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

BRIEF IN OPPOSITION

Charles S. Sims
Matthew J. Morris
Proskauer Rose LLP
1585 Broadway
New York, NY 10036

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

Arthur N. Eisenburg
Christopher T. Dunn
Melissa Goodman
New York Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004

QUESTION PRESENTED

Whether the court of appeals correctly held that plaintiffs–respondents have standing to challenge certain provisions of the FISA Amendments Act of 2008 based on their showing, through uncontroverted affidavits, that: (i) they have already suffered specific present objective injuries that are fairly traceable to those provisions, and (ii) they have an actual and well-founded fear that their communications will be monitored under those provisions in the future.

CORPORATE DISCLOSURE STATEMENT

Each corporate respondent certifies that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

The government petitions for review of an interlocutory judgment of the Court of Appeals for the Second Circuit holding that plaintiffs have standing to challenge the Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified at 50 U.S.C. § 1801 *et seq.*) ("FISA"), as amended by the FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 ("FAA" or "Act"). The FAA authorizes the dragnet surveillance of Americans' international communications. It allows the government to collect these communications *en masse* without specifying the individuals or facilities to be monitored; without observing meaningful limitations on the retention, analysis, and dissemination of acquired information; without individualized warrants based on criminal or foreign intelligence probable cause; and without prior judicial or even administrative determinations that the targets of surveillance are foreign agents or connected in any way, however remotely, to terrorism.

The Court should deny the government's petition. The appellate court correctly held that plaintiffs have standing for two independent reasons—because they have already suffered concrete and specific injuries that are fairly traceable to the Act and because they have an "actual and well-founded fear" that their communications will be monitored under the Act in the future.[1] The government's restrictive view of standing, which has

[1] Throughout this brief, respondents are generally referred to as "plaintiffs."

never been endorsed by this Court, would insulate the FAA from judicial review altogether. Multiple factors, moreover, counsel against interlocutory review. The government will suffer no prejudice if review is delayed until final judgment; the Act is scheduled to sunset in December; and the circuit court cases that the government describes as divergent are in fact reconcilable. There is a strong public interest in a judicial determination of the FAA's constitutionality. The district court should be permitted to reach the merits.

STATEMENT OF THE CASE

A. The Foreign Intelligence Surveillance Act

In 1978, Congress enacted the Foreign Intelligence Surveillance Act to regulate government surveillance conducted for foreign intelligence purposes. 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). Congress enacted FISA after this Court held, in *United States v. U.S. District Court*, 407 U.S. 297 (1972), that the Fourth Amendment does not permit warrantless surveillance in intelligence investigations of domestic security threats. FISA was a response to that decision and to a congressional investigation that revealed that the executive branch had engaged in widespread warrantless surveillance of U.S. citizens—including journalists, activists, and members of Congress—"who engaged in no criminal activity and who posed no genuine threat to the national security." S. Rep.

No. 95-604(I), at 6 (1977), *reprinted in* 1978 U.S.C.C.A.N. 3904, 3909 (internal quotation marks omitted).

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

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

50 U.S.C. § 1801(f)(2). Before passage of the FAA, FISA generally foreclosed the government from engaging in "electronic surveillance" without first obtaining individualized and particularized orders from the FISA Court.

B. The Bush Administration's Warrantless Surveillance Program

In late 2001 or early 2002, President Bush secretly authorized the National Security Agency ("NSA") to inaugurate a program of warrantless electronic surveillance inside the United States (the "Program"). Pet. App. 244a (Jaffer Decl. ¶ 3, Ex. A). President Bush publicly acknowledged the Program after *The New York Times* reported its existence in December 2005. Pet. App. 244a (Jaffer Decl. ¶ 4, Ex. B). The President reauthorized the Program repeatedly between 2001 and 2007. Pet. App. 244a (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 (Jaffer Decl. ¶ 6, Ex. D). The interceptions were not predicated on judicial warrants or any other form of judicial authorization; nor were they predicated on any determination of criminal or foreign intelligence probable cause. Instead, according to then-Attorney General Alberto Gonzales and then-NSA Director 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." Pet. App. 244a–245a (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, as a result, "any electronic surveillance that was occurring as part of the [Program] will now be conducted subject to the approval of the Foreign Intelligence Surveillance Court." Pet. App. 245a, 312a (Jaffer Decl. ¶ 8, Ex. F). 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 (Jaffer Decl. ¶ 9, Ex. G). After these modifications, the administration pressed Congress to amend FISA to permit the warrantless surveillance of Americans' international communications.

C. The FISA Amendments Act of 2008

President Bush signed the FAA into law on July 10, 2008. While leaving FISA in place for purely domestic communications, the FAA revolutionized the FISA regime by allowing the mass acquisition, without individualized judicial oversight or supervision, of Americans' international communications.[2] 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 intelligence information." 50 U.S.C. 1881a(a). The government is prohibited from "intentionally target[ing] any person known at the time of the acquisition to be located in the United States," *id.* § 1881a(b)(1), but an acquisition authorized under the FAA may nonetheless sweep up the international communications of U.S. citizens and residents.

