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 OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION, *ET AL.*, IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici curiae the Canadian Civil Liberties Association, the Center for Legal and Social Studies (Argentina), the Egyptian Initiative for Personal Rights, the Hungarian Civil Liberties Union, the Irish Council for Civil Liberties, the Kenya Human Rights Commission, the Legal Resources Centre (South Africa), the National Council for Civil Liberties (United Kingdom), Kim Lane Scheppele, Gábor Halmai, and János Kenedi respectfully submit this brief in support of respondents. Amici are international human rights organizations and individuals devoted to protecting civil liberties—including freedom from unchecked government surveillance and the right to challenge such surveillance—as well as gathering and analyzing information related to historical violations of civil liberties. Amici have unique knowledge and experiences in connection with government surveillance. In our view, the threat of surveillance directly harms people who reasonably believe they are subject to such surveillance and people who may be subject to surveillance will inevitably alter their behavior. A key protection against this type of harm is a meaningful opportunity to challenge the legal framework

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than the amici curiae or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court in accordance with Supreme Court Rule 37.3(a).

that creates the threat of surveillance. Amici's perspectives confirm the respondents have the requisite standing to challenge the validity of Section 702 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. § 1881a, hereinafter the "FAA"). A summary description of each amicus follows.

The Canadian Civil Liberties Association. The Canadian Civil Liberties Association is a Canadian non-governmental organization ("NGO") that was constituted in 1964 to promote respect for and observance of fundamental human rights and civil liberties. Its work, which includes research, public education, and advocacy aims to defend and ensure the protection and full exercise of those rights and liberties.

The Center for Legal and Social Studies (Centro de Estudios Legales y Sociales) ("CELS"). CELS is a NGO that has been working since 1979 in the promotion and protection of human rights and to strengthen the democratic system in Argentina. CELS' main objectives focus on: reporting human rights violations; influencing the policy-making process based on respect for fundamental rights, promoting legal and institutional reforms designed to improve the quality of democratic institutions, and promoting an increased exercise of these rights by the most vulnerable sectors of society. CELS' strategies in the international and national arenas include strategic litigation; the building of coalitions, alliances and networks; advocacy-oriented policy research; foreign policy monitoring; and advocacy and media work. CELS also promotes

standard-setting at the international and regional levels.

The Egyptian Initiative for Personal Rights ("EIPR"). EIPR is an independent rights NGO. It has worked since 2002 on strengthening and protecting basic rights and freedoms in Egypt, through research, advocacy, and litigation in the fields of civil liberties, economic and social justice, democracy and political rights, and criminal justice.

The Hungarian Civil Liberties Union ("HCLU"). HCLU is a non-profit human rights NGO established in Budapest, Hungary in 1994. HCLU is a law reform and legal defense public interest NGO in Hungary which works independently of political parties and the Hungarian government and its institutions. HCLU's aim is to promote the case of fundamental rights and principles set forth in the Constitution of the Republic of Hungary and international conventions. HCLU's general goal is building and strengthening civil society and the rule of law in Hungary and the Central Eastern European region. HCLU is guided by its belief in the principle that citizens have a right to control the use of their personal data and that they should have access to documents of public interest.

The Irish Council for Civil Liberties ("ICCL"). ICCL is Ireland's leading independent human rights NGO, which monitors, educates, and campaigns in order to secure full enjoyment of human rights for everyone. Founded in 1976 by Mary Robinson and others, ICCL has played a leading role in some of Ireland's most successful human

rights campaigns. These have included campaigns to establish an independent Garda Ombudsman Commission, legalize the right to divorce, secure more effective protection of children's rights, decriminalize homosexuality, and introduce enhanced equality legislation. Since 1976, ICCL has lobbied the Irish government to ensure the full implementation of international human rights standards in Ireland.

