveillance. Final Report of the S. Select Comm. to Study Governmental Operations with Respect to Intelligence Activities (Book II), S. Rep. No. 94-755, at v (1976) ("Church Report"). The committee discovered that, over the course of four decades, the intelligence agencies had "violated specific statutory prohibitions," "infringed the constitutional rights of American citizens," and "intentionally disregarded" legal limitations on surveillance in the name of "national security." *Id.* at 137.

Of particular concern to the committee was that the agencies had "pursued a 'vacuum cleaner' approach to intelligence collection," *id.* at 165, in some cases intercepting Americans' communications under the pretext of targeting foreigners. In one operation, for example, the National Security Agency ("NSA") used a program nominally targeted at foreigners to "obtain[] from at least two cable companies essentially all cables to or from the United States, including millions of the private communications of Americans." *Id.* at 104. In another, the NSA monitored thousands of phone calls between New York City and a city in South America. *Id.* at 161–62. The committee attributed the systemic constitutional violations it uncovered to a failure in the system of checks and balances. *Id.* at 289. To ensure proper judicial involvement in the protection of Americans' communications, the committee recommended that all surveillance of communications "to, from, or about an American without his consent" be subject to a judicial warrant procedure. *Id.* at 309.

Largely in response to the Church Report, Congress enacted the Foreign Intelligence

Surveillance Act of 1978 ("FISA"), Pub. L. No. 95-511, 92 Stat. 1783 (codified at 50 U.S.C. § 1801 *et seq*.). The statute created the Foreign Intelligence Surveillance Court ("FISA Court") and empowered it to grant or deny government applications for surveillance orders in foreign intelligence investigations. *See* 50 U.S.C. § 1803(a). In its current form, FISA regulates "electronic surveillance," 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.

Id. § 1801(f)(2).

Before passage of the FAA in 2008, FISA generally foreclosed the government from engaging in electronic surveillance without first obtaining an individualized and particularized order from the FISA Court. 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).

The FISA Court could issue such an order only if it found, among other things, 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 FISA Court had express authority to "assess compliance with . . . minimization procedures by reviewing the circumstances under which information concerning United States persons was acquired, retained, or disseminated." *Id.* § 1805(d)(3).

This Court has never reviewed the constitutionality of FISA. It last addressed the constitutionality of intelligence surveillance in *United States v. U.S. District Court* (*Keith*), 407 U.S. 297, 323–24 (1972), which held unconstitutional the warrantless surveillance of Americans' communications for the purpose of domestic security. Lower courts that have reviewed FISA's constitutionality have observed that FISA's procedures are considerably more permissive than those of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 *et seq.*, the

statute that governs surveillance in law enforcement investigations. These courts have upheld FISA, however, because of its probable cause requirements and its provision for judicial supervision of minimization. *See, e.g.*, *In re Sealed Case*, 310 F.3d 717, 737–41 (FISA Ct. Rev. 2002); *United States v. Duggan*, 743 F.2d 59, 72–74 (2d Cir. 1984); *United States v. Pelton*, 835 F.2d 1067 (4th Cir. 1987); *United States v. Cavanagh*, 807 F.2d 787 (9th Cir. 1987).

II. The Bush Administration's Warrantless Surveillance Program

In late 2001 or early 2002, President Bush secretly authorized the NSA to inaugurate a program of warrantless electronic surveillance inside the United States (the "Program"). Office of the Inspector Gen. of the Dep't of Def. et al., Unclassified Report on the President's Surveillance Program 1, 5–6 (2009) ("IG Report")[1]; Pet. App. 244a, 247a (Jaffer Decl. ¶ 3, Ex. A). President Bush publicly acknowledged the Program after *The New York Times* reported its existence in December 2005. IG Report 1, 29, 33, 36; Pet. App. 244a, 262a (Jaffer Decl. ¶ 4, Ex. B). The President reauthorized the Program repeatedly between 2001 and 2007. IG Report 6, 26, 30; Pet. App. 244a, 266a (Jaffer Decl. ¶ 5, Ex. C). According to public statements made by senior government officials, the Program involved the interception of emails and telephone calls that originated or terminated inside the United States. Pet. App. 244a–245a, 272a (Jaffer Decl. ¶ 6, Ex. D).

[1] The IG Report is available at http://1.usa.gov/RQ4qqZ.

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 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." IG Report 6, 15, 31; Pet. App. 244a–245a, 272a–314a (Jaffer Decl. ¶¶ 6–8, Exs. D–F).

On January 17, 2007, then-Attorney General Alberto Gonzales publicly announced that a judge of the FISA Court had effectively ratified the Program and that, consequently, "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." Pet. App. 245a, 312a (Jaffer Decl. ¶ 8, Ex. F); *see also* IG Report 30 (discussing transition of certain program activities from presidential authorization to FISA Court approval). The FISA Court orders issued in January 2007, however, were modified in the spring of that same year. The modifications reportedly narrowed the authority that the FISA Court had extended to the executive branch in January. Pet. App. 245a–246a, 315a (Jaffer Decl. ¶ 9, Ex. G). After these modifications, the administration pressed Congress to amend FISA in order to obtain what it described as important new and expanded surveillance authorities beyond what FISA had allowed for three decades.

III. The FISA Amendments Act of 2008

President Bush signed the FAA into law on July 10, 2008.[2] The Act substantially revised the FISA regime that had been in place since 1978 and authorized the acquisition without individualized suspicion of a wide swath of communications, including Americans' international communications, from telecommunications switches and other facilities inside the United States. As discussed below, the authority granted by the FAA is altogether different from and far more sweeping than the authority that the government has traditionally exercised under FISA, and the FAA's implications for Americans' constitutional rights are correspondingly far-reaching.[3]

Under the FAA, the Attorney General and Director of National Intelligence ("DNI") can "authorize jointly, for a period of up to 1 year . . . the targeting of persons reasonably believed to be located outside the United States to acquire foreign

---

[2] Congress passed a predecessor statute, the Protect America Act, on August 5, 2007. Pub. L. No. 110-55, 121 Stat. 552 (2007). The authorities provided by that Act expired, however, in February 2008.

[3] Throughout this brief, plaintiffs use the term "international" to describe communications that either originate or terminate (but not both) outside the United States. Plaintiffs use the term "Americans" to refer to "United States person[s]" as defined in 50 U.S.C. § 1801(i) (defining the term to include U.S. citizens, permanent residents, and certain corporations and unincorporated associations). 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.

intelligence information." 50 U.S.C. § 1881a(a). To obtain an order under section 1881a, the Attorney General and DNI must provide to the FISA Court "a written certification and any supporting affidavit" attesting that the FISA Court has approved, or that the government has submitted to the FISA Court for approval, "targeting procedures" that are "reasonably designed" to ensure that the acquisition is "limited to targeting persons reasonably believed to be located outside the United States" and to "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).[4]

The certification and supporting affidavit must also attest that the FISA Court has approved, or that the government has submitted to the FISA Court for approval, "minimization procedures" that meet the requirements of section 1801(h) or section 1821(4). *Id.* § 1881a(g)(2)(A)(ii). Finally, the certification and supporting affidavit must attest that the Attorney General has adopted "guidelines" to ensure compliance with the limitations set out in section 1881a(b); that the targeting procedures, minimization procedures, and guidelines are

[4] The FAA prohibits the government from targeting Americans for electronic surveillance without obtaining individualized orders from the FISA Court. 50 U.S.C. § 1881a(b). This suit concerns not the targeting of Americans for electronic surveillance but the dragnet collection of Americans' international communications in the course of surveillance targeted at non-Americans outside the United States.

consistent with the Fourth Amendment; and that "a significant purpose" of the acquisition is "to obtain foreign intelligence information." *Id.* § 1881a(g)(2)(A)(iii)–(vii). The phrase "foreign intelligence information" is defined broadly to include, among other things, information concerning terrorism, national defense, and foreign affairs. *Id.* § 1801(e).

One crucial difference between the FAA and traditional FISA is that the FAA authorizes surveillance that is not predicated on probable cause or even individualized suspicion. Obtaining an order under section 1881a does not require the government to demonstrate to the FISA Court that its surveillance targets are terrorists, agents of foreign powers, or suspected criminals. Indeed, it does not require the government to identify its surveillance targets at all. *See* David Kris & J. Douglas Wilson, National Security Investigations & Prosecutions § 17.3, 602 (2012) ("For non-U.S. person targets, there is no probable-cause requirement; the only thing that matters is the government's reasonable belief about the target's location." (internal parentheses omitted)).

Of equal significance, the statute provides that the government is not required to identify the facilities, telephone lines, email addresses, places, premises, or property at which its surveillance will be directed, 50 U.S.C. § 1881a(g)(4), which means that the government can "direct surveillance . . . at various facilities without obtaining a separate authorization for each one," Kris & Wilson § 17.3, 602, and that it can direct its surveillance at "gateway" switches, through which flow the

communications of millions of people, rather than at individual telephone lines or email addresses, *id.* § 16.12, 577 (discussing probable operation of the Program).

Still another important difference between FISA and the FAA is that the FAA's "significant purpose" requirement—the requirement that a significant purpose of the government's surveillance be to gather foreign intelligence—attaches to entire *programs* of surveillance, not (as under FISA) to the surveillance of specific targets and facilities. *Compare* 50 U.S.C. §§ 1804(a)(5), 1805(c)(1)(C), *with id.* § 1881a(g)(2)(A)(v).