Before authorizing surveillance under § 1881a—or, in some circumstances, within seven days of authorizing such surveillance—the Attorney General and the DNI must submit to the FISA Court an application for an order (hereinafter, a "mass acquisition order"). *Id.* § 1881a(a), (c)(2). A mass acquisition order is a kind of blank check, which once obtained permits—without further judicial authorization—whatever surveillance the government may choose to engage in, within broadly drawn parameters, for a period of up to one year. To

[2] Plaintiffs use the term "international" to describe communications that either originate or terminate (but not both) outside the United States.

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

Importantly, the Act does not require the government to demonstrate to the FISA Court that its surveillance targets are foreign agents, engaged in criminal activity, or connected even remotely with terrorism. Indeed, the statute does not require the government to identify its surveillance targets at all. Moreover, the statute expressly provides that the government's certification is not required to identify

the facilities, telephone lines, email addresses, places, premises, or property at which its surveillance will be directed. *Id.* § 1881a(g)(4).

Thus, a single mass acquisition order may be used to justify the surveillance of communications implicating thousands or even millions of U.S. citizens and residents. It could authorize the acquisition of all communications to and from specific countries 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. To effect such surveillance under the FAA, the government would have to "target" people overseas, but that targeting of people overseas would guarantee the collection of countless Americans' private communications.

Nor does the Act place meaningful limits on the government's retention, analysis, and dissemination of information that relates to U.S. citizens and residents. The Act requires the government to adopt "minimization procedures," *id.* § 1881a, that are "reasonably designed . . . to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons," *id.* §§ 1801(h)(1), 1821(4)(A). The Act does not, however, prescribe specific minimization procedures or give the FISA Court any authority to oversee the implementation of those procedures. Moreover, the FAA 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) (referring to *id.* §§ 1801(h)(1), 1821(4)(A)). The phrase "foreign intelligence information" is defined broadly to include, among other things, all information concerning terrorism, national security, and foreign affairs. *Id.* § 1801(e).

As the FISA Court has itself acknowledged, its role in authorizing and supervising FAA 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).[3] The judiciary's traditional role under the Fourth Amendment is to serve as a gatekeeper for particular acts of surveillance, but its role 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 does not supervise the implementation of the government's targeting or minimization procedures. In short, the role that the FISA Court plays under the FAA bears no resemblance to the role that it has traditionally played under FISA.

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

D. 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 dragnet, warrantless surveillance of the international communications of U.S. citizens and residents. Plaintiffs sought a declaration that the law is unconstitutional and an order permanently enjoining its use. In support of their motion for summary judgment, plaintiffs submitted nine declarations, including two expert declarations. The government opposed plaintiffs' motion and cross-moved for summary judgment, but without submitting any evidence. Pet. App. 17a ("The government did not submit any evidence of its own either in opposition to the plaintiffs' submissions, or in support of its own summary judgment motion."). Accordingly, the factual record below consisted entirely of evidence submitted by plaintiffs and not challenged by defendants.[4]

As set forth in the record: plaintiffs are attorneys and human rights, labor, legal, and media

[4] Pet. App. 77a ("In opposing the plaintiffs' motion for summary judgment, and in responding to the plaintiffs' Statement of Undisputed Facts pursuant to Local Rule 56.1 . . . the Government [made] no reference to any evidence except that submitted by the plaintiffs. . . . At oral argument, the government clarified that it was accepting the factual submissions of the plaintiffs as true for purposes of these motions.").

organizations whose work requires them to engage in sensitive and sometimes privileged telephone and email communications with colleagues, clients, journalistic sources, witnesses, experts, foreign government officials, and victims of human rights abuses located outside the United States. Pet. App. 399a. Because of the nature of their communications and the identities and geographic location of the individuals with whom they communicate, plaintiffs reasonably believe that their confidential communications will be acquired, analyzed, retained, and disseminated under the FAA.

As further set forth in plaintiffs' declarations, some plaintiffs communicate by telephone and email with people the government believes or believed to be associated with terrorist organizations. Pet. App. 349a–351a (Royce Decl. ¶¶ 3–6) (discussing Royce's communications in relation to her representation of Mohammedou Ould Salahi, a prisoner held at Guantánamo Bay); Pet. App. 343a–344a (Mariner Decl. ¶ 8) (discussing Mariner's communications with individuals who were previously held in CIA custody abroad); Pet. App. 357a (Walsh Decl. ¶ 6) (discussing Washington Office on Latin America (WOLA) staff members' communications with individuals charged under El Salvador's anti-terrorism legislation).

Several plaintiffs communicate by telephone and email with political and human rights activists who oppose governments that are supported economically or militarily by the United States. Pet. App. 337a (Klein Decl. ¶¶ 6–7) (discussing Klein's communications with foreign political activists and political groups in, among other countries, Colombia); Pet. App. 357a (Walsh Decl. ¶ 6) (discussing WOLA

staff members' communications with leaders of protest movements in El Salvador).

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) (discussing Mariner's communications with people in the Middle East, North Africa, Central Asia, and South Asia); Pet. App. 356a–357a, 361a (Walsh Decl. ¶¶ 5, 11) (discussing WOLA staff members' communications with people in, among other countries, Colombia, Cuba, and Venezuela); Pet. App. 365a–366a (Hedges Decl. ¶¶ 4, 7) (discussing Hedges' communications with contacts in Iran, Syria, Libya, Kosovo, Bosnia, Sudan, and Palestine).

