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 COMMITTEE ON CIVIL RIGHTS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Founded in 1870, the New York City Bar Association (the "Association") is a professional organization of more than 23,000 attorneys. Through its many standing committees, such as its Committee on Civil Rights, the Association educates the Bar and the public about legal issues relating to civil rights, including the right of access to the courts and the right to remain free from unreasonable searches and seizures. The Association also seeks to promote effective assistance of counsel for everyone, including those suspected or accused of criminal wrongdoing, and is especially concerned with protecting the confidentiality of attorney-client communications as essential to such representation.

Over the past several years, the Association has attempted to demonstrate by various means—including through the filing of *amicus curiae* briefs—that individual liberties need not be subverted by governmental interests during times of war and that national security can be achieved without prejudice to the constitutional rights that are at the heart of our democracy.

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[1] The parties have consented to the filing of this brief, and such consents have been lodged with the Court. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than the *Amicus*, its members, or its counsel made a monetary contribution to the brief's preparation or submission.

In filing this brief, the Association is advocating the interests of its members in maintaining the ethical requirements of the legal profession. The statute at issue here affects confidential communications and impairs the attorney-client relationship. The government's legal position fails to take seriously the attorney-client relationship, and thus the judicial process itself, both through the substance of the statute and the follow-on attempt to deprive even the most directly-affected lawyers of standing to challenge the statute in court.

SUMMARY OF ARGUMENT

A lawyer owes an inviolate duty of confidentiality to her client. Where there is a reasonable risk that a sensitive communication will be overheard by a third-party, a lawyer must refrain from making that communication. Under the broad terms of the FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 ("FAA"), there is a reasonable likelihood that the government will overhear the communications between certain lawyers and their clients. In response, these lawyers have taken certain safeguard measures that have resulted in a variety of costs: professional, economic, and ethical.

These costs are sufficient to confer standing upon plaintiffs Sylvia Royce and Scott McKay to challenge the constitutionality of the FAA. First, the uncontroverted testimony demonstrates the measures they have taken, and the resulting costs, to avoid risking disclosure of their clients' sensitive information. These costs are a cognizable injury under this Court's standing jurisprudence. Second,

the uncontroverted evidence shows that plaintiffs took these measures because of the FAA, such that their injuries are "fairly traceable" to the government's conduct. Although the government characterizes plaintiffs' injuries as "voluntary" and "self-inflicted," in fact plaintiffs' ethical obligations leave them no legitimate choice but to incur these costs.

I. The Uncontroverted Testimony Shows that Plaintiffs Have Incurred Substantial Professional and Economic Costs to Avoid Risking Disclosure of Their Clients' Confidences

Attorneys Sylvia Royce and Scott McKay are plaintiffs in this action. Their clients consist of accused terrorists and Guantánamo Bay detainees. The FAA allows the government to issue surveillance orders to monitor individual communications whenever two conditions are met: (1) one of the parties to the conversation is reasonably believed to be located outside the United States, and (2) the purpose of the surveillance is to obtain information concerning terrorism, national defense, or foreign affairs. 50 U.S.C. § 1881a(a); *id.* § 1801(e).[2] Ms. Royce and Mr. McKay regularly discuss their cases with individuals located outside the U.S. because they have clients who were born abroad, have family

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[2] *See generally Amnesty Int'l. USA v. Clapper*, 638 F.3d 118, 138 (2d Cir. 2012) (noting that "[t]he FAA is susceptible to such an interpretation, and the government has not controverted this interpretation or offered a more compelling one").

and acquaintances abroad, and/or were alleged to have taken certain illegal actions abroad. Due to the nature of the allegations against their clients, these conversations invariably "relate" to "terrorism, national defense, or foreign affairs." Taken together, their communications involve "precisely the sorts of individuals that the government will most likely seek to monitor," and "precisely the kind of information that [the FAA] authorizes the government to collect," *Amnesty Int'l USA v. Clapper*, 638 F.3d 118, 138–39 (2d Cir. 2012); Resp. Br. at 16—including, among other things:

- communications related to representation of accused terrorists, Pet. App. 370a–374a (McKay Decl. ¶¶ 5, 7, 12);

- communications with relatives of Guantánamo Bay detainees, Pet. App. 350a–351a (Royce Decl. ¶ 5); and

- communications with attorneys or co-counsel overseas, Pet. App. 351a (Royce Decl. ¶ 6)

It is thus entirely reasonable for Ms. Royce and Mr. McKay, and lawyers like them, to fear that the U.S. government will monitor phone calls and emails related to their representation of these clients. The proposition that they are, indeed, being monitored is very likely. *See Clapper*, 638 F.3d at 133-34.

The threat that the government is monitoring and intercepting international communications presents particularly acute problems for lawyers. As discussed in more detail in Section III below, lawyers owe their clients an affirmative duty to prevent a

third-party—especially an adversary—from learning about confidential information. With this duty in mind, Ms. Royce and Mr. McKay have had to change the way they communicate and investigate their cases. As Mr. McKay explains:

> The measures that we take in order to protect the confidentiality of sensitive information are far from costless. Collecting information in person sometimes requires travel that is both time-consuming and expensive. In some cases, of course, travel is impractical or prohibitively expensive, which means that we are faced with a choice between asking experts, investigators or witnesses to share sensitive information over the phone or by email or alternatively, forgoing the information altogether.

Pet. App. 372a–373a (McKay Decl. ¶ 10.) Not surprisingly, Mr. McKay concludes, these costs have "a real effect on our ability to properly represent our clients." Pet. App. 372a–373a (McKay Decl. ¶ 10.) Ms. Royce's experience is similar:

> My journalistic and human rights contacts approach me from time to time with information they have obtained by interviewing persons whose testimony may be material to Mr. [Mohammedou Ould] Salahi's case. . . . The increased risk of government surveillance means that in some cases journalists and researchers will limit the information they share with me, or that I must limit the information I share

> with them. For example, in a recent telephone call I cut off a German journalist because the information we were discussing, which related to a potential witness, was not something to which I would want the government to be privy.

Pet. App. 352a–353a (Royce Decl. ¶ 8.)[3]

II. These Professional and Economic Costs Are Cognizable Injuries Under This Court's Current Standing Doctrine

As the section above demonstrates, the uncontroverted evidence shows that Royce and McKay have already suffered actual professional and economic harms as a result of their efforts to protect the confidentiality of certain communications likely to be intercepted by the government under the authority granted by the FAA. These harms are real, not speculative. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992); *accord Horne v. Flores*, 129 S. Ct. 2579, 2592 (2009). The Second Circuit correctly concluded that there is "little doubt that the plaintiffs have satisfied the injury-in-fact requirement." *Clapper*, 638 F.3d at 133. This Court has consistently found professional and economic costs of this nature to be cognizable injuries for standing purposes. *See, e.g.*, *Clinton v. City of New York*, 524 U.S. 417, 430–32 (1998) (economic costs as

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[3] As the ACLU noted in its merit brief, Ms. Royce no longer represents this prisoner, but she continues to represent individuals held in the custody of the U.S. military overseas. *See* Resp. Br. at 15 n. 11.

cognizable injury); *Meese v. Keene*, 481 U.S. 465, 473 (1987) (harm to professional reputation of lawyer and state legislator as cognizable injury); *see also Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 642 (2007) ("In the case of economic or physical harms . . . the 'injury in fact' question is straightforward.").

It bears noting that Ms. Royce and Mr. McKay are uniquely impacted by the government's surveillance laws in ways that most people are not. *See United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, *J.*, concurring) (standing ensures that federal courts do not resolve "public-interest suits brought by litigants who cannot distinguish themselves from all taxpayers or all citizens"). As criminal defense lawyers with clients accused of terrorism, they regularly communicate with individuals located abroad about matters relating to the foreign affairs of the United States. Thus, they comprise a discrete group of attorneys who genuinely fear that their client communications will be intercepted. *See Clapper*, 638 F.3d at 133–34.