By dispensing with FISA's principal limitations, the FAA exposes *every* international communication—that is, every communication between an individual in the United States and a non-American abroad—to the risk of surveillance.[5] The government can once again conduct the kind of

[5] Because the predicate for surveillance under section 1881a is the government's "reasonabl[e] belie[f]" that the target is a non-U.S. person outside the United States, 50 U.S.C. § 1881a(b)(2), and because it is often difficult to determine the location of a party to any given communication, *see, e.g.*, FISA for the 21st Century, Hearing Before the S. Comm. on the Judiciary, 109th Cong. (2006) (statement of Michael Hayden) ("Hayden Testimony"), surveillance under the FAA will inevitably sweep up Americans' purely domestic communications as well. *See* Eric Lichtblau & James Risen, *Officials Say U.S. Wiretaps Exceeded Law*, N.Y. Times, Apr. 16, 2009, *available at* http://nyti.ms/O2OeSP ("The National Security Agency intercepted private e-mail messages and phone calls of Americans in recent months on a scale that went beyond the broad legal limits established by Congress last year, government officials said in recent interviews.").

vacuum-cleaner-style surveillance that the Church Committee found so troubling. A single section 1881a order may be used to monitor the communications of thousands or even millions of Americans over the course of an entire year. It could authorize the acquisition of all communications to and from specific geographic areas of foreign policy interest—for example Russia, Iran, or Israel—including communications to and from U.S. citizens and residents. It could authorize the acquisition of all communications of European attorneys who work with American attorneys on behalf of prisoners held at Guantánamo Bay. On the theory that the surveillance is targeted at a terrorist organization outside the United States, it could authorize the wholesale collection of millions of communications, including Americans' international communications, from gateway switches in the United States.

Indeed, the dragnet surveillance of Americans' international communications was one of the purposes of the Act. In advocating changes to FISA, the executive made clear that its aim was to enable broader surveillance of communications between individuals inside the United States and non-Americans abroad. *See* Hayden Testimony (stating, in debate preceding passage of FAA's predecessor statute, that certain communications "with one end in the United States" are the ones "that are most important to us"). Moreover, in advocating for the FAA, executive officials expressly sought the authority to engage in dragnet rather than individualized surveillance. *See, e.g.*, Letter from Att'y Gen. Michael Mukasey to Hon. Harry Reid, Majority Leader, U.S. Senate 4 (Feb. 5, 2008), *available at* http://1.usa.gov/O2RQ7m ("Mukasey

Letter") (arguing that the intelligence community should be permitted to target "a geographic area abroad").[6]

To the extent the FAA provides safeguards for Americans' constitutional rights, the safeguards take the form of "minimization procedures," which must be "reasonably designed . . . to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons." 50 U.S.C. §§ 1801(h)(1), 1821(4)(A). The minimization requirement, however, is weak. The Act does not prescribe specific minimization procedures; it does not give the FISA Court the authority to monitor compliance with minimization procedures; and it 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.* § 1881a(e).

The oversight role of the FISA Court is also weak. As the FISA Court itself has acknowledged, its role in authorizing and supervising FAA

---

[6] Notably, insofar as the FAA permits dragnet surveillance, the Act is broader than the Bush Administration's warrantless wiretapping program is known to have been. 154 Cong. Rec. S568 (Feb. 4, 2008) (statement of Sen. Feingold) ("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.").

surveillance 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).[7] The judiciary's traditional function under the Fourth Amendment is to serve as a gatekeeper for particular acts of surveillance, but its function under the FAA is simply to issue advisory opinions blessing in advance the vaguest of parameters under which the government is then free to conduct surveillance for up to one year. The FISA Court does not consider individualized and particularized surveillance applications, does not make individualized probable cause determinations, and, as noted above, may not monitor compliance with targeting and minimization procedures. The role that the FISA Court plays under the FAA bears no resemblance to the role that it has traditionally played under FISA.[8]

---

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

[8] Since oral argument before the Second Circuit, the government has released several hundred pages of documents under the Freedom of Information Act confirming that it is in fact using the FAA. *See* Letter from the Dep't of Justice to the ACLU (Nov. 29, 2010), *available at* http://www.aclu.org/national-security/faa-foia-documents. Recent statements by the intelligence community confirm that the FAA has been used to collect Americans' international communications. *See, e.g.*, Letter from the Office of the Dir. of Nat'l Intelligence to Senators Wyden and Udall (July 26, 2011), *available at* http://1.usa.gov/RQ4Z4b (stating that "it is not reasonably possible to identify the number of people located in the United States whose communications may have been reviewed under the authority of the FAA").

IV. The Record Below

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 sweeping, suspicionless, and warrantless surveillance of Americans' international communications.[9] Plaintiffs sought a declaration that the law is unconstitutional and an order enjoining its use.

Plaintiffs moved for summary judgment and submitted nine declarations, including two expert declarations, in support of their motion.[10] These included: (1) an affidavit from attorney plaintiff Scott McKay on behalf of himself and his law partner attorney plaintiff David Nevin; (2) an affidavit from attorney plaintiff Sylvia Royce; (3) an affidavit from human rights researcher Joanne Mariner, on behalf of plaintiff Human Rights Watch ("HRW"); (4) an affidavit from human rights researcher John Walsh, on behalf of plaintiff Washington Office on Latin

---

[9] Plaintiffs alleged that the FAA violates Article III by requiring the FISA Court to adjudicate the constitutionality not of specific searches but of programmatic rules that will govern sweeping surveillance programs.

[10] Not all plaintiffs filed affidavits in the district court, *see* Gov't Br. 30 n.10, but "the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." *Rumsfeld v. Forum for Academic & Institutional Rights*, 547 U.S. 47, 52 n.2 (2006).

America ("WOLA"); (5) an affidavit from journalist Chris Hedges, on behalf of plaintiff *The Nation* magazine; and (6) an affidavit from journalist Naomi Klein, also on behalf of *The Nation* magazine.[11]

The government opposed plaintiffs' motion and cross-moved for summary judgment, but without submitting any evidence. Pet. App. 17a. At oral argument in the district court, the government expressly stated that it was accepting the facts asserted by plaintiffs as true for purposes of summary judgment. Pet. App. 77a. The factual record before this Court is therefore uncontroverted.

Plaintiffs are attorneys and human rights, labor, legal, and media organizations whose work

---

[11] Plaintiffs' declarations were filed four years ago, and some of the assertions in them are now superseded. For example, the declaration of Scott McKay states that Mr. McKay and plaintiff David Nevin represented Khalid Sheik Mohammed, a prisoner who has been charged with capital offenses before the military commissions at Guantánamo Bay. Mr. Nevin's representation of Mr. Mohammed continues, but since 2008 Mr. McKay's representation of Mr. Mohammed has ceased. Similarly, plaintiff Sylvia Royce declared in 2008 that she represented a prisoner held at Guantánamo Bay; while she continues to represent individuals held in the custody of the U.S. military overseas, she no longer represents the prisoner whom she represented in 2008. Joanne Mariner no longer works for plaintiff HRW, but HRW continues to engage in the same kinds of work that Ms. Mariner described in her 2008 declaration. Plaintiffs' central allegations remain true, and plaintiffs' claim to standing remains essentially the same as it was in 2008. Because "the standing inquiry "focuse[s] on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed," *Davis v. FEC*, 554 U.S. 724, 734 (2008), the facts recited here are taken from the declarations filed in 2008.

requires them to engage in sensitive and sometimes privileged telephone and email communications with colleagues, clients, journalistic sources, witnesses, experts, and victims of human rights abuses located outside the United States. Because of the scope of the challenged law, the nature of their communications, and the identities and geographic locations of their contacts, plaintiffs reasonably believe that their confidential communications will be acquired, analyzed, retained, and disseminated under the FAA.

All plaintiffs exchange information that constitutes "foreign intelligence information" within the meaning of the FAA—that is, all plaintiffs communicate precisely the kind of information that the statute authorizes the government to collect. Pet. App. 370a–374a (McKay Decl. ¶¶ 5, 7, 12) (communications related to representation of accused terrorists); Pet. App. 352a–353a (Royce Decl. ¶ 8) (communications with relatives of Guantánamo Bay detainees); Pet. App. 343a–344a (Mariner Decl. ¶ 8) (HRW's communications with victims of extraordinary rendition); Pet. App. 356a–361a (Walsh Decl. ¶¶ 5–6, 8–9, 11) (WOLA's communications with dissidents in Latin America); Pet. App. 337a (Klein Decl. ¶ 6) (communications with indigenous rights advocates in Argentina); Pet. App. 366a (Hedges Decl. ¶ 7) (communications with sources throughout the Middle East).

Some plaintiffs communicate by telephone and email with people located in geographic areas that are a special focus of the U.S. government's counterterrorism or diplomatic efforts. Pet. App. 343a–344a (Mariner Decl. ¶ 8) (HRW

communications with people in the Middle East, North Africa, Central Asia, and South Asia); Pet. App. 356a–357a, 361a (Walsh Decl. ¶¶ 5, 11) (WOLA communications with people in Colombia, Cuba, and Venezuela); Pet. App. 365a–366a (Hedges Decl. ¶¶ 4, 7) (communications with people in Iran, Syria, and Libya).

Some plaintiffs communicate with attorneys or co-counsel overseas. Pet. App. 351a (Royce Decl. ¶ 6) (communications with co-counsel in Mauritania and France); Pet. App. 343a (Mariner Decl. ¶ 7).