All plaintiffs exchange information that constitutes "foreign intelligence information" within the meaning of the FAA. Pet. App. 352a–353a (Royce Decl. ¶ 8); Pet. App. 343a–344a (Mariner Decl. ¶ 8); Pet. App. 356a–361a (Walsh Decl. ¶¶ 5–6, 8–9, 11); Pet. App. 336a–337a (Klein Decl. ¶¶ 5–6); Pet. App. 366a (Hedges Decl. ¶ 7).

The undisputed record shows that the FAA injures plaintiffs by disrupting their ability to engage in confidential communications that are integral to their professional activities. Pet. App. 351a–353a (Royce Decl. ¶¶ 7–9); Pet. App. 344a–346a (Mariner Decl. ¶¶ 9–11); Pet. App. 357a–362a (Walsh Decl. ¶¶ 7, 9–13); Pet. App. 337a–338a (Klein Decl. ¶¶ 7–9). It compromises plaintiffs' 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. 353a (Royce Decl. ¶ 9); Pet. App. 345a (Mariner Decl. ¶ 10); Pet. App. 359a–362a (Walsh Decl. ¶¶ 9–13); Pet. App. 338a (Klein Decl. ¶ 9); Pet. App. 366a–367a (Hedges Decl. ¶¶ 8–9); Pet. App. 372a–373a (McKay Decl. ¶¶ 10–11); Pet. App. 381a–382a, 386a–387a (Gillers Decl. ¶¶ 10, 12, 23). It has particularly serious consequences for those plaintiffs who are attorneys. Pet. App. 351a–353a (Royce Decl. ¶¶ 6–9); Pet. App. 371a–373a, 375a (McKay Decl. ¶¶ 8–11, 14); Pet. App. 381a–387a (Gillers Decl. ¶¶ 10–23).

The challenged law compels plaintiffs to take costly and burdensome measures to protect the confidentiality of sensitive and privileged communications. Pet. App. 338a (Klein Decl. ¶ 9); Pet. App. 366a–367a (Hedges Decl. ¶¶ 8–9); Pet. App. 371a–373a, 375a (McKay Decl. ¶¶ 8, 10–11, 14). Some plaintiffs have already forgone communications that are particularly sensitive. Pet. App. 366a–367a (Hedges Decl. ¶¶ 8–9); Pet. App. 371a–373a (McKay Decl. ¶¶ 8, 10).

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

> Because of the status of their clients, the identity and location of witnesses and sources, and the breadth of the FAA authority, [the lawyer 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).

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

E. Procedural History

The district court denied plaintiffs' motion for summary judgment and 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 reached that conclusion because the statute does not directly regulate plaintiffs' conduct and (in its view) does not "require [them] to do anything." Pet. App. 96a. The

court also found relevant, and perhaps dispositive, that the challenged statute does not directly authorize surveillance but rather permits the FISA Court to authorize it. Pet. App. 89a. 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 also rejected plaintiffs' second asserted basis for standing—that the statute had already caused them to suffer concrete injuries. It held that these injuries amounted only to the kind of "subjective chill" that the courts had found insufficient in earlier cases. Pet. App. 101a–103a.

A unanimous three-judge panel of the Second Circuit vacated the district court's judgment and upheld plaintiffs' standing. As an initial matter, 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 to recognize 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. In so doing, the court rejected the government's argument that plaintiffs could establish standing only by showing that interception of their communications was "certain" or "effectively certain." Pet. App. 30a. 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 6-6 vote.[5] Pet. App. 114a–115a.

REASONS FOR DENYING THE PETITION

I. The Second Circuit's decision was correct.

To satisfy the standing requirements of Article III, plaintiffs must establish that (i) they have suffered a "concrete and particularized" injury that is "actual or imminent" rather than "conjectural" or "hypothetical"; (ii) there is a causal connection between their injury and the challenged statute or conduct, such that the injury is "fairly traceable" to the defendant's alleged violation; and (iii) it is "likely" that their injury would be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

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[5] Judge Hall dissented from the denial of rehearing en banc solely because he believed that the case involved a question of exceptional importance warranting en banc review. Pet. App. 196a. As senior judges, Judges Calabresi and Sack, two of the members of the panel that upheld plaintiffs' standing, were not eligible to participate in deciding whether to grant the government's petition for rehearing en banc. Pet. App. 116a n.1.

Applying this standard, the Second Circuit correctly concluded that plaintiffs have standing for two independent reasons. First, plaintiffs have suffered present injuries that are fairly traceable to the FAA: because of professional and ethical obligations, they have taken costly and burdensome measures to protect their sensitive communications from interception. *See, e.g.*, Pet. App. 28a. Second, plaintiffs have established justiciable future injuries, because they have demonstrated a "realistic danger" that their communications will be monitored under the Act. *See, e.g.*, Pet. App. 30a–31a. The court of appeals rightly held that both of these injuries would be redressed by a favorable ruling. Pet. App. 40a–41a & n.24.

a. Plaintiffs have standing because they have already suffered concrete and identifiable injuries that are fairly traceable to the FAA.