The Kenya Human Rights Commission ("KHRC"). KHRC is a Kenyan NGO founded in 1991 with the aim of defending human rights and advocating for political reforms in Kenya. KHRC's mission is to work towards the respect, protection, and promotion of all human rights for all individuals and groups. This is achieved through strategies and actions aimed at entrenching human rights and democratic values by facilitating and supporting individuals, communities, and groups to claim and defend their rights by holding state and non-state actors accountable for the actions.

The Legal Resources Centre ("LRC"). LRC is a human rights NGO in South Africa. LRC seeks to use the law as an instrument of justice for the vulnerable and marginalized, including poor, homeless, and landless people and communities who suffer discrimination by reason of race, class, gender, disability, or by reason of social, economic, and historical circumstances. Inspired by South Africa's history, its constitution, and international human rights standards, LRC is committed to a fully democratic society based on the principle of substantive

equality and to ensure that the principles, rights, and responsibilities enshrined in South Africa's constitution are respected, promoted, protected, and fulfilled.

The National Council for Civil Liberties ("Liberty"). Liberty is one of the United Kingdom's leading civil liberties and human rights NGOs. Liberty was founded in 1934 and has since worked to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning, and research.

Individual Amici. Kim Lane Scheppele is the Director of the Program in Law and Public Affairs at Princeton University and Laurance S. Rockefeller Professor of Sociology and International Affairs in the Woodrow Wilson School and the University Center for Human Values. Gábor Halmai is a Professor of Law and Director of the Institute for Political and International Studies at Eötvös Lóránd University, Budapest, Hungary, as well as Director of the Hungarian Human Rights Information and Documentation Center. János Kenedi is a Research Fellow at the Institute for the History of the 1956 Hungarian Revolution.

Amici are concerned that the expansive power created under the FAA and the insufficient safeguards attached thereto may give rise to the monitoring of their communications. By way of example, since the tragic events of September 11, 2001, Liberty has been heavily involved in litigation, lobbying, and campaigning work relating to the counter-terrorism practices, policies, and laws undertaken by

both the U.K. and U.S. governments. Just as the U.K. and U.S. governments have collaborated in fighting terrorism, Liberty has collaborated closely with civil rights bodies in the United States to challenge those policies Liberty believes unnecessarily infringe fundamental rights and freedoms. Regular communication with human rights groups based in the United States is essential for the effectiveness of Liberty's work and such communications typically relate to sensitive matters that Liberty wishes to remain confidential, such as litigation strategy, advocacy, political engagement, and the organization and timing of campaigns. Liberty is accordingly concerned that staff members' communications with sister human rights organizations in the United States will be surveilled simply because the United Kingdom is of foreign policy interest. The possibility that Liberty's communications with its U.S. counterpart organizations could be monitored by the U.S. government is of grave concern to Liberty.

Knowing that Liberty's communications with U.S.-based organizations on these substantive issues and accompanying strategy could be intercepted by the United States makes Liberty less likely to communicate with its U.S. colleagues. That is because Liberty's private and sensitive communications about which many of Liberty's campaigns indirectly relate could be intercepted by the U.S. government and because, once intercepted, Liberty's communications could be passed to the U.K. authorities, to whom all of Liberty's campaigning

activity relates. Liberty's position exemplifies the manner in which respondents' foreign contacts will likely respond to the threat of surveillance under the FAA.

PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT

Technological advances have vastly increased the ease with which massive amounts of personal information can be collected and processed, but the threat of pervasive government surveillance is nothing new. Historical experience has demonstrated that where surveillance is reasonably likely, people modify their behavior. Measures taken to avoid surveillance or mitigate its effects were and are a direct consequence of potential government monitoring of communications—particularly when the communications in question concern confidential or otherwise sensitive issues. Respondents here fear that the broad monitoring through mass surveillance orders that the FAA authorizes makes it likely their communications will be monitored. They have thus taken reasonable measures to insulate their communications from such surveillance. Petitioners' attempt to dismiss these injuries as "self-inflicted" runs counter to historical experience, applicable social science, and common sense.