Some plaintiffs communicate by telephone and email with the family members of individuals who have been detained by the U.S. military or CIA. Pet. App. 350a (Royce Decl. ¶ 5) (communications with client's brother, Yahdih Salahi, a university student in Germany); Pet. App. 343a (Mariner Decl. ¶ 7).

Some plaintiffs communicate by telephone and email with political dissidents and human rights activists abroad. Pet. App. 337a (Klein Decl. ¶¶ 6–7) (communications with foreign activists in Colombia and the Philippines); Pet. App. 357a (Walsh Decl. ¶ 6) (WOLA communications with leaders of protest movements in El Salvador).

Some plaintiffs communicate by telephone and email with foreign journalists, researchers, and other experts overseas. Pet. App. 343a (Mariner Decl. ¶ 7) (HRW communications with researchers, lawyers, former detainees, activists, translators, and others); Pet. App. 358a (Walsh Decl. ¶ 8) (communications with Colombian scientific experts).

The FAA disrupts plaintiffs' ability to engage in confidential communications that are integral to

their professional activities. It compromises their ability to locate witnesses, cultivate sources, gather information, communicate confidential information to their clients, and engage in other legitimate and constitutionally protected communications. Pet. App. 345a (Mariner Decl. ¶ 10) ("Many of the people with whom I communicate will not share information with me if they believe that by sharing information with me they are also sharing information with the U.S. government."); Pet. App. 359a–362a (Walsh Decl. ¶¶ 9–13); Pet. App. 338a (Klein Decl. ¶ 9); Pet. App. 366a–367a (Hedges Decl. ¶¶ 8–9); Pet. App. 373a (McKay Decl. ¶ 11); *see also* Pet. App. 381a–382a, 386a–387a (Gillers Decl. ¶¶ 10, 12, 23).

The FAA has particularly serious implications for those plaintiffs who are attorneys. Plaintiff Sylvia Royce explained:

> 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.

Pet. App 351a–352a (Royce Decl. ¶ 7); *see also* Pet. App. 371a–372a (McKay Decl. ¶ 8); Pet. App. 381a–387a (Gillers Decl. ¶¶ 10–23).

The challenged law has compelled plaintiffs to take costly and burdensome measures to protect the

confidentiality of sensitive and privileged communications. Pet. App. 371a–373a, 375a (McKay Decl. ¶¶ 8, 10–11, 14); Pet. App. 338a (Klein Decl. ¶ 9); Pet. App. 366a–367a (Hedges Decl. ¶¶ 8–9).

Some plaintiffs have forgone communications that are particularly sensitive. Pet. App. 372a–373a (McKay Decl. ¶ 10) ("[W]e are 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. This has a real effect on our ability to represent our clients."); Pet. App. 352a–353a (Royce Decl. ¶ 8); Pet. App. 366a–367a (Hedges Decl. ¶¶ 8–9).

Some plaintiffs have traveled overseas to gather information that they would otherwise have gathered by telephone or email. Pet. App. 338a (Klein Decl. ¶ 9); Pet. App. 351a–352a (Royce Decl. ¶ 7); Pet. App. 372a–373a (McKay Decl. ¶ 10); Pet. App. 345a (Mariner ¶ 10).

The record establishes that the measures plaintiffs have taken to protect the confidentiality of sensitive communications are not only reasonable but in some cases obligatory. For example, as explained in an expert declaration filed by Professor Gillers, a nationally known legal ethicist, rules of professional conduct prohibit lawyers from "divulg[ing] confidential information about a client over any vehicle of communication, including telephone, fax, and e-mail, if the lawyer does not have 'a reasonable expectation of privacy' in the use of the vehicle." Pet. App. 380a (Gillers Decl. ¶ 9). Professor Gillers described the dilemma this creates for the attorney plaintiffs in the following terms:

> Because of the status of their clients, the identity and location of witnesses and sources, and the breadth of the FAA authority, [the attorney plaintiffs] 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.

Pet. App. 383a–384a (Gillers Decl. ¶ 16) (emphasis added).

The burden imposed on plaintiffs by the FAA is different in degree and kind from the burden imposed by other surveillance. As attorney plaintiff McKay explained:

> [W]e now have to assume that every one of our international communications may be monitored by the government. With respect to every single international communication, we have to make an assessment of whether our client's interest would be compromised if the government were to acquire the communications. If the answer is yes, we have to forgo the communication altogether or find a way of collecting the information we need (or conveying the information we want to convey) in

> person rather than by telephone or email.

Pet. App. 375a (McKay Decl. ¶ 14); Pet. App. 350a–351a (Royce Decl. ¶ 5); Pet. App. 356a–357a, 360a (Walsh Decl. ¶¶ 4, 5, 10); Pet. App. 336a–338a (Klein Decl. ¶¶ 5–6, 8–9); Pet. App. 365a–367a (Hedges Decl. ¶¶ 6–9); Pet. App. 345a–346a (Mariner Decl. ¶ 11) ("A risk that was previously limited to a subset of communications with a small subset of people is now a risk that we must evaluate and address every time we make an international telephone call or send an e-mail to an individual located abroad.").

In sum, undisputed record evidence establishes that plaintiffs reasonably fear that the FAA will be used to acquire their communications; that the statute already has compelled them to take costly and burdensome measures to protect the confidentiality of sensitive and privileged communications; and that the measures they have taken are not discretionary but rather are prudent, reasonable, and in some cases compulsory responses to the threat presented by the statute.

V. Procedural History

The government offered no evidence to contradict plaintiffs' Rule 56(c) submission, instead arguing that plaintiffs' evidence, even if true, was insufficient to satisfy Article III. The district court entered summary judgment for defendants, holding that plaintiffs lacked standing. Pet. App. 63a. The court held 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. Pet. App. 96a–97a. The court found

that the statute does not directly regulate plaintiffs' conduct and does not "require [them] to do anything." Pet. App. 96a. 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. Pet. App. 85a. The district court dismissed plaintiffs' concerns about surveillance as a "subjective chill" insufficient to ground standing. Pet. App. 101a–103a.

A unanimous panel of the Second Circuit vacated the district court's judgment and upheld plaintiffs' standing. The court held that plaintiffs had established injury in fact because of the additional burdens and expenses they had incurred to preserve the confidentiality of their communications. The court then held that this injury was fairly traceable to the FAA because it was an "appropriate" and "reasonable" response, Pet. App. 48a–49a, to the "realistic danger," *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979), that their communications would be intercepted under the FAA. Pet. App. 30a. Because of that "realistic danger," the court also concluded that plaintiffs had established a likelihood of future injury that provided an independent basis for standing. Noting that the government had contested neither plaintiffs' evidence, Pet. App. 26a, nor their construction of the challenged statute, Pet. App. 36a & n.21, the court described the threat that plaintiffs' communications would be intercepted as "real and immediate," not "conjectural or hypothetical," Pet. App. 29a. Finally, the court ruled that the equitable relief that plaintiffs are seeking would redress the

constitutionally cognizable injuries they had suffered.

The government's petition for rehearing en banc was denied by a six-to-six vote. Pet. App. 114a–115a.[12]

SUMMARY OF ARGUMENT

Plaintiffs' Complaint raises serious constitutional questions about a statute that invests the government with sweeping new authority to collect Americans' international communications from telecommunications switches and other facilities inside the United States. There is no dispute that the statute is being used; there is no dispute that the government is collecting Americans' international communications under it; there is no dispute that it may be used to collect plaintiffs' communications; and there is no dispute that plaintiffs' communications include precisely the kind of information—"foreign intelligence information"—that the statute expressly empowers the government to collect. The only question before the Court is whether plaintiffs have standing.

The court of appeals rightly held that plaintiffs have standing based on two distinct sets of injuries.

---

[12] Judge Hall dissented from the denial of rehearing en banc because he believed the case involved a question of exceptional importance warranting en banc review. Pet. App. 196a. Judges Calabresi and Sack, two of the members of the panel that upheld plaintiffs' standing, were ineligible to participate in deciding whether to grant the government's petition for rehearing en banc. Pet. App. 116a n.1.

First, plaintiffs have standing because the substantial risk that their communications will be monitored under the FAA requires them to take costly and burdensome measures to protect the confidentiality of information that is privileged or sensitive. These costs and burdens are cognizable injuries traceable to the statute and would be redressed by a favorable decision. The government argues that plaintiffs' injuries are "self-inflicted," but as the court of appeals observed, the measures that plaintiffs have taken are reasonable responses to the substantial risk of surveillance under the FAA. Indeed, uncontroverted record evidence, including a declaration from an expert in legal ethics, establishes that some of the measures that plaintiffs have taken are obligatory under rules of professional conduct. The kinds of injuries incurred here—injuries incurred because of plaintiffs' reasonable efforts to avoid greater injuries that are otherwise likely to flow from the conduct they challenge—are the same kinds of injuries that this Court held to support standing in cases such as *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010), *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000), and *Meese v. Keene*, 481 U.S. 465 (1987).

The government's argument that plaintiffs' injuries are "subjective," and that accordingly this case is controlled by *Laird v. Tatum*, 408 U.S. 1 (1972), is incorrect. The Court held that the *Laird* plaintiffs lacked standing because they failed to establish that they had suffered any injury as a result of the program they had challenged. While the *Laird* plaintiffs claimed that they had been "chilled" by the program, the Court found that their own

submissions cast considerable doubt on that claim. *Laird* did not hold that plaintiffs who suffer actual and ongoing injuries because of government surveillance lack standing unless they can show to a certainty that their communications are actually being collected. To the contrary, the *Laird* Court made clear that plaintiffs who demonstrate "specific present objective harm[s]"—as plaintiffs have done in this case—have standing to sue. *Id.* at 14. The government reads *Laird* to establish a distinct and more restrictive set of standing rules for cases involving government surveillance, but there is no principled reason to treat surveillance cases differently from all others, and *Laird*, properly understood, did not propose that the courts should do so.

