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 *AMICUS CURIAE* OF CONSTITUTIONAL ACCOUNTABILITY CENTER IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. CAC accordingly has a strong interest in this case and the scope of the protections in Article III and the Bill of Rights. CAC has filed *amicus curiae* briefs in this Court in cases raising significant issues regarding the text and history of the original Constitution and the Bill of Rights, including *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), and *National Federation of Independent Business v. Sebelius,* 132 S. Ct. 2566 (2012).

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[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondents—including lawyers, journalists, and human rights researchers—filed a lawsuit seeking to strike down as unconstitutional the Foreign Intelligence Surveillance Act Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 ("FAA" or "Act"),[2] a statute that they assert invested the government with sweeping new authority to collect Americans' international communications from telecommunications facilities inside the United States. Respondents argue that "[t]he Act permits the government to collect these communications *en masse*—without having to demonstrate or even assert to any court that any party to any of the communications is a terrorist, an agent of a foreign power, or a suspected criminal." Br. for Resp. at 1. The U.S. Court of Appeals for the Second Circuit ruled that that Plaintiffs-Respondents had standing to raise this constitutional challenge. Now, Petitioner Clapper and the federal government ask this Court to block judicial review of Respondents' challenge to these allegedly unconstitutional surveillance procedures.

The text and history of the Constitution support judicial review of Respondents' constitutional claims. The Founders crafted Article

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[2] The challenged provision is Section 702 of the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C.A. § 1881a, which was enacted in 2008 as part of the FISA Amendments Act (FAA), Pub. L. No. 110-261, sec. 101(a)(2), § 702, 122 Stat. 2438.

III's judicial power as a vital check on unlawful actions of the legislature, which is precisely what Respondents claim in this case. Fearing legislative overreach, the Constitution's Framers considered a variety of safeguards, from a judicial veto on proposed legislation to the enduring, robust judicial review ultimately written into Article III. The records of the Constitutional Convention demonstrate that the Framers were deeply concerned that the national legislature would enact laws contravening the Constitution and individual liberty. The Framers unanimously agreed that the authority of the judiciary to intervene was needed to ensure the constitutionality of national laws.

While the government suggests that the separation-of-powers concerns reflected in standing doctrine support blocking access to the courts in this case, Gov't Br. at 23, 35, history shows that allowing the judiciary to check legislative infringements on individual rights is essential to our constitutional system. Indeed, it was the assurance of robust judicial review of legislative action that encouraged the supporters of the Bill of Rights. Concerned that an enumeration of fundamental rights could end up as merely a parchment barrier to tyranny, the supporters of the Bill of Rights counted on the availability of meaningful judicial review to protect the rights and liberties set forth in the Amendments.

Of course, the Framers did not establish courts of mere complaint: James Madison and others confirmed that cases before the federal courts under Article III must be appropriate for the

judiciary to resolve, and Court precedent implements this concern by ensuring that only individuals with a redressable "injury in fact" press their claims before the courts. *See* John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1232 (1993) ("The Court's recognition that injury in fact is a requirement of Article III ensures that the courts will more properly remain concerned with tasks that are, in Madison's words, 'of a Judiciary nature.'"). Because Article III requires a "case or controversy" for judicial review, "[a]t bottom, 'the gist of the question of standing' is whether petitioners have 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.'" *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). The unchallenged allegations of harm by Respondents meet this standard. *See* Br. of Resp. at 28-29, 32-35, 53-54.

The court of appeals correctly determined that Plaintiffs-Respondents have standing.

ARGUMENT

I. The Text and History of Article III of the Constitution Support Standing In This Case.

Article III empowers the judiciary to determine the constitutionality of laws enacted by the federal legislature. Its words provide in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority….

U.S. CONST., art. III, § 2. Article III goes on to list certain categories of "Controversies" over which the federal judicial power shall extend. *Id.*

In the 18th Century, the word "cases" was understood to encompass both civil and criminal matters, while "controversies" referred only to civil disputes. Cass R. Sunstein, *What's Standing After* Lujan? *Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 168 (1992) (citing *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 431-32 (1793)). Perhaps most important, the word "all" in Article III "meant just what it said: Federal courts had to be the last word in 'all' top-tier cases," including claims derived from the Constitution and federal statutes. AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 228 (2005). It was crucial to the Framers of the Constitution that the federal courts serve as "the last word" in cases

arising under the Constitution, as Respondents' claims here do.

A. The Framers Considered Judicial Review Essential To Protecting Liberty and Preventing Abuse of Government Power.

The Framers crafted Article III's judicial power as a vital check on allegedly unlawful actions of the legislature. The records of the Constitutional Convention demonstrate that the Framers were deeply concerned that the national legislature would enact laws contravening the Constitution or infringing on individual liberty. They unanimously agreed that the authority of the judiciary to intervene was needed to ensure the constitutionality of national laws. After debating different possible judicial mechanisms, the Framers chose judicial review as the exclusive method for the judiciary to protect the rights of the people.