Because the standing issues before this Court implicate questions concerning the harm suffered by individuals subject to the threat of surveillance, the firsthand experience of individuals exposed to the threat of surveillance in other historical circum-

stances is of particular relevance. Similarly, the decisions of the European Court of Human Rights (the "ECHR"), which is closer to this history, also merit this Court's attention. The ECHR's decision on a similar challenge to Moldova's grant of power to Moldovan authorities to intercept certain telephone communications is illustrative. In *Iordachi and Others v. Moldova*, the ECHR held that applicants who had not been targets of surveillance nevertheless could assert their claims where they had extensive contact with persons that Moldovan authorities were authorized to wiretap and where they were "at the material time potentially at risk of being subjected to such measures."[2] This position is consistent with this Court's standing doctrine, which allows plaintiffs to challenge government behavior that injures them even if they are not directly targeted.[3]

I. THE THREAT OF SURVEILLANCE DIRECTLY HARMS PEOPLE WHO REASONABLY BELIEVE THEY ARE SUBJECT TO GOVERNMENT MONITORING

The surveillance the FAA authorizes injures respondents "by compelling them to take costly and burdensome measures to protect the confidentiality of their international communications and by

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[2] *Iordachi v. Moldova*, Eur. Ct. H.R. (Sept. 14, 2009) at 15.

[3] *See, e.g., United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 679, 686-90 (1973); *Mass. v. EPA*, 549 U.S. 497, 516-26 (2007); *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 73-78 (1978).

compromising their ability to locate witnesses, cultivate sources, gather information, communicate confidential information to their clients, and to engage in other legitimate and constitutionally protected communications."[4] Historical experience bears out the fact that the threat of surveillance injures those who reasonably believe they may be monitored. Over the last several decades, social scientists have conducted extensive research concerning the effects of government surveillance on individuals. Psychological studies confirm that perceptions of surveillance or a lack of privacy are correlated with psychological stress and altered behavior.[5] This research confirms that the threat of

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[4] *Amnesty Int'l U.S.A. v. Clapper*, 638 F.3d 118, 133 (2d Cir. 2011) (internal quotations omitted).

[5] For example, a workplace study conducted statewide in New Jersey found a direct correlation between workers' perceptions of surveillance and negative sentiments concerning privacy, role in the work place, self-esteem, and workplace communication. Carl Botan, *Communication Work and Electronic Surveillance: A Model for Predicting Panoptic Effects*, 63 Communications Monographs (1996). In other words, "the more surveilled workers perceive[d] themselves to be" the more they reported negative feelings about these issues. *Id.* at 293. Likewise, a study conducted in Romania in the 1980s found that people feared government surveillance and therefore avoided discussing certain topics, such as those that could be deemed critical of the government. Gabriela Zanfir, 'Big Brother' in a Post-Communist Era, Apr. 20, 2012, at 9-10 (citing Radu Clit, *Frica de zi cu zi* ["The Daily Fear"], *in* Viața cotidiană în comunism ["The Daily Life in Communism"] (2004). Similarly, a study of seven urban centers in New Zealand supported the conclusion that a perceived lack of privacy is directly associated with psychosomatic stress.

surveillance directly harms those subject to it—both by forcing them to adjust their behaviors in response to the potential surveillance and by causing related psychological trauma.

Individual stories from people living under the threat of surveillance bear out the results of these studies. Importantly, experience shows that when people reasonably perceive they are likely to be surveilled by the government they alter their behavior to avoid or minimize the surveillance. This reaction flows directly and naturally from the