Plaintiffs have satisfied the injury-in-fact requirement by demonstrating, through uncontroverted evidence, that the challenged statute has already caused them to suffer professional and economic harms. The court of appeals accurately characterized this present injury as "the most mundane of injuries in fact." Pet. App. 26a.

As the Second Circuit observed, Pet. App. 26a, 36a–41a, 43a, 47a–50a, the undisputed evidence establishes that the FAA has caused the plaintiffs concrete injuries by compelling them to take costly and burdensome measures to protect the confidentiality of their international communications. In some instances, the statute has compelled them to forgo certain particularly sensitive

communications altogether. *See, e.g.*, Pet. App. 366a–367a (Hedges Decl. ¶¶ 8–9); Pet. App. 371a–373a (McKay Decl. ¶¶ 8, 10). Some plaintiffs are compelled to travel long distances at considerable expense to collect information in person that they otherwise would have been able to collect over the phone or by email. *See, e.g.*, Pet. App. 367a (Hedges Decl. ¶ 9). In some instances, third parties have refused to share information with plaintiffs because of the risk that the government may be monitoring their communications. *See, e.g.*, Pet. App. 338a (Klein Decl. ¶ 8–9); Pet. App. 352a–353a (Royce Decl. ¶ 8). As a result, the challenged statute has compromised plaintiffs' ability to locate witnesses, cultivate sources, gather information, communicate confidential information to their clients, and engage in other legitimate and constitutionally protected communications. *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).

The government denigrates plaintiffs' injuries as mere "subjective chill," Pet. 23–24, of the kind this Court found insufficient to support standing in *Laird v. Tatum*, 408 U.S. 1 (1972). This case, however, bears little resemblance to that one. *See* Pet. App. 50a–60a. *Laird* involved a challenge to a surveillance program, but the information gathered under the challenged program was "nothing more than a good newspaper reporter would [have been] able to gather by attendance at public meetings and the clipping of articles from publications available on any newsstand." 408 U.S. at 9. Moreover, the *Laird* plaintiffs acknowledged that they in fact had not been "cowed and chilled" by the threat of the

surveillance. *Id*. at 14 n.7. The *Laird* plaintiffs were found to lack standing because, in the Court's view, they failed to demonstrate *any* injury. *Laird* certainly did not involve the kinds of injuries asserted here.

Nor did *Laird* purport to set out a new and virtually prohibitive standing rule for challenges to government surveillance. Indeed, *Laird* expressly distinguished allegations of "subjective chill," which it held to be inadequate to establish injury in fact, from allegations of "specific present objective harm," which it indicated *would* be sufficient. *Id*. at 13–14 ("Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." (citation omitted)); *see also United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 (1973) (stating that plaintiffs who allege "specific and perceptible harm that distinguishe[s] them from other citizens" will have presented a cognizable injury).

Plaintiffs here have suffered the kinds of "specific present objective harms" that *Laird* made clear are sufficient to support standing. Unlike the *Laird* plaintiffs, plaintiffs here have pointed to specific instances in which their professional work has been compromised because of the FAA. Unlike the *Laird* plaintiffs, plaintiffs here have demonstrated that they have already suffered economic harm because of the statute. And whereas the plaintiffs in *Laird* had not altered their conduct in response to the challenged program, plaintiffs here *have* altered their conduct in ways that are not only prudent and reasonable but, at least in some

instances, obligatory under codes of professional conduct. As the appeals court observed, "[t]his case is a far cry from *Laird*." Pet. App. 54a.[6]

The government's argument that plaintiffs' *present* injuries are not injuries within the meaning of Article III, Pet. 23, conflates the first two prongs of the Article III standing inquiry: injury in fact and causation. *See* Pet. App. 43a ("The heart of the government's challenge to the plaintiffs' standing based on the indirectness of their injury . . . goes to whether the plaintiffs' injuries are causally connected to the challenged legislation."). Plaintiffs have unquestionably suffered an injury in fact by incurring certain costs and forgoing certain communications. The relevant question, then, is simply whether the FAA caused this injury. The answer to that question does not turn on the imminence of the injury—an issue relevant only in determining the justiciability of *future* injury. *See* Pet. 23–25. Rather, it turns on whether plaintiffs' present injury is "fairly traceable to the challenged action." *Summers*, 555 U.S. at 493.

Plaintiffs' injuries are fairly traceable to the FAA. As the court of appeals observed, Pet. App. 37a, the FAA plainly authorizes the acquisition of plaintiffs' international communications. On its face, it authorizes the government to monitor any international communication as long as (i) the government's surveillance "targets" are non-U.S.