III. Plaintiffs Are Required by Ethical Rules to Take Reasonable Measures to Safeguard Their Clients' Confidences and to Provide Competent Representation Under the Circumstances

A. Relevant Rules of Professional Responsibility

Ms. Royce and Mr. McKay practice law in Washington, D.C. and Idaho, respectively. Both jurisdictions have professional conduct rules for

lawyers that are substantially the same as (though not identical to) the American Bar Association's Model Rules of Professional Conduct ("Model Rules"). Pet. App. 378a–379a (Gillers Decl. ¶ 4.) For ease of reference and consistency, we address the Model Rules here but cite to the specific rules of Washington, D.C. and Idaho where appropriate.

Model Rule 1.6(a) provides: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent . . . ." Confidential information under Model Rule 1.6 is a broad category that includes both privileged information and other information gained in representing the client from any source.[4] Pet. App. 379a–380a (Gillers Decl. ¶ 8.) Under the Model Rules, a lawyer has an affirmative duty to safeguard confidential information: "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." Model Rule 1.6(c).[5] When transmitting confidential information, a lawyer "must take reasonable precautions to prevent the information

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[4] *See* Model Rule 1.6 cmt. [1] ("This Rule governs the disclosure by a lawyer of *information relating to the representation of a client* during the lawyer's representation of the client.") (emphasis added); cmt. [3] ("The confidentiality rule . . . applies not only to matters communicated in confidence by the client but also to *all information relating to the representation, whatever its source*.") (emphasis added).

[5] *See also* Rule 1.6, Comments [17], [18], Idaho Rules of Prof'l Conduct, effective July 1, 2004; Rule 1.6, Comment [40], District of Columbia Rules of Prof'l Conduct, effective Feb. 1, 2007.

from coming into the hands of unintended recipients." Model Rule 1.6 cmt. [19]. According to the American Bar Association, the organization that promulgated the Model Rules, the effect of Model Rule 1.6 is that a lawyer violates her ethical obligations if she divulges sensitive information about a client by using a method of communication over which she does not have "a reasonable expectation of privacy." ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 413 (1999); *see also* Pet. App. 380a–381a (Gillers Decl. ¶ 9); NYS Bar Ass'n Comm. on Prof'l Ethics Op. 709 (1998) ("[I]n circumstances in which a lawyer is on notice for a specific reason that a particular e-mail transmission is at heightened risk of interception, or where the confidential information at issue is of such an extraordinarily sensitive nature that it is reasonable to use only a means of communication that is completely under the lawyer's control, the lawyer *must select a more secure means of communication* than unencrypted Internet e-mail.") (emphasis added).[6]

The duty to keep client confidences is fundamental to "the trust that is the hallmark of the client-lawyer relationship," for it encourages clients "to seek legal assistance and to communicate fully

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[6] The New York City Bar Association has stated that "a lawyer should exercise caution when engaging in conversations containing or concerning client confidences or secrets by cellular or cordless telephones or other communication devices readily capable of interception, and should consider taking steps sufficient to ensure the security of such conversations." NYC Bar Ass'n, Formal Op. 11 (1994).

and frankly with the lawyer even as to embarrassing or legally damaging subject matter." Model Rule 1.6 cmt. [2]; *see also Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). This Court has repeatedly stated that the ability of a lawyer to expect a degree of privacy in her work product is the "historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests." *Hickman v. Taylor*, 329 U.S. 495, 511 (1947); *see also Upjohn Co.*, 449 U.S. at 389; *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998); *Jaffee v. Redmond*, 518 U.S. 1, 11 (1996). This Court in *Hickman* described the consequences of not protecting a lawyer's work product as nothing short of devastating:

> Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

329 U.S. at 511; *accord F.T.C. v. Grolier Inc.*, 462 U.S. 19, 31 (1983) (Brennan, *J.*, concurring) (finding that the need for work–product protection is essential even after active litigation ends, for "[a]ny litigants who face litigation of a commonly-recurring type . . . [such as,] civil rights or civil liberties

organizations . . . have an acute interest in keeping private the manner in which they conduct and settle their recurring legal disputes"). This reasoning applies *a fortiori* to lawyers engaged in defending clients from criminal or military charges.