Second, even apart from the prophylactic steps that they have taken, plaintiffs have standing because there is an objectively reasonable likelihood that their communications will be acquired under the FAA. The threat of imminent surveillance constitutes a cognizable injury distinct from the injuries noted above, and this injury, too, is traceable to the FAA and would be redressed by a favorable decision.

The government's argument that plaintiffs have failed to establish a sufficiently imminent risk of surveillance under the FAA to ensure the adverseness required by Article III is incorrect. Again, there is no dispute that plaintiffs' communications may be collected under the Act, and there is no dispute that plaintiffs' communications include the kind of information that the Act expressly authorizes the government to collect.

Moreover, in detailed declarations, none of which the government has challenged, plaintiffs have established that they engage in the kinds of communications that are especially likely to be monitored. Importantly, the risk that plaintiffs' communications will be monitored under the statute stems not from the possibility that the government's surveillance authority will be abused but from the indisputably reasonable premise that the statute is being used precisely as it was designed to be used.

The government emphasizes that plaintiffs cannot prove to a certainty that their communications will be monitored under the statute, but Article III does not demand that plaintiffs do so. Requiring plaintiffs to establish a certainty of future injury would be particularly inappropriate in the present context because the secrecy that surrounds the government's surveillance activities will prevent anyone from *ever* satisfying that requirement—not because the surveillance will never take place but because they will be unaware of it when it does. The government's argument also fails to appreciate that an overbroad surveillance authority *itself* deters expressive and associational activity that is vital to any democracy, and that this deterrent effect stems not from the certainty of surveillance but from the substantial risk of it.

The government's theory of standing would render real injuries nonjusticiable and insulate its surveillance activities from meaningful judicial review. Nothing in Article III or this Court's jurisprudence requires or recommends this result, and history counsels emphatically against it. *See* Church Report 1 (stating that absent "new and

tighter controls," surveillance practices "threaten to undermine our democratic society and fundamentally alter its nature").

ARGUMENT

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) their injury would "likely" be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

Application of these requirements is not a "mechanical exercise," *Allen v. Wright*, 468 U.S. 737, 751 (1984), and is properly guided by the underlying purposes of the standing doctrine. "At bottom, 'the gist of the question of standing' is whether petitioners have 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.'" *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)); *see also Lujan*, 504 U.S. at 581 (Kennedy, J., concurring) (standing "preserves the vitality of the adversarial process by assuring both that the parties before the court have an actual, as opposed to professed, stake in the outcome").

As the government notes, Gov't Br. 23, 35, the standing requirements also reflect considerations

relating to the separation of powers. These considerations, however, can favor the exercise of jurisdiction as much as the disavowal of it. *See, e.g.*, *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982) ("Proper regard for the complex nature of our constitutional structure requires neither that the Judicial Branch shrink from a confrontation with the other two coequal branches of the Federal Government, nor that it hospitably accept for adjudication claims of constitutional violation by other branches of government where the claimant has not suffered cognizable injury."); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, C.J.) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."); *cf. Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012) (noting Court's "responsibility to decide cases properly before it, even those it 'would gladly avoid'" (quoting *Cohens*, 19 U.S. (6 Wheat.) at 404)).

The court of appeals correctly concluded that plaintiffs have standing.

I. PLAINTIFFS HAVE STANDING BECAUSE THE FAA CAUSES THEM ACTUAL AND ONGOING INJURIES THAT WOULD BE REDRESSED BY A FAVORABLE DECISION.

A. Plaintiffs are suffering actual injuries that are fairly traceable to the FAA.

The court of appeals correctly held that plaintiffs have satisfied the injury-in-fact

requirement by establishing that the FAA is causing them actual and ongoing professional and economic harms as a result of the substantial risk that their communications are being or will be monitored. Pet. App. 26a, 36a–41a, 43a, 47a–50a. The statute has compelled them to take costly and burdensome measures to protect sensitive and privileged information from the risk of interception. It has deterred them from using the phone and email to exchange information that is privileged or particularly sensitive. *See, e.g.*, Pet. App. 366a–367a (Hedges Decl. ¶¶ 8–9); Pet. App. 371a–373a (McKay Decl. ¶¶ 8, 10). It has compelled them to travel abroad to gather information that they would otherwise have gathered by phone or email. *See, e.g.*, Pet. App. 367a (Hedges Decl. ¶ 9). It leads third parties to refuse to share information that they would otherwise share. *See, e.g.*, Pet. App. 338a (Klein Decl. ¶¶ 8–9); Pet. App. 352a–353a (Royce Decl. ¶ 8). In a variety of ways, the statute has impaired plaintiffs' ability to locate witnesses, cultivate sources, gather information, communicate confidential information to their clients, and engage in other legitimate and constitutionally protected communications that their work necessitates. *See, e.g.*, Pet. App. 366a–367a (Hedges Decl. ¶¶ 8–9); Pet. App. 372a–375a (McKay Decl. ¶¶ 10–11, 13–14); Pet. App. 381a–382a, 386a–387a (Gillers Decl. ¶¶ 10, 12, 23).

These injuries, which the court of appeals correctly characterized as "the most mundane of injuries in fact," Pet. App. 26a, are fairly traceable to the FAA. The government does not dispute that the FAA dramatically expands its authority to monitor Americans' international communications. First, by

dispensing with the requirement that the government's surveillance target be an agent of a foreign power, the FAA allows the government to target innumerable people that it cannot target under FISA. Under the FAA, the government can target anyone—human rights researchers, academics, attorneys, political activists, journalists—simply because they are foreigners outside the United States, and in the course of its surveillance it can collect Americans' communications with those individuals. Second, the FAA dispenses with the requirement that the government specify the facilities to be monitored. This means that the government does not need to seek FISA Court approval for each of the phone numbers or email addresses at which its surveillance is directed, and indeed that it can direct its surveillance not at individual phone numbers or email addresses but at categories of phone numbers and email addresses or even gateway switches through which millions of Americans' communications flow. Third, the FAA's "significant purpose" requirement—its "foreign intelligence information" limitation—attaches not to individualized surveillance orders but to entire programs of surveillance. *See* 50 U.S.C. § 1881a(g)(2)(A)(v).

The consequence of the changes wrought by the FAA is that the government can now conduct exactly the kind of dragnet surveillance that the Church Committee found so disturbing. Rather than target its surveillance power at a specific person thought to be the agent of a foreign power, the government can target its surveillance power at a group of people, a neighborhood, a country, or a geographic region. The government contends that it

is "speculative" to suggest that the statute authorizes dragnet surveillance, but, as the court of appeals observed, Pet. App. 36a, the government has not offered any alternative construction of the Act, and the Act does not fairly admit of any alternative construction.

Moreover, executive officials who advocated passage of the Act made clear that the Act was intended to permit dragnet surveillance, *see, e.g.*, Mukasey Letter 4, and legislators who participated in the debate that preceded the Act's passage observed that the proposed law could be used in this way, *see, e.g.*, 154 Cong. Rec. S568 (Feb. 4, 2008) (statement of Sen. Feingold); 154 Cong. Rec. H5743 (June 20, 2008) (statement of Rep. Robert Scott) ("The bill actually permits the government to perform mass untargeted surveillance of any and all conversations believed to be coming into and out of the United States without any individualized finding and without a requirement that any wrongdoing is believed to be involved at all."). The author of the leading treatise on FISA wrote in 2008, correctly, that the debate about the then-proposed FISA modernization bill was about "whether and to what extent the government will be subject to FISA's individualized warrant requirement, rather than a vacuum-cleaner regime, for its foreign intelligence surveillance." David Kris, A Guide to the New FISA Bill, Part I, June 21, 2008, *available at* http://balkin.blogspot.com/2008/06/guide-to-new-fisa-bill-part-i.html.

The government emphasizes that the FAA prohibits the government from targeting Americans inside the United States, Gov't Br. 18, but this

restriction is irrelevant. Plaintiffs' concern is not that they themselves will be targeted under the FAA but that their communications will be collected under it, and the collection of plaintiffs' communications is something that the government concedes the Act permits, Gov't Br. 7. Indeed, although the government uses the word "incidental" to describe the collection of Americans' communications under the statute, the statute was written and enacted with the purpose of permitting the government to collect international communications, including Americans' international communications.[13] In the debate preceding passage of the FAA, lawmakers stated their belief that Americans' communications would in fact be collected under Act.[14] The Bush Administration expressly opposed amendments that would have narrowed the FAA to exclude or provide more protection to Americans' international communications. *See generally* Mukasey Letter.

Plaintiffs' reasonable assumption that their communications will be monitored under the Act is not based solely on the Act's scope; it is based as well on the nature of their work and the nature of their

---

[13] *See* Mukasey Letter 4 (emphasizing that "[p]art of the value of the Protect America Act, and any subsequent legislation" is to allow the government access to communications between Americans at home and terrorism suspects abroad); Hayden Testimony (stating, in hearing relating to FAA's predecessor statute, that "one-end U.S. conversations" are "among the most critically important kinds of terrorist related communications, at least in terms of protecting the homeland").