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[6] Much of the government's petition turns on this Court's decision in *Summers v. Earth Island Institute*, 555 U.S. 488 (2009). That decision concerned the showing necessary to establish *future* harm. *See, e.g.*, *id.* at 495–96. It is not relevant to plaintiffs' claim of standing based upon their present injuries.

persons outside the United States, and (ii) the programmatic purpose of any particular surveillance program is to gather "foreign intelligence information." 50 U.S.C. § 1881a(b), (g)(2)(A)(v). While the parties disagreed about the significance of the statute's minimization requirements—that is, the statute's restrictions on the government's use, retention, and dissemination of acquired communications—not even the government proposed that these requirements protected plaintiffs' communications against interception in the first instance. To the contrary, the government expressly acknowledged that plaintiffs' communications could be intercepted under the Act. Defendants' Memorandum in Support of Defendants' Cross-Motion for Summary Judgment at 33, *Amnesty Int'l v. McConnell*, 646 F. Supp. 2d 633 (S.D.N.Y. 2009) (No. 1:08-CV-6259), ECF No. 10 (acknowledging that Americans' communications can be acquired as an "incident" to surveillance of overseas targets).[7]

Plaintiffs established not only that the FAA could be used to monitor their international communications but that their communications were *likely* to be monitored under it. The Second Circuit correctly noted that plaintiffs communicated with "precisely the sorts of individuals that the government will most likely seek to monitor":

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[7] Since oral argument before the Second Circuit, the government has released several hundred pages of documents under the Freedom of Information Act relating to the FAA. Those records confirm that the government 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.

individuals whom the U.S. government believes to be terrorists, or to be associated with terrorists; political and human rights activists who oppose governments that the United States supports economically or militarily; and individuals located in geographic areas that are a special focus of the U.S. government's counterterrorism or diplomatic efforts. Pet. App. 37a. The Second Circuit found that "plaintiffs' assessment that these individuals are likely targets of FAA surveillance is reasonable." Pet. App. 37a. It observed, moreover, that "the government [had] not disputed that assertion." Pet. App. 37a.

For these reasons, plaintiffs' present injuries are fairly traceable to the FAA.

The government's chief response—that plaintiffs' injuries are "self-imposed," Pet. 24—ignores the record and misunderstands the law. Plaintiffs' uncontroverted declarations establish that the FAA *compels* them to take costly and burdensome measures to protect the confidentiality of their communications. In theory, of course, plaintiffs could have declined to take these measures and simply suffered the consequences, including, in the case of the attorney-plaintiffs, violation of controlling ethical rules and exposure to possible bar discipline. The law is clear, however, that where a defendant's conduct puts a plaintiff to this kind of "choice," the plaintiff has standing to challenge that conduct.

This Court's decision in *Meese v. Keene*, 481 U.S. 465 (1987), is instructive. In that case a state legislator sued to enjoin application of a statute that required the National Film Board of Canada to

register certain documentaries as "political propaganda." *Id.* at 467–68. While the statute did not impose any obligation on the plaintiff, the plaintiff submitted evidence that he would suffer reputational harm if he were to screen films that the government had labeled "political propaganda." *Id.* at 473. Although the plaintiff's choice to avoid the injury by simply declining to screen the films was voluntary in some sense, *id.* at 475, this Court held that he nonetheless had standing because "the Act 'puts the plaintiff to the Hobson's choice of foregoing the use of the three Canadian films for the exposition of his own views or suffering an injury to his reputation.'" *Id.* (quoting approvingly the district court decision).

The Court's decisions in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000), and *SCRAP* also supply useful guidance. In *Laidlaw*, environmental organizations brought suit under the Clean Water Act against a corporation that they alleged was exceeding statutory limits on the discharge of certain pollutants. The plaintiffs' asserted injury consisted of their cessation of certain activities—for example swimming, camping, and bird-watching—for fear of exposure to pollution discharged by the defendant. *Id.* at 182. The Court held that the injuries were not self-inflicted but reasonable responses to the threat of exposure to contaminated water. *Id.* at 183–84. In *SCRAP*, similarly, plaintiffs' injuries consisted principally of their decision to forgo the use of certain natural resources—"forests, streams, mountains, and other resources"—because of the defendants' allegedly unlawful actions. 412 U.S. at 685. The Court held that plaintiffs who had curtailed their use

of natural resources in response to the defendants' challenged policy had standing to challenge that policy. *Id.*

As in *Meese*, *Laidlaw*, and *SCRAP*, plaintiffs here have taken measures in reasonable response to government conduct that they allege is unlawful. The Second Circuit correctly held that plaintiffs therefore have standing to challenge the conduct.

b. Plaintiffs have standing because they have an "actual and well-founded fear" that their communications will be monitored under the Act in the future.

As the Second Circuit noted, Pet. App. 30a–31a, where First Amendment rights are at stake, plaintiffs can satisfy the injury requirement by demonstrating an "actual and well-founded fear" of future harm. *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 384 (1988).[8] The "actual and well-founded fear" test is more lenient than the test that applies outside the First Amendment context, in recognition of the fact that "free expression [is] of transcendent value to all society, and not merely to those exercising their rights." *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965); *see also Am. Booksellers Ass'n*,

[8] The potential interception of plaintiffs' private communications under the FAA undeniably implicates their First Amendment rights. *See, e.g.*, *U.S. Dist. Court*, 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."). The government has not argued otherwise.

484 U.S. at 392–93. Even outside the First Amendment context, however, a plaintiff threatened with injury need not await the consummation of that injury before bringing suit. *Davis v. FEC*, 554 U.S. 724, 734 (2008) ("[T]he injury required for standing need not be actualized."); *Blum v. Yaretsky*, 457 U.S. 991, 1000 (1982). It is enough that she demonstrate a "realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt*, 442 U.S. at 298 (emphasis added); *see also Pennell v. City of San Jose*, 485 U.S. 1, 8 (1988).