The FAA implicates other ethical duties as well. Model Rule 1.1 requires a lawyer to provide "competent representation," which requires "inquiry into and analysis of the factual and legal elements of the problem" and "adequate preparation."[7] Model Rule 1.1 cmt. [5] Significantly, "[t]he required attention and preparation are determined in part by what is at stake." *Id.* A Comment to Model Rule 1.3 elaborates on a lawyer's duty to be diligent, stating that a lawyer "should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor."[8] Model Rule 1.3 cmt. [1]. Under Model Rule 1.4, an attorney also owes his or her client a duty of communication, pursuant to which the client's objectives are to be accomplished. The Comments to Model Rule 1.4 emphasize the importance of this communication to

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[7] *See also* Rule 1.1, District of Columbia Rules of Prof'l Conduct, effective Feb. 1, 2007; Rule 1.1 Idaho Rules of Professional Conduct, effective July 1, 2004.

[8] *See also* Rule 1.3, Comment [1], Idaho Rules of Prof'l Conduct. The District of Columbia Rules of Professional Conduct are nearly identical to the Model Rules, with the only difference being that they goes further to explicitly *require* such actions by the attorney. Rule 1.3, Comment [1], District of Columbia Rules of Prof'l Conduct.

the client-lawyer relationship, explaining that "[r]easonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation." Model Rule 1.4 cmt. [1].

B. The FAA Implicates Plaintiffs' Ethical Obligations and Presents Them with an Untenable Ethical and Professional Dilemma

The fear that the government will monitor lawyers' sensitive communications felt by the plaintiff lawyers is a direct result of the changes made by the FAA. The differences between the pre- and post-FAA surveillance authorization procedures make it more likely that lawyers' communications will be subject to government surveillance. As the Second Circuit explained, "the FAA indisputably and significantly broadens the risk of interception, lowers the government's probable-cause burden, and decreases the oversight role of the Foreign Intelligence Surveillance Court ("FISC")." *Amnesty Int'l. USA v. Clapper*, 667 F.3d 163, 166 (Lynch, *J.*, concurring in denial of reh'g en banc). Under Section 702 of the FAA, "the probable-cause determinations are no longer particularized," and the "Attorney General no longer needs to identify specific surveillance targets to the FISC." *Id.* (citing 50 U.S.C § 1881a(g)(4)). In addition, the FISC "no longer considers individual surveillance applications, but rather is charged only with overseeing whether the agency has complied with FISA's general procedural requirements." *Id.* (citing 50 U.S.C. § 1881a(i)(2), (3)(A)). The effects of these changes are

not lost on criminal defense attorneys like Mr. McKay:

> [T]he concerns raised by dragnet surveillance of international communications are far more serious than the concerns raised by surveillance that is based on individualized suspicion and subject to individualized judicial oversight. In the past, I have understood that certain of my communications with experts, witnesses, clients, and others could be subject to surveillance by the U.S. government, but I have also understood that this surveillance was strictly limited, judicially supervised, and subject to minimization procedures that were also supervised by judges on an individualized basis. I understood that the government had the authority to monitor my communications in certain narrow circumstances, but now my communications may be monitored simply because I am communicating with someone who is outside the country.

Pet. App. 374a–375a (McKay Decl. ¶ 13.)

Given these changes, it is highly likely that the government will actually monitor Ms. Royce and Mr. McKay's electronic communications with persons located abroad—namely, their clients, their clients' families, witnesses, investigators, human rights activists, foreign governments and journalists, among others. Their assessment that their communications will be subject to surveillance is eminently reasonable—and not credibly disputed.