[14] 154 Cong. Rec. H5770 (June 20, 2008) (statement of Rep. Speier) ("It is fundamentally untrue to say that Americans will not be placed under surveillance after this bill becomes law.").

communications. As discussed above, plaintiffs are attorneys, journalists, and human rights researchers whose work often requires them to communicate with colleagues, clients, sources, witnesses, experts, and victims of human rights abuses overseas. Many of the people with whom plaintiffs communicate are located in geographic areas that are a special focus of the U.S. government's counterterrorism or diplomatic efforts. Pet. App. 343a–344a (Mariner Decl. ¶ 8); Pet. App. 356a–357a, 361a (Walsh Decl. ¶¶ 5, 11); Pet. App. 365a–366a (Hedges Decl. ¶¶ 4, 7). Some plaintiffs communicate with people who have been the targets of surveillance or other U.S. government attention in the past. Pet. App. 344a (Mariner Decl. ¶ 8). In the course of communicating with these people, plaintiffs routinely convey or receive "foreign intelligence information"—the very information that the FAA expressly authorizes the government to collect. Thus journalist Naomi Klein communicates with indigenous-rights advocates in Colombia about issues relating to the conflict between FARC and the U.S.-backed Colombian government. Pet. App. 337a (Klein Decl. ¶ 6). Human rights researcher Joanne Mariner communicates with former CIA detainees about issues relating to U.S. counterterrorism policy. Pet. App. 344a (Mariner Decl. ¶ 8). Attorney Sylvia Royce communicates with co-counsel and experts in Europe about the cases of individuals currently detained by the U.S. military. Pet. App. 349a (Royce Decl. ¶ 3).

As the court of appeals found, "plaintiffs have good reason to believe that their communications, in particular, will fall within the scope of the broad surveillance that they can assume the government will conduct." Pet. App. 37a. Importantly, plaintiffs'

belief does not stem from speculation about the possibility that the government's surveillance authority will be abused, *Laird*, 408 U.S. at 13, but from the indisputably reasonable assumption that the statute is being used precisely as it was designed to be used. Pet. App. 36a ("It is significant that the injury that the plaintiffs' fear results from conduct that is authorized by the statute."); *see also Massachusetts v. EPA*, 549 U.S. at 516–17.

Plaintiffs' injuries are fairly traceable to the FAA because they stem from plaintiffs' objectively reasonable responses to the risk of surveillance under the statute. Indeed, Professor Gillers' expert declaration—cited and relied on by the court of appeals but entirely unmentioned in the government's brief—explains that the attorney plaintiffs would violate ethical rules and expose themselves to possible bar discipline if they failed to take reasonable measures to protect confidential information from the risk of interception. Pet. App. 387a (Gillers Decl. ¶ 23). As Professor Gillers observes, the Model Rules of Professional Conduct generally prohibit attorneys from "reveal[ing] information relating to the representation of a client unless the client gives informed consent." Pet. App. 379a (Gillers Decl. ¶ 7) (quoting Model Rules of Prof'l Conduct R. 1.6(a)). The prohibition on disclosure of confidential information places a particular burden on attorneys who, like plaintiffs here, have reason to believe that their electronic communications will likely be monitored. Pet. App. 381a (Gillers Decl. ¶ 10) ("If an attorney has reason to believe that sensitive and confidential information related to the representation of a client and transmitted by telephone, fax, or e-mail is reasonably likely to be

intercepted by others, he or she may not use that means of communication in exchanging or collecting information."). As Professor Gillers explains, the FAA *compels* plaintiffs to take measures to protect the confidentiality of their communications. Pet. App. 387a (Gillers Decl. ¶ 23) ("The lawyers' decision to avoid electronic surveillance is *not discretionary*. *It is obligatory*." (emphasis added)).

An amendment to the Model Rules, adopted by the American Bar Association in August 2012, further clarifies this professional obligation and reinforces that certain measures the attorney plaintiffs have taken are not simply reasonable but mandatory. Motivated by attorneys' increasing reliance on electronic communication, ABA Report 105A at 2 (Aug. 2012), *available at* http://bit.ly/QnDFG4, the ABA amended Model Rule 1.6 to clarify and make express an attorney's obligation to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of the client." Model Rules of Prof'l Conduct R. 1.6(c). A comment explains that the rule "*requires* a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties." *Id.* cmt. 18 (emphasis added).

Plaintiffs' injuries are thus fairly traceable to the FAA. The FAA exposes plaintiffs' international communications to interception, and the substantial risk of interception requires plaintiffs to take avoidance measures. Further, the measures that plaintiffs are taking "are not overreactions to the FAA; they are appropriate measures that a

reasonably prudent person who plausibly anticipates that his conversations are likely to be monitored, and who finds it important to avoid such monitoring, would take to avoid being overhead." Pet. App. 48a–49a; *see also* 13A Charles Alan Wright et al., Federal Practice and Procedure § 3531.4 (3d ed. 2011) ("The anticipation of future injury may itself inflict present injury. Living with fear and uncertainty is itself a burden, and prudence may dictate efforts to avoid or reduce possible injury.").[15]

B. Plaintiffs' actual injuries are neither "self-inflicted" nor "subjective."

The government does not seriously engage the appeals court's ruling that plaintiffs' responses to the statute are reasonable—again, it fails even to mention Professor Gillers' declaration. It argues, however, that plaintiffs' injuries are insufficient to support standing because they are "voluntary" or "self-inflicted," Gov't Br. 21, 38–39, and because they amount to "subjective chill" of the kind this Court found nonjusticiable in *Laird*, Gov't Br. 22, 39–42. Neither argument has merit.

1. Plaintiffs' actual injuries are not "self-inflicted."

The government's contention that plaintiffs' injuries are "self-inflicted" ignores the record and

[15] To the extent the government's argument is that plaintiffs are not in fact obliged to take measures to protect their communications, Gov't Br. 43, the government's argument was waived by failure to contest plaintiffs' submissions below. Pet. App. 17a–18a.

misunderstands the law. Uncontroverted record evidence establishes that plaintiffs must take measures to protect their communications—or compromise the security of sensitive and privileged information, risk exposing sources and witnesses to professional and personal harm, violate rules of professional conduct, and, in the case of the attorney plaintiffs, risk bar discipline. If plaintiffs' injuries are self-inflicted, they are self-inflicted only in the entirely formalistic (and irrelevant) sense that plaintiffs could, in theory, decline to take measures to protect their communications from possible interception and simply accept whatever consequences may follow for them, for their contacts, and for their clients. This Court has made clear, however, that avoidance injuries—injuries incurred as a result of a plaintiff's effort to avoid an injury that would otherwise be inflicted by the defendant's challenged conduct—are sufficient to support standing if they are fairly traceable to the challenged conduct and redressable by the relief sought.

For example, 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 mercury. The plaintiffs' asserted injury consisted of their cessation of certain activities—for example, swimming, camping, and bird-watching—for fear of exposure to the mercury. *See, e.g.*, *Laidlaw*, 528 U.S. at 181–82 (one plaintiff refrained from fishing in river because of "concern[] that the water was polluted by Laidlaw's discharges"); *id.* at 182 (another plaintiff refrained from walking and bird-watching near the river "because she was concerned about harmful effects from discharged pollutants").

The Court held that the injuries were objectively reasonable responses to the threat of exposure to contaminated water and could not be dismissed as self-inflicted:

> [W]e see nothing improbable about the proposition that a company's continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms. *The proposition is entirely reasonable . . . and that is enough for injury in fact.*

Id. at 184–85 (internal quotation marks omitted and emphasis added).

The same principle was applied to find standing in *Keene*, which concerned a state legislator's suit to enjoin application of the Foreign Agents Registration Act, a statute that labeled as "political propaganda" certain expressive materials produced by "agents of foreign principals." 481 U.S. at 473. The plaintiff was particularly concerned about the attachment of that label to certain foreign films about "acid rain," which the plaintiff had not screened out of concern that "if he were to exhibit the films while they bore [the label 'political propaganda'], his personal, political, and professional reputation would suffer and his ability to obtain re-election and to practice his profession would be impaired." *Id*. at 473 (internal quotation marks omitted). The plaintiff acknowledged that the challenged statute regulated only the filmmakers, not those who screened the films, but he argued, and

the Court held, that he had standing to challenge the statute because it had deterred him from screening the films. The Court wrote:

> In ruling on the motion for summary judgment, the District Court correctly determined that the affidavits supported the conclusion that appellee could not exhibit the films without incurring a risk of injury to his reputation and of an impairment of his political career. The court found that 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. at 475 (citation and internal quotation marks omitted).

Particularly germane to plaintiffs' argument here is that the Court found standing even though the plaintiff could have taken measures to minimize the risk of harm to his reputation associated with screening the films. *Id*. at 474–75 (noting that plaintiff could have, for example, "provid[ed] the viewers of the films with an appropriate statement concerning the quality of the motion pictures . . . and his reasons for agreeing with the positions advocated by their Canadian producer"). The "need to take such affirmative steps to avoid the risk of harm," the Court wrote, is itself a cognizable injury. *Id*. at 475.

This Court recently applied the same principle to find standing in *Monsanto*, where farmers of conventional alfalfa challenged the decision of the

Animal and Plant Health Inspection Service (APHIS) to deregulate a variety of genetically engineered alfalfa developed under license from Monsanto Company. The district court held that APHIS had violated the National Environmental Policy Act (NEPA) by issuing a deregulation decision without first preparing an environmental impact statement. To remedy that violation, the district court vacated the agency's deregulation decision, ordered the agency not to act on the deregulation petition until it had completed an environmental impact statement, and enjoined almost all planting of the genetically engineered alfalfa pending completion of that statement. Monsanto appealed the scope of relief granted but did not challenge the existence of a NEPA violation. 130 S. Ct. at 2752. The court of appeals affirmed.