On May 29, 1787, Governor Edmund Randolph of Virginia put forth an opening proposal for the form of the national government. His plan included judicial tribunals, consisting of one or more supreme tribunals as well as inferior tribunals, that would answer "questions which may involve the national peace and harmony." 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 22 (Max Farrand ed. 1911). In addition, Randolph proposed a "council of revision," consisting of "the Executive and a convenient number of the National Judiciary . . . with authority to examine every act of the National Legislature before it shall operate." *Id*. at

21. Randolph's suggestion for a council of revision would have established a judicial veto power over federal legislation.

On June 4, 1787, the proposal for a council of revision came up for a vote, but the Framers chose to postpone its consideration. *Id.* at 94. Elbridge Gerry of Massachusetts offered an alternative proposition that only the executive would have veto power over national laws, subject to an override by two-thirds of each branch of the national legislature. *Id.* Gerry's proposal for the executive veto passed by a vote of eight states to two. *Id.* at 94-95. The Convention then voted unanimously to establish a national judiciary. *Id.* at 95.

Several of the Framers explained that they opposed the judicial veto power of the council of revision because the judiciary would be thoroughly involved in protecting the people against unconstitutional laws through judicial review. Gerry stated that the judiciary "will have a sufficient check agst. encroachments on their own department by their exposition of the laws, which involved a power of deciding on their Constitutionality." *Id.* at 97. Rufus King of Massachusetts asserted "that the Judicial ought not to join in the negative of a Law, because the Judges will have the expounding of those Laws when they come before them; and they will no doubt stop the operation of such as shall appear repugnant to the constitution." *Id.* at 109. Under this reasoning, the council of revision was unnecessary due to the expansiveness of the judicial review power.

James Madison, a supporter of the council of revision, emphasized the importance of the judicial branch operating as a check on the power of the national legislature. Judicial intervention was needed to provide "for the safety of a minority in Danger of oppression from an unjust and interested majority." 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 108. While no one disputed this potential peril, judicial review was preferred by most of the Constitutional Convention delegates as the remedy.[3] In fact, "the single most important reason the Council of Revision was rejected derived from the Convention's commitment to judicial review as an integral part of the constitutional structure." Robert L. Jones, *Lessons from a Lost Constitution: The Council of Revision, the Bill of Rights, and the Role of the Judiciary in Democratic Governance*, 27 JOURNAL OF LAW AND POLITICS 459, 507 (2012). The Framers considered judicial review of legislative actions as an essential part of the new Constitution's system of government and a bulwark of liberty.

B. The Drafters of Article III Created Robust Judicial Review of Legislative Action.

The records of the Constitutional Convention document several changes to the proposed constitutional text that were designed to expand

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[3] On June 6, 1787, the proposal for a council of revision was defeated by a vote of eight states to three. *Id*. at 131, 140.

the scope of the federal judicial power. The founding generation carefully selected the words of Article III to ensure that the judicial branch would have the authority to resolve disputes involving the constitutionality of federal statutes.

Madison observed on July 18, 1787, that "[s]everal criticisms ha[d] been made on the definition" of the jurisdiction of the national judiciary. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 46 (Max Farrand ed. 1911). In response to these criticisms, Madison recommended making explicit in the constitutional text "that the jurisdiction shall extend to all cases arising under the Natl. laws." *Id*. The Framers voted unanimously to adopt Madison's proposed language. Then, on August 27, William Samuel Johnson of Connecticut urged that the text of Article III reference "this Constitution," immediately before the word "laws." *Id*. at 430. His proposal was enacted without opposition.

After Johnson's suggestion to reference the Constitution directly in Article III's text, Madison "doubted whether it was not going too far to extend the jurisdiction of the Court generally to cases arising Under the Constitution, & whether it ought not to be limited to cases of a judiciary nature." *Id*. No specific text was proposed to address this concern, but the Framers "generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary Nature." *Id*. Madison's understanding of federal jurisdiction has been identified as consonant with this Court's standing jurisprudence. "The Court's recognition that injury

in fact is a requirement of Article III ensures that the courts will more properly remain concerned with tasks that are, in Madison's words, 'of a Judiciary nature.'" John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1232 (1993) (citing 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430).

Discussions of judicial review during ratification affirm that Article III was intended as a bulwark against legislative overreaching that infringed upon the rights of the people. In the *Federalist Papers*, for example, both Madison and Alexander Hamilton expressed the view that the national legislative branch poses a serious threat to the rights of the people, with judicial review as the constitutional means of preventing legislative oppression. Madison wrote that, in a "representative republic where the executive magistracy is carefully limited," the greatest danger to the rights of the people comes from the "legislative power". THE FEDERALIST PAPERS 48 (Madison) (Clinton Rossiter ed. 1999).