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Stephen D. Webb, *Privacy and Psychosomatic Stress: An Empirical Analysis*, 6 Soc. Behavior & Personality 227 (1978). In addition, a study conducted on the impact of loyalty and security procedures on professors and government employees in Washington, DC found that typical reactions to these measures included withdrawing from non-governmental organizations on the Attorney General's list of subversive organizations and cancelling subscriptions to the organizations' literature, refusing to sign petitions without proof of bona fide sponsorship, and being cautious in political conversations with strangers. Marie Jahoda & Stuart W. Cook, *Security Measures and Freedom of Thought*, 61 Yale L.J. 296, 307-08 (1952). *See also* Mary Fulbrook, *Anatomy of a Dictatorship: Inside the GDR 1949-1989* 55 (1995) ("Many East Germans lived with a sense of oppression and fear, although—perhaps even because—they did not know the extent of surveillance and interference in their lives."); Mary Fulbrook, *The People's State: East German Society from Hitler to Honecker* 246 (2005) ("[W]here the vast majority of the populace were aware of the existence of the Stasi [Ministry for State Security], it appears to have been simply taken for granted as a fact of life, in light of which certain precautions had to be taken (which for some individuals undoubtedly meant major restrictions on their activities, whereas for others the impact barely registered).").

threat of surveillance. By way of example, in her memoir about growing up in Budapest, Hungary during the 1950s, Kati Marton describes her parents' fears of government surveillance and the actions they took to avoid it. Endre Marton, Kati's father, often (and correctly) suspected the government was monitoring him due to his work as a reporter for the Associated Press. Later declassified government files document the steps he took to circumvent surveillance. For instance, the government's file details Endre Marton's efforts to prevent government eavesdropping on his telephone conversations, noting that "[d]espite the fact that he has two telephone lines in his apartment, Marton frequently makes calls from public phone booths."[6] Similarly, Endre Marton regularly engaged in a series of maneuvers when driving his car to thwart government watchers. According to the government's file:

> When he first gets in his car, he looks around to make sure no one is following him. Then he usually drives around the corner, makes a loop, before he heads off. Sometimes, he parks in front of the market, on the corner of Csaba and Maros Utca, gets out, looks around before he gets back in his car. When the weather is clear, he keeps the roof of his convertible down, so he is able to observe anybody following him.[7]

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[6] Kati Marton, *Enemies of the People: My Family's Journey to America* 79 (2009) (quoting Hungarian Secret Police file on Endre Marton).

[7] *Id.*

Endre Marton also suspected (again, correctly) that Gabrielle Guillemet, the governess of his children, was a government spy, and he took numerous precautions accordingly. For example, the government reported that on one evening in early 1955, "the Martons left for the evening but half an hour later Marton returned unexpectedly and looked carefully around the apartment."[8] In addition, the government noted during this period that "[l]ately when [Gabrielle] gets up early in the morning Marton follows her into the kitchen and wants to know what she is doing there."[9]

Kati Marton's mother, Ilona Marton, who was employed as a reporter for the United Press International, took similar measures to avoid government surveillance of her telephone conversations. In particular, Ilona Marton made phone calls from the local post office because "[s]he did not trust [their] house phone."[10] According to a report provided to the government by Gabrielle, Ilona Marton later ripped her house phone "out of the wall."[11] When Gabrielle asked the Marton children why their mother had done so, "the children answered that their mother told them their phone was not only for speaking, but was also for listening into their apartment. The children said that from now

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[8] *Id.* at 81.

[9] *Id.* at 81-82.

[10] *Id.* at 105.

[11] *Id.* at 115.

on their mother had been told by friends to whisper."[12]

Historical experience shows that it is not only the targets of surveillance who change their behavior. People who believe they may be covered by surveillance affecting a third party will also change their behavior. For example, just as the Martons took reasonable steps to evade surveillance, other members of the Budapest community took steps to stay away from them. Kati recalls that "[m]ost Hungarians feared and avoided my parents."[13] Even as a child, she "understood" that Zsuzsi Kalmar, another local child, "could not reciprocate [a] visit to her home for fear of being contaminated by [the Marton family]."[14] In this atmosphere of distrust, an America diplomat living next door to the Martons even suspected that the Martons themselves were Hungarian spies.[15] To prevent his cook from speaking with them, he installed iron bars on the window of his house facing their apartment.

Others had similar experiences under comparable surveillance regimes. Timothy Garton Ash describes the precautions he took while living in East Berlin in the German Democratic Republic (*i.e.*, East Germany) in 1978 to conduct research in

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[12] *Id.* After its report on this incident, the government's file dryly concluded, "Notice: telephone listening device no longer functioning at Martons'." *Id.*

[13] *Id.* at 39.