In this Court, Monsanto challenged the farmers' standing to seek injunctive relief. Rejecting this challenge, the Court held that the farmers had established standing because they had demonstrated a "substantial risk" that in the absence of injunctive relief their conventional crops might be infected with the engineered gene. *Id.* at 2747. That risk would predictably injure the farmers in numerous ways, including by reasonably leading them to conduct testing to determine whether their crops had been infected and to "take certain measures to minimize the likelihood of potential contamination and to ensure an adequate supply of non-genetically-engineered alfalfa." *Id.* at 2754–55. The Court wrote:

> Such harms, which respondents will suffer even if their crops are not

> actually infected with the [engineered gene], are sufficiently concrete to satisfy the injury-in-fact prong of the constitutional standing analysis. Those harms are readily attributable to APHIS's deregulation decision, which . . . gives rise to a significant risk of gene flow to non-genetically engineered varieties of alfalfa.

Id. at 2755; *see also Camreta v. Greene*, 131 S. Ct. 2020, 2029 (2011) (government official who prevailed on grounds of qualified immunity had standing to challenge decision that his conduct had violated Constitution because "[s]o long as [the decision] continues in effect, he must either change the way he performs his duties or risk a meritorious damages action").

Laidlaw, *Keene*, and *Monsanto* confirm the justiciability of the injuries that plaintiffs assert here. Like the plaintiffs in those cases, plaintiffs here are required to take costly and burdensome measures to avoid harms threatened by the defendants' conduct, and the measures they are taking are objectively reasonable. Just as there was "nothing 'improbable'" about the *Laidlaw* plaintiffs taking measures to avoid exposure to the polluted river, 528 U.S. at 184, there is nothing improbable about journalists and human rights researchers taking measures to protect the confidentiality of sources and witnesses, or attorneys taking measures to protect communications that are privileged or sensitive. Here, some of the measures that plaintiffs have taken are not simply reasonable but mandatory under rules of professional conduct. Even more than

in *Laidlaw*, *Keene*, and *Monsanto*, therefore, the defendants' conduct in this case presents plaintiffs with a "Hobson's choice," *Keene*, 481 U.S. at 475, between two substantial harms. Pet. App. 49a ("[T]he FAA has put the plaintiffs in a lose–lose situation: either they can continue to communicate sensitive information electronically and bear a substantial risk of being monitored under a statute they allege to be unconstitutional, or they can incur financial and professional costs to avoid being monitored. Either way, the FAA directly affects them.").

The government's argument that plaintiffs' avoidance injuries are insufficient—indeed, irrelevant—because plaintiffs have not shown that surveillance is "imminent," Gov't Br. 27–28, is also mistaken. As an initial matter, it conflates the first two prongs of the standing inquiry: injury in fact and causation. Plaintiffs have unquestionably suffered injuries in fact by incurring certain costs and foregoing certain communications. Pet. App. 26a ("The plaintiffs' declarations . . . establish that they have already incurred professional and economic costs to avoid interception."). These injuries are not simply imminent but *actual*. Because plaintiffs have demonstrated actual injuries, the relevant question is not "imminence"—a concept relevant to determining the justiciability of *future* injury—but whether plaintiffs' actual injuries are fairly traceable to the FAA. Pet. App. 26a–27a; *see also Laidlaw*, 528 U.S. at 184–85; *Monsanto*, 130 S. Ct. at 2754–55; *Duke Power Co. v. Carolina Envtl. Study Grp.*, 438 U.S. 59, 73–74 (1978). For the reasons discussed above, they are.

Furthermore, the government's argument misunderstands the injuries that plaintiffs are trying to avoid. Plaintiffs are taking avoidance measures in response not only to *surveillance* under the FAA but to the *risk* of surveillance. It is not simply future surveillance but the present and substantial risk of surveillance that triggers (for example) the journalist plaintiffs' obligation to forgo certain communications, and the attorney plaintiffs' obligation to travel abroad to gather information that they would otherwise have gathered by phone or email. If plaintiffs did not take those measures, they would immediately be exposing sources and witnesses to the possibility of retaliation and other harms, they would immediately be in violation of rules of professional conduct, and they would immediately be exposed to the possibility of bar discipline. *Cf. Monsanto*, 130 S. Ct. at 2754–55. The substantial risk of surveillance is already manifest, and it is this risk, not actual surveillance, that compels plaintiffs to take avoidance measures.

For similar reasons, the government's complaint that plaintiffs have "manufacture[d] Article III standing 'for the price of a plane ticket,'" Gov't Br. 39 (quoting Pet. App. 148a), is groundless. Again, plaintiffs' injuries stem not from their voluntary actions but from the statute itself, which effectively *compels* plaintiffs to take the measures they have taken in order to meet their professional obligations. To the extent the government's complaint is that plaintiffs' theory results in "similarly situated plaintiffs" being treated differently on the ground that one has taken action to avoid future harm while the other has not, Gov't Br. 39, the answer is that these hypothetical plaintiffs

are not similarly situated if the challenged violation compels one to take immediate action but does not compel the other to do so. Pet. App. 27a.

The government attempts to distinguish *Laidlaw* on the ground that it involved "undisputed" conduct. Gov't Br. 42–43. But this case involves undisputed conduct, too: It is undisputed that Congress has authorized the executive to conduct warrantless surveillance, and it is undisputed that the executive is using that authority. While plaintiffs cannot prove to a certainty that their own communications will be monitored under the FAA, the *Laidlaw* plaintiffs similarly could not prove to a certainty that they would be injured by Laidlaw's conduct.[16] This Court's recent decision in *Monsanto* underscores the deficiency in the government's argument. As discussed above, the plaintiffs in that case could not prove that their crops would be contaminated by the modified gene—only that there was a risk of contamination. The risk, and the necessity of taking measures in response to it, was held sufficient to support standing. *Monsanto*, 130 S. Ct. at 2754–55.

[16] Indeed, in *Laidlaw* the feared injury was doubly attenuated: The plaintiffs could only speculate that they would in fact be exposed to the mercury if they entered the river, and the district court had determined that no harm would come of any exposure because the amount of mercury discharged was environmentally insignificant. *See Laidlaw*, 528 U.S. at 181; *id.* at 199 (Scalia, J., dissenting). In this case there is no dispute that plaintiffs would be injured by actual surveillance.

2. Plaintiffs' actual injuries are not "subjective."

The government's contention that plaintiffs' injuries are "subjective," Gov't Br. 42, and therefore nonjusticiable under *Laird* is equally mistaken. *Laird* involved a program under which the Army collected information about public activities that were thought to have the potential to create civil disorder. 408 U.S. at 6. The plaintiffs contended that the program was "beyond the mission requirements of the Army" and that the mere existence of it "constitute[d] an impermissible burden on [them] and other persons similarly situated which exercises a present inhibiting effect on their full expression and utilization of their First Amendment rights." *Id.* at 10 (internal quotation marks omitted). The Court held that plaintiffs lacked standing. The Court reached this conclusion, however, because the *Laird* plaintiffs failed to establish that they had been injured *at all*. While they alleged in broad terms that the program had a "'chilling' effect," their submissions "cast considerable doubt" on whether the program had in fact caused them to alter their behavior. *Id.* at 13 & n.7.

The Court also found that any "chill" that the *Laird* plaintiffs had in fact suffered was not a reasonable response to the program they challenged. The Court emphasized that the challenged program mainly involved the collection of publicly available information, including from "the news media and publications in general circulation" and from agents who attended public meetings. *Id.* at 6. The plaintiffs' claim rested not on the contention that the program was unlawful *per se* but on speculation that

the program might be abused in some unspecified way in the future. *See, e.g.*, *id.* at 9 (noting plaintiffs' argument that "in the future it is possible that information relating to matters far beyond the responsibilities of the military may be misused by the military to [their] detriment").

The injuries asserted in this case are very different from the injuries that were asserted in *Laird*. First, there is no dispute that plaintiffs here have in fact altered their conduct because of the FAA. Second, the record makes clear that plaintiffs have acted reasonably in doing so. Notably, this is not a case like *Laird* in which plaintiffs complain of the possibility that the authority they challenge may be abused in some unknown way in the future. Plaintiffs' claim is based on the reasonable premise that the FAA is being used precisely as it was designed to be used. Pet. App. 54a.