Sounding the same theme, Hamilton invoked the specter of the national legislature enacting laws that infringe the rights of the people. He warned readers to beware of situations "where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution." THE FEDERALIST PAPERS 78 (Hamilton). Hamilton responded to the charge of those opposed to ratification "that the legislative body are themselves the constitutional judges of their own powers" by noting that such an

interpretation "is not to be collected from any particular provisions in the Constitution." *Id*. To the contrary, the text of the Constitution provides that it is the "proper and peculiar province of the courts" to uphold the Constitution as "fundamental law." *Id*.

Hamilton emphasized the special role judges have in enforcing "specific exceptions to the legislative authority." In Hamilton's words:

> The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

Id.

Madison and the other Framers expressed in their statements and wrote into the Constitution's text that cases addressing the constitutionality of federal laws are squarely in the judiciary's domain. The text and history of Article III establish a judicial branch with the duty to play a vigorous role

in checking acts by the national legislature that infringe the rights of the people.

C. The Framers of the Bill of Rights Relied Upon the Availability of Article III Judicial Review.

The special role of the judiciary in reviewing congressional legislation that infringed the rights of the people was also essential to the passage of the Bill of Rights.

When Madison wrote to Thomas Jefferson on October 17, 1788, listing reasons both in favor of and against a Bill of Rights, he worried that "[t]he restrictions however strongly marked on paper will never be regarded when opposed to the decided sense of the public, and after repeated violations in extraordinary cases they will lose even their ordinary efficacy." 11 THE PAPERS OF JAMES MADISON, 299 (William T. Hutchinson et al., eds. 1961). In response, Jefferson wrote on March 15, 1789, that "[i]n the arguments in favor of a declaration of rights, you omit one which has great weight with me, the legal check which it puts into the hands of the judiciary." 12 PAPERS OF JAMES MADISON, at 13. Jefferson echoed what both Madison and Hamilton had previously highlighted in the *Federalist Papers*: the need for a judicial check against the legislative branch.

Jefferson viewed the availability of judicial review as a powerful reason to enact the Bill of Rights, so that the people would have an affirmation of their rights and liberties and a

means of enforcing these guarantees. His letter and its reasoning regarding the role of the courts "had a profound influence on Madison." LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 33 (1999).

When Madison proposed the Bill of Rights in Congress on June 8, 1789, he eloquently espoused the position suggested by Jefferson: that adoption of a Bill of Rights would enable the judiciary to protect the people from legislative tyranny. He also echoed Hamilton's argument in the *Federalist Papers* about the unique role of courts in enforcing "specified exceptions to the legislative authority." He stated:

> If the [Bill of Rights] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.

Annals of Congress, 1st Cong., 1st Sess. 457 (1789). Madison steered the Bill of Rights to passage in order "to foster a consensus among Americans about the fundamental rights that defined their society and to institutionalize the judiciary as the guardian of those rights." Jones, 27 JOURNAL OF LAW AND POLITICS at 550.

The Framers expected the judicial branch to vigorously uphold the rights reserved to the people

in the Bill of Rights. Judicial review was the key to transforming rights from mere marks on paper to an effective shield guarding the people from a tyrannical government.

D. Court Precedent Supports Judicial Review of Respondents' Claims.

This Court's jurisprudence affirms the role of the judiciary in protecting against legislative overreaching and provides ample precedent to support review of the merits of Respondents' constitutional claims.

In the early period from 1789 to 1861, this Court "substantively evaluated the constitutionality of a federal statutory provision" in sixty-two cases, including five cases pre-dating *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803). Keith E. Whittington, *Judicial Review of Congress Before the Civil War*, 97 GEO. L.J. 1257, 1266-67, 1330 (Appendix of Cases) (2009). *Marbury* was notable in providing an "elaborate explanation" of the court's power to decide the constitutionality of federal law, but in the 19th Century, *Marbury* was viewed "as one case among others that took note of the principle that the judiciary could enforce constitutional limitations on legislatures." *Id.* at 1286, 1307.

M'Culloch v. Maryland, 17 U.S. 316, 423 (1819) provides the classic statement of both the need for, and the limits of, judicial review, emphasizing again the special role of the courts in enforcing acts "prohibited by the constitution":

> Should congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire the decree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground.