[14] *Id.*

[15] *Id.* at 58.

connection with his history studies at Oxford: "I deliberately did not seek the company of Western correspondents . . . partly because I thought this might arouse the authorities' suspicions."[16] After spending time in East Berlin, Garton Ash became even more cautious of potential surveillance:

> Before flying to Prague, I carefully concealed the names and addresses of the people I was going to visit, writing them, in abbreviated form, in minuscule pencil letters on the back of a Eurocheck. I never telephoned dissident friends, just appeared on the doorstep, after checking that I was not being followed.[17]

Anna Funder further explains the impact that surveillance had on people living in East Germany:

> In [East Germany] it was inconceivable that a person would ask a stranger, a total stranger whether they lived near the border. It was also inconceivable that the stranger would ask you whether you were thinking of escaping. . . . Relations between people were conditioned by the fact that one or the other of you could be one of *them*. Everyone suspected everyone else and the mistrust this bred was the foundation of social existence.[18]

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[16] Timothy Garton Ash, *The File: A Personal History* 76 (1997).

[17] *Id.* at 209.

[18] Anna Funder, *Stasiland: Stories from Behind the Berlin Wall* 28 (2002). As noted in relevant psychological studies,

Just as the Martons, their neighbors, and Timothy Garton Ash changed their behavior in reasonable response to the threat of surveillance of their lawful activities, respondents acted in reasonable response to the threat of surveillance under the FAA. That action was, in a sense, voluntarily taken, but "[s]tanding is not defeated merely because the plaintiff has in some sense contributed to his own injury."[19]

II. THE ECHR HAS HELD THAT PLAINTIFFS POTENTIALLY SUBJECT TO SURVEILLANCE MAY CHALLENGE SUCH SURVEILLANCE

Given Europe's history of invasive state surveillance, the ECHR's analysis permitting applicants, the equivalent of plaintiffs in the U.S. legal system, to challenge government surveillance merits this Court's attention.

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perceptions of surveillance can be psychologically damaging. *See supra* note 5. For example, a woman whose letters to her boyfriend were routinely intercepted and reviewed by the Stasi was negatively affected by such surveillance, stating, "[L]ooking back on it, it's the total surveillance that damaged me the worst. I *know* how far people will transgress over your boundaries—until you have no private sphere left at all. And I think that is a terrible knowledge to have." Funder, at 113.

[19] *Amnesty Int'l U.S.A.*, 638 F.3d at 133 (quoting 13A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3531.5, at 361-62 (3d ed. 2008) (footnotes omitted)).

A. Background on the ECHR and its Surveillance Jurisprudence

Following the devastation of the Second World War, the Council of Europe was founded to promote the rule of law, human rights, and democracy. The Council's first legal treaty to protect human rights was the Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention").[20] The Convention established the ECHR to rule on individual or State applications alleging violations of the civil and political rights protected under the Convention.[21]

The ECHR is empowered to rule on alleged violations of the Convention concerning States Parties' government surveillance. In particular, applicants to the ECHR may allege violations of Article 8 of the Convention, which provides protections similar to those under the Fourth Amendment to the United States Constitution. Article 8 §§ 1 and 2 of the Convention provide:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of

[20] Convention, Nov. 4, 1950, 213 U.N.T.S. 221.

[21] Convention art. 19. ECHR decisions are binding on countries that have ratified the Convention (the "States Parties"). *Id.* art. 46.