The government reads *Laird* to stand for the proposition that plaintiffs lack standing to challenge government surveillance unless they can show that their communications have actually been monitored, but *Laird* says nothing of the kind. The *Laird* Court found that plaintiffs lacked standing because their complaint was about the surveillance program's "mere existence, without more." 408 U.S. at 10. It expressly distinguished plaintiffs' allegations of "subjective chill," which it held insufficient to support standing, from allegations of "specific present objective harm," which it indicated would be sufficient. *Id.* at 13–14. Plaintiffs' injuries here fall into the latter category. Plaintiffs have been forced to forgo communications that they would otherwise have engaged in. Their ability to locate witnesses,

cultivate sources, and gather information has been compromised. They have been deterred from sharing information that they would otherwise have shared. They have been forced to travel long distances to gather information that, but for the FAA, they would have collected by telephone or email. In some cases the measures they have taken to protect their confidential information are mandatory under rules of professional conduct. These injuries cannot fairly be described as "subjective"; to the contrary, they are the kinds of injuries that the *Laird* Court made clear would be sufficient to support standing. *See also Keene*, 481 U.S. at 472–74 (distinguishing plaintiff who "merely alleged" that challenge statute had deterred him from exercising his First Amendment rights from one who "alleged and demonstrated" that the challenged statute "threaten[ed] to cause him cognizable injury"); *Socialist Workers Party v. Att'y Gen.*, 419 U.S. 1314, 1318–19 (1974) (Marshall, Circuit Justice) (distinguishing plaintiff who expressed merely a "distaste" for challenged conduct from one who made "specific" allegations of "concrete" effects).[17]

---

[17] Lower courts have not read *Laird* as the government does. *See, e.g.*, *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1089 (10th Cir. 2006); *Presbyterian Church v. United States*, 870 F.2d 518, 521–22 (9th Cir. 1989); *Smith v. Meese*, 821 F.2d 1484, 1494 (11th Cir. 1987); *Clark v. Library of Cong.*, 750 F.2d 89, 93 (D.C. Cir. 1984); *Ozonoff v. Berzak*, 744 F.2d 224 (1st Cir. 1984) (Breyer, J.). *But see ACLU v. Nat'l Sec. Agency*, 493 F.3d 644 (6th Cir. 2007). The government relies heavily on *United Presbyterian Church v. Reagan*, 738 F.2d 1375 (1984), Gov't Br. 31, 41, but in that case, which the D.C. Circuit characterized as a challenge to "the constitutionality of the entire national intelligence-gathering system," *id.* at 1381,

At bottom, the government's argument is that plaintiffs who have taken what are not only reasonable but in some instances obligatory measures to avoid harm from unlawful government conduct have suffered no injury that is cognizable under Article III. Neither *Laird* nor any other case identified by the government supports this proposition, and accepting it would require the Court either to overrule cases like *Monsanto* and *Laidlaw* or to create a distinct set of standing rules to govern challenges to government surveillance. There is no good reason to do either of these things.

C. Plaintiffs' actual and ongoing injuries would be redressed by a favorable judgment.

Plaintiffs have taken costly and burdensome measures in response to the risk of surveillance under the FAA. A declaration that the statute is unconstitutional, and an injunction against its use, would render these measures unnecessary. Accordingly, the court of appeals was correct to hold that plaintiffs' injuries would be redressed by a favorable judgment. Pet. App. 41a n.24; Pet. App. 126a–127a (Lynch, J., concurring in the denial of rehearing en banc).

The contention that plaintiffs lack standing because "they have not sought to enjoin all possible government surveillance of their contacts abroad," Gov't Br. 45, misunderstands plaintiffs' burden. "[A]

---

plaintiffs failed to establish that the harms they had suffered were effectively coerced or objectively reasonable responses to the authority they challenged.

plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury." *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982).

Massachusetts v. EPA is instructive. In that case plaintiffs argued that the EPA's refusal to regulate greenhouse gas emissions aggravated the harm petitioners would suffer from global climate change. The EPA responded that "its decision not to regulate [such emissions] contributes . . . insignificantly to petitioners' injuries," and that no "realistic possibility exists that the relief petitioners seek would mitigate global climate change and remedy their injuries . . . because predicted increases in greenhouse gas emissions from developing nations, particularly China and India, are likely to offset any marginal domestic decrease." 549 U.S. at 523–24. Notwithstanding the EPA's argument, the Court held that plaintiffs' injuries were redressable:

> While it may be true that regulating motor-vehicle emissions will not by itself *reverse* global warming, it by no means follows that we lack jurisdiction to decide whether the EPA has a duty to take steps to *slow* or *reduce* it.

Id. at 525; *see also id.* at 524 (noting that the EPA's challenge to the redressability of global warming "rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum").

Duke Power found standing on similar reasoning. Plaintiffs in that case challenged

provisions of the Price–Anderson Act that capped liability for nuclear accidents resulting from the operation of private nuclear plants licensed by the government. 438 U.S. at 62. The plaintiffs asserted multiple injuries, including an "objectively reasonable present fear and apprehension regarding the effect of the increased radioactivity in air, land and water upon [them] and their property." *Id*. at 73 (internal quotation marks omitted). The defendant public utility company argued that plaintiffs had failed to establish redressability because "the Government would have undertaken development of nuclear power on its own and the same injuries would likely have accrued to [the plaintiffs] from such Government-operated plants as from privately operated ones." *Id.* at 77. The Court rejected this argument. "Whatever the ultimate accuracy of [the defendants'] speculation, it is not responsive to the simple proposition that private power companies now do in fact operate the nuclear-powered generating plants injuring [the plaintiffs], and that their participation would not have occurred but for the enactment and implementation of the Price–Anderson Act." *Id.* at 77–78; *see also Keene*, 481 U.S. at 476 ("enjoining the application of the words 'political propaganda' to the films would at least *partially* redress the reputational injury of which appellee complains" (emphasis added)).[18]

[18] The government alludes to the possibility that some of plaintiffs' communications could be collected by the United States under authorities other than the FAA and FISA. Gov't Br. 45. Beyond merely citing the executive order that governs all U.S. intelligence activities, however, the government fails to explain this point, let alone identify which authorities it means,

The government's redressability argument also fails to appreciate that the burden imposed on plaintiffs by the FAA is distinct from that imposed by other surveillance. As the court of appeals observed, the FAA substantially expands the government's authority to monitor Americans' communications. Pet. App. 37a. The government itself acknowledges that, unlike FISA—which permits surveillance only upon a judicial finding that the target is a foreign agent or foreign power—the FAA permits surveillance without individualized suspicion or individualized judicial review. Gov't Br. 6. One consequence is that surveillance programs authorized under the FAA may sweep up thousands or even millions of communications. Another is that entire categories of communications are now far more likely to be collected by the government than was the case before the FAA was enacted. *See, e.g.*, Pet. App. 337a (Klein Decl. ¶¶ 6–7) (foreign activists and advocates for indigenous rights); Pet. App. 342a–346a (Mariner Decl. ¶¶ 5, 7, 9, 11) (translators, relatives of detainees, political activists, victims of human rights abuses, witnesses, experts, and

---

or explain what those authorities allow. *Cf. Duke Power*, 438 U.S. at 78 (stating that plaintiffs need not "negate [other] speculative and hypothetical possibilities . . . in order to demonstrate the likely effectiveness of judicial relief"). If the government could already monitor all of the communications at issue here, there would have been no need for the FAA. Pet. App. 37a ("the FAA was passed specifically to permit surveillance that was not permitted by FISA"); Pet. App. 121a ("[P]roponents of the statute argued that it was necessary precisely because it made possible expanded surveillance that would not have been permitted under prior law." (citing legislative history)).

scholars); Pet. App. 350a–353a (Royce Decl. ¶¶ 5–8) (co-counsel, relatives of client, journalists, and researchers).

Finally, the government's argument that plaintiffs cannot establish redressability because some of their communications might be susceptible to surveillance by other countries, Gov't Br. 46, fails as a matter of law. *Massachusetts v. EPA*, 549 U.S. at 523–26 ("Nor is it dispositive that developing countries such as China and India are poised to increase greenhouse gas emissions substantially over the next century: A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere."); *Duke Power*, 438 U.S. at 77–78. The government's argument also fails to engage the record, which shows that some of plaintiffs' communications are likely to be of interest to the U.S. government in particular. Pet. App. 342a (Mariner Decl. ¶ 5) (communications about CIA rendition program, CIA black sites, abuses committed by U.S. military personnel in Afghanistan and Iraq, and the Guantánamo Bay military commissions); Pet. App. 371a, 373a–374a (McKay Decl. ¶¶ 7, 12) (David Nevin's communications relating to representation of Khalid Sheik Mohammed); Pet. App. 356a–362a (Walsh Decl. ¶¶ 5–13) (communications with individuals in countries with an antagonistic relationship with the United States—including Cuba, Venezuela, and others—about U.S. foreign policy). The record also shows that some of plaintiffs' foreign contacts fear surveillance by the U.S. in particular. Pet. App. 337a–338a (Klein Decl. ¶¶ 6, 8); Pet. App. 361a (Walsh Decl. ¶ 11); Pet. App. 343a–345a (Mariner Decl. ¶¶ 8, 10). The record also shows that there are

unique concerns associated with surveillance by the United States. Pet. App. 371a–372a (McKay Decl. ¶ 8) (discussing concerns about U.S. surveillance where the government is the opposing party in litigation); Pet. App. 351a–352a (Royce Decl. ¶ 7) (same).

II. PLAINTIFFS HAVE STANDING BECAUSE SURVEILLANCE OF THEIR COMMUNICATIONS UNDER THE FAA IS "IMMINENT."

Plaintiffs also have standing because they have demonstrated that surveillance of their communications is "imminent" within the meaning of Article III given the scope of the statute, the nature of plaintiffs' communications, and the identities and locations of plaintiffs' contacts.

As discussed above, there is no dispute that the FAA is being used; there is no dispute that the government is collecting Americans' international communications under it; there is no dispute that it may be used to collect plaintiffs' communications; and there is no dispute that plaintiffs' communications include precisely the kind of information—"foreign intelligence information"—that the FAA expressly empowers the government to collect. That plaintiffs cannot be "targeted" under the statute, Gov't Br. 18, is irrelevant. Plaintiffs' concern is not that they will be targeted but that their communications will be acquired. Importantly, the risk that plaintiffs' communications will be monitored under the statute stems not from the possibility that the government's surveillance authority will be abused but from the reasonable

premise that the statute is being used precisely as it was designed to be used.