The Second Circuit properly concluded that plaintiffs had satisfied not only the First Amendment "actual and well-founded fear" test but also the more stringent one that applies outside the First Amendment context. Pet. App. 31a. As noted above, the court observed that the statute plainly authorizes the acquisition of plaintiffs' international communications, a fact conceded by the government. Pet. App. 36a–37a. Moreover, plaintiffs established that their communications were *likely* to be monitored. Pet. App. 37a (noting that plaintiffs communicated with "precisely the sorts of individuals that the government will most likely seek to monitor"); Pet. App. 37a ("The plaintiffs' assessment that these individuals are likely targets of FAA surveillance is reasonable, and the government has not disputed that assertion.").

The government, relying principally on two sentences from *Summers v. Earth Island Institute*, 555 U.S. 488, 499–500 (2009), argues that the appeals court erred in failing to require that plaintiffs show "imminent" injury, but the government's reliance on *Summers* is misplaced. The

Second Circuit found that plaintiffs' injuries were "real and immediate," Pet. App. 29a; if there is a difference between that standard and the "imminence" standard, it is not a material one. Moreover, *Summers* was a case in which plaintiffs had neither suffered a present injury nor established any substantial likelihood that they would be injured in the future by the regulation they challenged. 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."). It was a case, in other words, in which the Court concluded that plaintiffs could not satisfy even the most lenient 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.").

The government also argues that plaintiffs lack standing because the government has "multiple means" of monitoring plaintiffs' communications. Pet. 26. That the government has other means of intercepting communications, however, is beside the point. Plaintiffs have challenged the FAA because that statute has unique procedural defects and because those defects both vastly increase the likelihood that their communications will be monitored and compel them to take measures to protect their communications from interception. This Court has made clear that "a 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); *see also* Pet. App. 126a–127a.

The appeals court was correct to find that plaintiffs have standing because of the likelihood that their communications will be monitored in the future.

c. The government's novel theory of standing would insulate the Act from meaningful judicial review.

The appeals court's decision was consistent with well-settled precedent of this Court. The Court should be particularly wary of departing from that precedent here because to accept the government's alternative vision of Article III would effectively insulate the FAA and other foreign-intelligence surveillance statutes from meaningful judicial review.

Neither the FAA nor other foreign intelligence surveillance statutes have general notice requirements, *In re Sealed Case*, 310 F.3d 717, 741 (FISA Ct. Rev. 2002), and accordingly, the vast majority of people whose communications are monitored under these statutes will never learn that their privacy has been compromised. Even those who are criminally prosecuted with FAA-derived evidence are unlikely ever to learn about it. While the FAA requires the government to notify a defendant if it intends to introduce FAA-derived evidence at trial, 50 U.S.C. § 1881e, the notice provision does not require the government to distinguish surveillance conducted under the FAA from surveillance conducted under FISA. Notably, the FAA has been in place for almost four years, but plaintiffs know of

no case in which the government has informed a defendant that it is relying on FAA-derived evidence. Even if it could be assumed that the government would one day introduce FAA-derived evidence in a criminal trial, it would be inconsistent with the purposes of the Fourth Amendment to tell plaintiffs already injured by the FAA that their constitutional rights can be vindicated only if the government in its own discretion decides one day to introduce FAA-derived evidence against someone else. *Cf. United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) ("The Fourth Amendment functions differently [than the Fifth Amendment]. . . . [A] violation of the Amendment is 'fully accomplished' at the time of an unreasonable intrusion." (quoting *United States v. Calandra*, 414 U.S. 338, 354 (1974))).

In the appeals court, the government argued that review by the FISA Court would be sufficient to ensure the constitutionality of surveillance carried out under the FAA. However, while the FAA invests the FISA Court with jurisdiction to examine the lawfulness of targeting and minimization procedures, 50 U.S.C. § 1881a(i), that court has stated that "it is not required, in the course of this [1881(a)(i)] review . . . to . . . conduct a facial review of the constitutionality of the statute," *In re Proceedings Required by § 702(i) of the FISA Amendments Act of 2008*, No. Misc. 08-01, slip op. at 10 (FISA Ct. Aug. 27, 2008). Moreover, the FISA Court's review of the targeting and minimization procedures is conducted *ex parte* and *in camera*. A secret proceeding limited to the narrow review of targeting and minimization procedures is not a substitute for an adversarial and open adjudication of constitutional claims brought by

Americans whose communications may be—and likely already have been—swept up *en masse*.[9]

In the end, what the government disguises as a narrow, technical argument about justiciability reveals itself to be this sweeping proposition: The courts have no meaningful role to play in protecting Americans' international communications from wholesale government surveillance, or even in determining whether that surveillance is consistent with the Constitution. For sound strategic reasons, the government avoids stating the proposition forthrightly, but it is the inescapable consequence of the argument it advances. Nothing in this Court's precedents countenances such a result.

II. Multiple other reasons counsel against granting the government's petition for interlocutory review.

a. The government will suffer no prejudice if review is delayed until final judgment.