> national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

To find that States Parties' surveillance laws comport with Article 8, the ECHR requires the existence of an "effective control" by which an applicant may challenge a State Party's "interference." The ECHR stated in *Klass v. Germany*:

> [T]he values of a democratic society must be followed as faithfully as possible in the supervisory procedures if the bounds of necessity, within the meaning of Article 8 § 2, are not to be exceeded. One of the fundamental principles of a democratic society is the rule of law . . . [which implies] that an interference by the executive authorities with an individual's rights should be subject to an effective control.[22]

The ECHR has described telephone tapping as "a very serious interference with a person's rights and . . . only very serious reasons based on a reasonable suspicion that the person is involved in serious criminal activity should be taken as a basis for authorising it."[23] In addition, in *Lambert v. France*, Judge Pettiti stated that the court's case law on telephone tapping is "undoubtedly one of the most positive aspects of its work to safe-

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[22] 28 Eur. Ct. H.R. (ser. A) at 25-26 (1978).

[23] *Iordachi*, Eur. Ct. H.R. at 20.

guard fundamental rights."[24] In the *Lambert* case, the ECHR found a violation of Article 8. Judge Pettiti described the interception of telephone conversations as:

> [O]ne of the most serious temptations for State authorities and one of the most harmful for democracies. Originally, reason of State or national security were put forward in the attempt to justify interceptions, particularly in the sphere of so-called administrative telephone tapping that is sometimes used to evade the rules governing judicial telephone tapping. Abuses, however, are becoming more and more unacceptable . . . . In several member States the supervision systems set up to control the monitors have proved inadequate and defective. Will it be necessary in the future, in order to protect privacy, to require people to get into 'bubbles', in imitation of the practice of some embassies, in order to preclude any indiscretions? That would be to give in to Big Brother.[25]

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[24] 1998-V Eur. Ct. H.R. 2231, 2245 (Pettiti, J., concurring opinion).

[25] *Id.*

B. ECHR Analysis of Admissibility in Surveillance Cases

ECHR cases are admissible if an individual applicant (1) is a victim of a violation of the Convention (or Protocols thereto) by a State Party, and (2) has suffered a significant disadvantage.[26]

In *Iordachi v. Moldova*, a case analogous to the one before the Court, the ECHR considered a case brought by members of Lawyers for Human Rights ("LHR"), a group based in Moldova specializing in representing applicants before the ECHR. Moldovan law provided for wiretapping "'only when such measures are necessary in the interests of national security, public order, the economic situation of the country, the maintenance of legal order and the prevention of serious, very serious and exceptionally serious offences . . . .'"[27] LHR represented many people who could be surveilled under this law and alleged that while not all members of the LHR worked on serious cases, all of its members used LHR telephones and therefore risked interception. The applicants claimed that they ran a serious risk of having their telephones tapped, but did not claim to have been victims of any specific interception of their communications. The Moldovan government responded that no interception of the applicants' communications had taken place, and

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[26] Convention arts. 34, 35.

[27] *Iordachi*, Eur. Ct. H.R. at 5 (citing Operational Investigative Activities Act of 12 April 1994, § 6(2)(c) (internal emphasis omitted)).

the applicants could not claim to be potential victims because not every person in Moldova was targeted and the legislation clearly established a category of persons susceptible to interception. Nevertheless, the ECHR found an "interference by a public authority" with the applicants' Article 8 rights, stating:

> The mere existence of the legislation entails, for all those who might fall within its reach, a menace of surveillance; this menace necessarily strikes at freedom of communication between users of the postal and telecommunication services and thereby constitutes an 'interference by a public authority' with the exercise of the applicants' right to respect for correspondence . . . .[28]

In reaching this result, the ECHR cited its decision in *Klass*:

> The Court points out that where a State institutes secret surveillance the existence of which remains unknown to the persons being controlled, with the effect that the surveillance remains unchallengeable, Article 8 could to a large extent be reduced to a nullity. It is possible in such a situation for an individual to be treated in a manner contrary to Article 8, or even to be deprived of the right granted by that Article, without his being aware of it and therefore without being able to obtain a

[28] *Id.* at 15-16.