Review of the constitutionality of federal laws by this Court increased following the Civil War. *See* Otis H. Stephens, Jr., *Marbury v. Madison: 200 Years of Judicial Review in America*, 71 TENN. L. REV. 241, 248 (2004). In the 20th Century and continuing to the present, this Court has repeatedly emphasized the judiciary's responsibility to review the constitutionality of federal laws in order to protect the rights of the people. *E.g.*, *Fairbank v. United States,* 181 U.S. 283, 286 (1901) ("This judicial duty of upholding the provisions of the Constitution as against any legislation conflicting therewith has become now an accepted fact in the judicial life of this nation."); *Trop v. Dulles*, 356 U.S. 86, 103 (1958) ("The Judiciary has the duty of implementing the constitutional safeguards that protect individual rights."); *United States v. Munoz-*

Flores, 495 U.S. 385, 391 (1990) (emphasizing that "this Court has the duty to review the constitutionality of congressional enactments"). Just last Term, this Court cited *Marbury* as authority for the well-established principle that "when an Act of Congress is alleged to conflict with the Constitution, '[i]t is emphatically the province and duty of the judicial department to say what the law is.'" *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427-28 (2012) (quoting *Marbury*, 5 U.S. at 177).

Just as in these earlier cases, Respondents' challenge to the constitutionality of the FAA is "of a Judiciary nature." Roberts, 42 DUKE L.J. at 1232. This Court observed in the Founding Era that resolving conflicts between federal statutes and the Constitution "is of the very essence of judicial duty." *Marbury*, 5 U.S. (1 Cranch) at 178. Chief Justice John Marshall explained: "Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void." *Id*. at 177. As shown above, the Founding generation in America did indeed expect that unconstitutional laws would be invalidated by the federal courts. Judicial review of the FAA comports with the text and history of Article III.

II. The Particular Concerns of the First Amendment Support Standing In This Case.

The robust role of the judiciary envisioned in Article III is particularly strong in the context of the First Amendment. As this Court has recognized on many occasions, where First Amendment rights are at stake, an "actual and well-founded fear that the law will be enforced against them" is sufficient for plaintiffs to demonstrate injury sufficient to confer standing. *See Virginia v. American Booksellers' Ass'n*, 484 U.S. 383, 393 (1988); *see also Babbit v. American Farm Workers*, 442 U.S. 289, 298 (1979). This Court's precedents, sensitive to the Framers' understanding that the judiciary has a critical role to play in the protection of fundamental constitutional rights, support standing where, as here, plaintiffs must "take significant or costly compliance measures," *American Booksellers*, 484 U.S. at 392, to ensure their ability to speak freely and openly without the government listening in. *See* Brief of Resp. at 24, 29, 37, 43 (detailing costly and burdensome measures plaintiffs must take to protect their right to engage in confidential communications); *see also Meese v. Keene*, 481 U.S. 465, 475 (1987) (finding standing to challenge statute labeling film as "political propaganda" because of plaintiff's need to "take . . . affirmative steps to avoid risk of harm to his reputation").

The text of the First Amendment makes clear that the "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST.

amend. I. The government fundamentally misunderstands the First Amendment's text and history as well as this Court's precedents when it insists that Respondents show that they will certainly be surveilled under the law in order to challenge it. As Justice Alito recently explained, it is blackletter standing doctrine that "the injury required for standing need not be actualized. A party facing prospective injury has standing to sue where the threatened injury is real, immediate, and direct." *Davis v. FEC*, 554 U.S. 724, 734 (2008). As the Court's standing cases repeatedly have recognized, First Amendment rights are vulnerable, largely due to potential chilling effects, and thus the mere existence of an infringing law can cause harm. Because "even minor punishments can chill protected speech," this Court "permit[s] facial challenges to statutes that burden expression." *Ashcroft v. Free Speech Coal.,* 535 U.S. 234, 244 (2002). In the instant case, for example, attorneys credibly fear professional sanctions for unethical behavior if they engage in communications with their clients that are predictably likely to be subjected to warrantless surveillance by the federal government. *E.g.*, Br. of Resp. at 32-36. The government's accusations that Respondents' alleged harms are purely speculative are therefore particularly misplaced with respect to judicial review under the First Amendment.

Finally, the injury demonstrated by Respondents is plainly redressable. As this Court has explained: "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in

legal contemplation, as inoperative as though it had never been passed." *Norton v. Shelby County*, 118 U.S. 425, 442 (1886). A judicial declaration that the FAA violates the First Amendment would redress Respondents' injury resulting from Congress's enactment of this Section. This remedy fully satisfies the redressability prong of the standing analysis. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). *See generally* Br. of Resp. at 48-53.

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Marbury v. Madison proclaims that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." 5 U.S. at 163. The text and history of Article III and the First Amendment support the conclusion that Respondents have amply demonstrated redressable injury sufficient to invoke judicial review of the constitutionality of the FAA.

CONCLUSION

The decision of the U.S. Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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