The decision of the court of appeals is interlocutory, not final. It does not declare the FAA to be unconstitutional. It does not enjoin any ongoing surveillance program. It does not foreclose the government from relying on the FAA to initiate

[9] The FAA gives "electronic communications service providers" the right to challenge the government's surveillance directives before the FISA Court. Third-party service providers, however, will rarely have any incentive to file the kinds of challenges that might protect plaintiffs' rights. *See* 50 U.S.C. § 1881a(h)(3) (providing that "[n]o cause of action shall lie in any court" against electronic communications service providers that comply with directives issued under the FAA).

any new surveillance program. It simply permits plaintiffs who the government *concedes* have been harmed by the FAA, Pet. App. 124a n.6, to challenge the statute's constitutionality. While the Court plainly has jurisdiction to grant interlocutory petitions, review before final judgment is appropriate only in "extraordinary cases," *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 257–58 (1916), in which "[t]he facts of the case require an earlier interposition" by the Court, *The Conqueror*, 166 U.S. 110, 114 (1897). *See also Am. Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co.*, 148 U.S. 372, 384 (1893) (interlocutory review appropriate only where necessary to prevent "extraordinary inconvenience and embarrassment in the conduct of the cause"). This standard is not satisfied here.

The government's suggestion that its interests will be prejudiced if the district court adjudicates the constitutionality of the FAA "in the abstract, without the essential assistance of concrete facts concerning any actual, imminent surveillance affecting the persons challenging the law," is unpersuasive. The record is replete with "concrete facts," all of them undisputed, describing plaintiffs' basis for believing that their communications will be monitored under the law, the effect the law has already had on plaintiffs' professional activities, and the measures that plaintiffs have already had to take to protect their communications from possible interception. Indeed, the government argued below that the district court could adjudicate the merits of the dispute without further factual development, and it moved for summary judgment on that basis. Pet. App. 2a–3a. Further, there is no material dispute here about the proper construction of the statutory

provisions that plaintiffs challenge; the government did not dispute below that the statute "permits broad monitoring through mass surveillance orders that authorize the government to collect thousands or millions of communications, including communications between the plaintiffs and their overseas contacts." Pet. App. 36a; *see also* Pet. App. 36a ("the government has not controverted [plaintiffs'] interpretation [of the statute] or offered a more compelling one"); Pet. App. 122a ("At oral argument, we asked the government to clarify what it found inaccurate in the plaintiffs' characterization [of the statute's scope], and again it failed to do so.").

In the final paragraph of its petition, the government asserts without explanation that requiring it even to defend the constitutionality of the FAA could result in "disrupt[ion to] important Executive Branch activities protecting the national security." Pet. 34. This assertion is puzzling. The appellate court's decision does not enjoin the government from conducting surveillance under the FAA or any other authority. The government's assertion is nonetheless noteworthy, because it makes clear that the government's concern is not with the possibility that the statute will be subject to judicial review *in this case* but with the possibility that the statute will be subject to judicial review at all.

This is not a case in which interlocutory review is necessary to prevent "extraordinary inconvenience and embarrassment in the conduct of the cause." *Am. Constr. Co.*, 148 U.S. at 384. The government would suffer no prejudice if review were delayed until final judgment. Eugene Gressman et

al., *Supreme Court Practice* 82 (9th Ed. 2007) ("Supreme Court review of a final judgment opens up the entire case, including all relevant interlocutory orders that may have been entered by the court of appeals or the district court.").

b. The challenged law is scheduled to sunset in December.

When it enacted the FAA in August 2008, Congress provided that the surveillance authorities at issue in this case would expire on December 31, 2012. FAA § 403(b). The sunset provision was meant to ensure that the most far-reaching changes to surveillance law since 1978 would not be made permanent without further debate about the scope of the law, the sufficiency of the law's safeguards for civil liberties, and the manner in which the law was being implemented. *See, e.g.*, 154 Cong. Rec. S229 (daily ed. Jan. 24, 2008) (statement of Sen. Rockefeller) ("This bill provides a significant new authority, and it is essential—because it is a significant new authority in what is still emerging in the collection of intelligence—that we carefully monitor the implementation of this authority and revisit it to ensure it is working as we now envision."); 154 Cong. Rec. S242 (daily ed. Jan. 24, 2008) (statement of Sen. Dodd) ("I believe that, when making such a dramatic change in the Nation's terrorist surveillance regime, we ought to err on the side of some caution. Once the new regime has been tested, once its effectiveness against terrorism and its compromises of privacy have been weighed, we deserve to have this debate again."); 154 Cong. Rec. S251 (daily ed. Jan. 24, 2008) (statement of Sen. Kennedy) ("Because this legislation will make major

untested changes to the FISA system and the pace of technology change will only increase, we should evaluate it sooner rather than later.").[10]

Since the FAA's enactment, Congress has considered proposals to extend § 1881a beyond December 2012. *See, e.g.*, FISA Sunsets Extension Act of 2011, S. 149, 112th Cong. (2011) (proposing to extend § 1881a to the end of 2013); Intelligence Authorization Act for Fiscal Year 2012, S. 1458, 112th Cong. (2011) (proposing to extend § 1881a to the end of 2015). None of these proposals, however, has been adopted. Accordingly, Congress will consider later this year whether to reauthorize the FAA in its current form, modify it, or let it expire. *See* Letter from Sens. Ron Wyden and Mark Udall to Dir. of Nat'l Intelligence James R. Clapper, Jr. (July 14, 2011), *available at* http://1.usa.gov/pHpW4Y (noting that "[i]n the coming months, Congress is likely to consider various legislative initiatives that would modify different aspects of domestic surveillance law" and, in anticipation of such initiatives, requesting information about implementation of FAA).