As the court of appeals observed, plaintiffs have "good reason" to believe that their communications will in fact be collected under the statute. Pet. App. 37a. In six detailed declarations, none of which the government has challenged, plaintiffs have established that they communicate with "precisely the sorts of individuals that the government will most likely seek to monitor": foreign political dissidents, human rights activists, journalists, attorneys, and other individuals located in geographic areas that are a special focus of the U.S. government's counterterrorism or diplomatic efforts. Pet. App. 37a. As the court of appeals wrote, "[p]laintiffs' assessment that these individuals are likely targets of FAA surveillance is reasonable." Pet. App. 37a.

The government faults the court of appeals for holding that plaintiffs could establish standing by demonstrating an objectively reasonable likelihood of future harm, but that standard is one that this Court has applied repeatedly. *See, e.g.*, *Camreta*, 131 S. Ct. at 2029 (citing *City of L.A. v. Lyons*, 461 U.S. 95, 111 (1983), for the proposition that a party has standing where it demonstrates a "sufficient likelihood" of injury); *Monsanto*, 130 S. Ct. at 2754 (holding that Monsanto had standing to challenge lower court ruling because "there is more than a strong likelihood" that, but for ruling, agency would deregulate engineered gene); *Massachusetts v. EPA*, 549 U.S. at 526 n.23 ("[E]ven a small probability of injury" can be sufficient to create a case or controversy. (alteration in original) (quoting *Vill. of*

Elk Grove Vill. v. Evans, 997 F.2d 328, 329 (7th Cir. 1993))); *Pennell v. City of San Jose*, 485 U.S. 1, 2 (1988) (landlords' association had standing to challenge rent control ordinance where demonstrated a "realistic danger" of direct injury); *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383 (1988) (booksellers had standing where demonstrated an "actual and fell-founded fear" that the challenged law would be enforced against them); *Blum v. Yaretsky*, 457 U.S. 991, 999–1001 (1982) (nursing home residents had standing to challenge transfers to lower levels of care where possibility of such transfers was "quite realistic"); *Duke Power*, 438 U.S. at 73–74 (plaintiffs who demonstrated "'objectively reasonable' present fear" of radiation had standing to challenge statute that imposed limitation on liability for nuclear accidents). The government's contention that the "objectively reasonable likelihood" standard is "novel," Gov't Br. 25, is incorrect.

The government's argument that plaintiffs must show that the injury they fear is "certain[]" to occur, Gov't Br. 19, is also incorrect. While the Court has sometimes used the phrase "certainly impending" as a gloss on the imminence requirement, it has used the phrase interchangeably with some version of "reasonable likelihood of future harm." *See, e.g.*, *Laidlaw*, 528 U.S. at 190 (plaintiff in *Lyons* did not meet *Whitmore*'s "certainly impending" standard because "he could not credibly allege that he faced a realistic threat"); *Adarand Constructors v. Pena*, 515 U.S. 200, 211–12 (1995) (where construction company challenged subcontractor-compensation statute, "certainly impending" requirement was satisfied because plaintiff was "likely" to be given opportunity to bid on

regulated contracts and was "very likely" to bid on those contracts); *Babbitt*, 442 U.S. at 298 ("A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement. . . . If the injury is certainly impending, that is enough.").

The government relies heavily on *Summers v. Earth Island Institute*, 555 U.S. 488 (2009), which suggested that "imminence" requires more than "a realistic threat," but in *Summers* the plaintiffs had not established any substantial likelihood that they would be injured in the future by the regulation they challenged. *Summers*, 555 U.S. at 495 ("There may be a chance, but is hardly a likelihood, that [plaintiff's] wanderings will bring him to a parcel [of the National Forests] about to be affected by a project unlawfully subject to the regulations."). *Summers* was a case, in other words, in which the Court concluded that plaintiffs could not satisfy *any* arguably applicable standard for justiciable injury. *Id.* at 500 ("The problem for the dissent is that the timely affidavits no more meet that [lower] requirement than they meet the usual formulation.").[19]

---

[19] The government also relies heavily on *Whitmore v. Arkansas*, 495 U.S. 149 (1990). That case cites four cases in support of the proposition that plaintiffs must establish that their injury is "certainly impending." Only two of these used the phrase "certainly impending." One is *Babbitt*, which, as noted above, used the phrase interchangeably with "realistic danger." The other is *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923), which indicated that a "certainly impending" injury was *sufficient* to support standing. *Id.* at 593 ("If the injury is certainly impending, that is enough.").

The critical issue is not the precise language used in different decisions but whether the facts of the case provide a basis to believe that the legal questions before the Court will be presented with the concreteness and adverseness that Article III demands.[20] The government's insistence that plaintiffs cannot establish standing without proving the certainty of surveillance is at bottom not a standing argument but a bid for a kind of immunity. This is because its proposed standard is one that neither plaintiffs nor anyone else will ever be able to meet—not because the surveillance they fear will never take place but because they will be unaware of it when it does.[21] Unlike analogous law enforcement statutes, the FAA does not generally require the government to notify individuals whose communications it has monitored. *Cf.* 18 U.S.C. § 2518(8) (criminal wiretap statute requiring government to provide notice, within 90 days after termination of surveillance, to surveillance target and "such other parties to intercepted

---

[20] The government's complaint that plaintiffs' case would require litigation of the constitutionality of the FAA "in the abstract," Gov't Br. 36, ignores the concrete facts contained in plaintiffs' declarations. Moreover, the government does not explain how evidence that plaintiffs will certainly be surveilled would change the nature of the district court's task on the merits—plainly it would not. The question on the merits is simply the facial validity of a statute, the kind of question routinely raised by pre-enforcement challenges.

[21] Indeed, it is entirely possible that the surveillance plaintiffs fear is taking place already, and that it is only the government's secrecy that forecloses plaintiffs from meeting the standing requirement that the government urges the Court to impose.

communications as the judge may determine in his discretion that is in the interest of justice"). While the FAA requires the government to provide a form of notice to those who are *prosecuted* on the basis of FAA evidence, it is the executive that decides whether to commence such prosecutions and to introduce such evidence, and accordingly it is the executive that determines whether its surveillance will be subject to judicial review. *See Keith*, 407 U.S. at 318 (noting that "post-surveillance review would never reach the surveillances which failed to result in prosecutions"). As far as plaintiffs are aware, the government has yet to introduce FAA-derived evidence in a criminal trial, though four years have passed since the statute was signed into law.[22]

There is another reason not to embrace the government's prohibitive interpretation of Article III: As the Court has recognized, *Keith*, 407 U.S. at 313–14, and as the experience of many other countries attests, an overbroad surveillance authority deters expressive and associational activity that is vital to any democracy, and this chilling effect stems not

[22] It is not at all clear what must be disclosed under the FAA's notice provision even if the government does prosecute someone using FAA evidence. *Compare* 50 U.S.C. § 1806(c) (traditional FISA notice provision), *with* 50 U.S.C. § 1881e(a) (FAA notice provision directing the government to treat FAA surveillance as traditional FISA surveillance under FISA's notice provision); *see also* Order, *United States v. Khan*, No. 1:11-cr-20331 (S.D. Fla. Mar. 14, 2012) (ECF No. 285) (upholding government's refusal to disclose whether its FISA application relied upon evidence obtained under the FAA); Gov't Resp., *United States v. Khan*, No. 1:11-cr-20331 (S.D. Fla. Mar. 14, 2012) (ECF No. 284).

simply from the certainty of surveillance but from the substantial possibility of it. 154 Cong. Rec. S574 (Feb. 4, 2008) (statement of Sen. Cardin) ("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.").

More than forty years ago, when surveillance technology was comparatively primitive, this 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 it cautioned that the threat to core democratic rights was especially pronounced where surveillance authority was exercised in the service of national security, *Keith*, 407 U.S. at 313 ("National security cases, moreover, often reflect a convergence of First and Fourth Amendment values not present in cases of 'ordinary' crime. Though the investigative duty of the executive may be stronger in such cases, so also is there greater jeopardy to constitutionally protected speech."). To accept the government's theory of standing would be to accept that the courts are powerless to address the threat presented by surveillance authorities exercised in secret, and powerless to protect Americans' most fundamental constitutional rights against the encroachment of increasingly sophisticated and intrusive forms of government power.

Contrary to the government's formalistic approach, the Court has long recognized that the "concept [of standing] cannot be reduced to a one-sentence or one-paragraph definition," *Valley Forge*, 454 U.S. at 475, and that application of its three requirements is not a "mechanical exercise," *Allen*, 468 U.S. at 751; *see also Lujan*, 504 U.S. at 565 n.2. The government's theory of standing would render real injuries nonjusticiable and insulate the government's surveillance activities from meaningful judicial review. The Court's Article III jurisprudence has never been oblivious to such practical realities, and it should not be.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully Submitted,

Jameel Jaffer
Counsel of Record
Steven R. Shapiro
Alexander A. Abdo
Mitra Ebadolahi
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500
jjaffer@aclu.org

Arthur N. Eisenburg
Christopher T. Dunn
New York Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
(212) 607-3300

Charles S. Sims
Matthew J. Morris
Proskauer Rose LLP
1585 Broadway
New York, NY 10036
(212) 969-3000