> remedy either at the national level or before the Convention institutions.
>
> . . .
>
> The Court finds it unacceptable that the assurance of the enjoyment of a right guaranteed by the Convention could be thus removed by the simple fact that the person concerned is kept unaware of its violation. A right of recourse to the Commission for persons potentially affected by secret surveillance is to be derived from Article 25 [concerning the powers of the ECHR], since otherwise Article 8 runs the risk of being nullified.[29]

Here, petitioners seek to bar respondents' claims based on a similar lack of knowledge of "how the government exercises its targeting authority under Section 1881a."[30] In other words, petitioners contend that the government can eliminate respondents' ability to challenge violations to their constitutional rights "by the simple fact [that respondents are] kept unaware of [the] violation."[31] The ECHR rejected this very theory, concluding in *Iordachi* that the LHR applicants' claims were admissible because they had extensive contact with individuals that Moldovan authorities were authorized to wiretap.

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[29] *Id.* at 15.

[30] Pet. Brief at 31.

[31] *Compare Iordachi*, Eur. Ct. H.R. (Sept. 14, 2009) at 15, *with* Pet. Brief at 31.

Moreover, the ECHR reasoned that secret surveillance measures could have been applied to the applicants and they were "at the material time potentially at risk of being subjected to such measures."[32] The same reasoning applies to respondents here.[33]

Similarly, in *Lambert v. France*, the ECHR ruled on the case of an applicant who had been convicted based on evidence collected using a wiretap of a

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[32] *Iordachi*, Eur. Ct. H.R. at 15.

[33] This result is consistent with this Court's standing decisions. *See Davis v. FEC*, 554 U.S. 724, 734-35 (2008) (congressional candidate had standing to challenge campaign finance law that allowed competitors to receive additional contributions in certain circumstances, even though the relevant provision was not yet triggered when suit was filed, because "the record at summary judgment indicated that most candidates who had the opportunity to receive expanded contributions had done so"); *Pennell v. City of San Jose*, 485 U.S. 1, 8 (1988) (plaintiffs had standing to bring facial challenge to rent control law because "[t]he likelihood of enforcement, with the concomitant probability that a landlord's rent will be reduced below what he or she would otherwise be able to obtain in the absence of the Ordinance, is a sufficient threat of actual injury to satisfy Art. III's requirement that 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" (internal quotation marks and bracket omitted)); *Duke Power Co.*, 438 U.S. at 73-78 (plaintiffs had standing to bring constitutional challenge against statute capping liability for nuclear reactor accidents, because statute incentivized defendant to build and operate nuclear facility whose "emission of . . . radiation into [plaintiffs'] environment would also seem a direct and present injury").

third party's telephone line when the applicant happened to use the tapped telephone. The applicant alleged interference by a public authority under Convention Art. 8 § 2.[34] The French Court of Cassation had rejected the application on the basis that the applicant had no "locus standi" to challenge the monitoring of a third party's telephone line.[35] The ECHR disagreed and found it "of little importance that the telephone tapping in question was carried out on the line of a third party" because telephone conversations are covered by notions of "private life" and "correspondence" within the meaning of Article 8, and the interception amounted to "interference by a public authority."[36]

Despite holding in *Lambert* that the French telephone tapping law satisfied Convention Article 8 requirements, the ECHR found a violation of Article 8 of the Convention, stating:

> [The French] Court of Cassation's reasoning could lead to decisions whereby a very large number of people are deprived of the protection of the law, namely all those who have conversations on a telephone line other than their own. That would in practice render the protective machinery largely devoid of substance. That was the case with the applicant,

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[34] *Lambert*, 1998-V Eur. Ct. H.R. at 2238.

[35] *Id.* at 2236.

[36] *Id.* at 2238-39. Again, this decision is consistent with U.S. case law on standing. *See Duke Power Co.*, 438 U.S. at 73-78.

> who did not enjoy the effective protection of national law, which does not make any distinction according to whose line is being tapped . . . . The Court therefore considers . . . that the applicant did not have available to him the 'effective control' to which citizens are entitled under the rule of law and which would have been capable of restricting the interference in question to what was 'necessary in a democratic society.'[37]

That warning is particularly apt here.

[37] *Lambert*, 1998-V Eur. Ct. H.R. at 2241-42.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Dated: New York, New York
September 21, 2012

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