The uncertainty about the law's future counsels against granting the government's petition. The Court should not reach out to review an interlocutory decision when the statute at the center of the dispute is scheduled to expire within months, and when the statute may be modified in unforeseen ways even if reenacted. Interlocutory review would

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[10] These three statements are available at http://www.gpo.gov/fdsys/pkg/CREC-2008-01-24/pdf/CREC-2008-01-24-pt1-PgS227-3.pdf.

be particularly ill-advised here because plaintiffs' standing argument turns in part on their contention that the law permits the dragnet surveillance of Americans' international communications. Pet. App. 131a (noting connection between standing argument and the Act's scope); Pet. App. 138a–139a & n.4 (same). If Congress were to modify that feature of the law, plaintiffs' claim to standing would be affected correspondingly.

c. The circuit court decisions that the government contends are divergent are reconcilable.

The government contends that the Second Circuit's decision is in conflict with decisions of the Sixth and D.C. Circuits, but the three decisions are reconcilable, as Judge Lynch noted. Pet. App. 58a & n.32; Pet. App. 130a–131a.

ACLU v. NSA, 493 F.3d 644 (6th Cir. 2007), which involved a challenge to the Bush administration's warrantless wiretapping program, concerned the particularized surveillance of individual targets believed to be associated with al Qaeda, whereas the statute at issue here authorizes dragnet surveillance without any determination, judicial or even administrative, of individualized suspicion. This difference is crucial because plaintiffs' injury stems in large part from the scope of the surveillance authority they challenge. It is because of the scope of the FAA that plaintiffs' communications are likely to be intercepted, and it is because plaintiffs' communications are likely to be intercepted that they have been compelled to limit the information they exchange by telephone and

email. Pet. App. 345a–346a (Mariner Decl. ¶ 11); Pet. App. 385a–386a (Gillers Decl. ¶ 21).

ACLU v. NSA is also distinguishable because that case involved a challenge to a surveillance program launched secretly by the executive (and exposed only partially by the media), whereas this case involves a challenge to a public law. There is no question, of course, that executive programs may be subject to judicial challenge. However, the secrecy surrounding the warrantless wiretapping program, whether legitimate or not, made it more difficult for the plaintiffs in *ACLU v. NSA* to establish the precise scope of the program, more difficult for them to show that their communications were likely to be intercepted, and more difficult for them to show that the measures they had taken to protect their communications were objectively reasonable. Here, the political branches have published the scope of the government's surveillance authority, and they have described, in a public law, the safeguards that are meant to protect Americans' rights.

Finally, *ACLU v. NSA* is distinguishable because there the government contended that the question of whether plaintiffs' communications were likely to be acquired under the challenged program could not be answered without the disclosure of information protected by the state secrets privilege. Defendants Memorandum in Support of Motion to Dismiss or, in the Alternative, for Summary Judgment at 25, *ACLU v. NSA*, 438 F. Supp. 2d 754 (E.D. Mich. 2006) (No. 06-CV-10204), ECF No. 34 (contending that, because of the state secrets privilege, the government would be "unable to present facts that would bear upon the question of

standing—for example, by showing that [plaintiffs] . . . have no reasonable fear of being targeted"). Here, by contrast, the government has not invoked the state secrets privilege and has not controverted plaintiffs' assertion that their communications are likely to be acquired under the statute. To the contrary, the government declined to contest the evidence submitted by the plaintiffs and submitted a cross-motion for summary judgment. Pet. App. 17a–18a.

United Presbyterian Church v. Reagan, 738 F.2d 1375 (D.C. Cir. 1984), is also distinguishable. That case involved what the D.C. Circuit characterized as a challenge to "the constitutionality of the entire national intelligence-gathering system," *id.* at 1381, whereas this case involves a challenge to a specific federal statute brought by plaintiffs who have already suffered concrete injuries because of it. In *United Presbyterian Church*, moreover, the record failed to establish that the harms the plaintiffs had suffered were anything other than subjective and self-imposed. *Id.* Here, plaintiffs have established that the challenged Act has compelled them to take costly and burdensome measures to protect the privacy of their communications. An expert in legal ethics has testified that these measures are not simply prudent and reasonable responses to the challenged law but, at least in some instances, required by the relevant code of professional ethics. The government has failed to dispute any of this evidence.

CONCLUSION

The petition for a writ of certiorari should be denied.

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

Arthur N. Eisenburg
Christopher T. Dunn
Melissa Goodman
New York Civil Liberties
Union Foundation
125 Broad Street
New York, NY 10004

Charles S. Sims
Matthew J. Morris
Proskauer Rose LLP
1585 Broadway
New York, NY 10036

Dated: April 17, 2012