As a result of this assessment, it would be implausible for Ms. Royce, for example, to conclude that there would be "a reasonable expectation of privacy" in a phone call or email to a potential witness related to her former representation of Mohammedou Ould Salahi—who, the government alleges, "acted as a liaison between al Qaeda members close to Osama bin Laden and a group of Islamic radicals living in Hamburg, Germany, some of whom planned or participated in the September 11 attacks." Pet. App. 349a–350a (Royce Decl. ¶ 4.) Similarly, Mr. McKay could not expect privacy in a communication with a potential witness related to his former representation of Khalid Sheik Mohammed—who, the government alleges, engaged in "international terrorism and an alleged criminal conspiracy involving the events of September 11, 2001,"[9] Pet. App. 373a–374a (McKay Decl. ¶ 12)—or of Sami Omar Al-Hussayen—who "was acquitted in June 2004 on terrorism charges" and who is now facing civil charges for events related to September 11. Pet. App. 369a–370a (McKay Decl. ¶ 3.) These potential witnesses and sources of information are "precisely the sorts of individuals that the government will most likely seek to monitor." *See Clapper*, 683 F.3d at 138–39. At the same time, Ms. Royce and Mr. McKay are ethically obligated to take all "reasonable precautions to prevent [confidential] information from coming into the hands of unintended recipients." Model Rule 1.6 cmt. [19]; *see*

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[9] As the ACLU noted in its merit brief, Mr. McKay no longer represents Mr. Mohammed, but David Nevin, also a plaintiff in this case, continues to do so. *See* Resp. Br. at 15 n. 11.

also Pet. App. 381a (Gillers Decl. ¶ 11) ("Determinative of how the lawyer may proceed is . . . whether the lawyer has good reason to believe that his or her communications are reasonably likely to be intercepted, even if the interception is lawful.").

The risk that the government will intercept their communications also implicates the duty to provide "competent representation." Model Rule 1.1; *see also Upjohn Co.*, 449 U.S. at 390 (noting that the protection of client confidences is necessary and "exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice"). Notably, because the stakes at issue in these cases could not be higher, Ms. Royce and Mr. McKay's ethical obligations to their clients require more attention and preparation than is required in the average lawyer-client relationship. *See* Model Rule 1.1, cmt. [5]. For instance, Mr. Mohammed is charged with capital offenses in the Military Commissions at Guantánamo for his alleged involvement with the events of September 11, Pet. App. 373a–374a (McKay Decl. ¶ 12), and Mr. Salahi has been detained in Guantánamo since 2002 and faces the prospect of being detained there indefinitely. Pet. App. 349a (Royce Decl. ¶3.) What is more, these cases have enormous consequences for the United States' national security efforts and the development of federal criminal and military law. In cases like these, lawyers must perform with the highest levels of attention and preparation in order to satisfy their obligation of competent representation under Model Rule 1.1.

Ms. Royce and Mr. McKay have testified that their ability to communicate effectively and to gather information regarding their clients' cases has been significantly hampered as a result of the threat of surveillance under the FAA, thus interfering with their ability to provide the competent representation required by ethical rules. Ms. Royce explained:

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

Pet. App 351a–352a (Royce Decl. ¶ 7); *see also* Pet. App. 371a–372a (McKay Decl. ¶ 8.) Their clients and witnesses are now more reluctant to discuss sensitive matters over the phone or by email. Thus, Ms. Royce and Mr. McKay, and lawyers like them, must struggle to develop and investigate their cases by locating alternative sources of information or by foregoing essential information entirely.

Many lawyers now must confront a troubling ethical and professional dilemma: either refrain from communicating sensitive but important information over the phone or by email and risk violating their duty to provide competent representation, or continue to communicate as they had prior to the FAA and violate their duty to safeguard client confidences. As the only reasonable

alternative to this ethical dilemma, many lawyers have been forced to undertake costly and burdensome measures to protect their clients' confidentiality and yet continue to provide competent representation. Some have been forced to travel great distances to conduct interviews and investigations that otherwise would have been accomplished via phone or email. This alternative, of course, is not always feasible, especially where clients and witnesses are located abroad. Lawyers who are confronted with these ethical dilemmas, like Ms. Royce and Mr. McKay, should be able to challenge the government's conduct in federal court.

IV. Plaintiffs Incurred Costs As a Direct Result of the FAA's Expanded Surveillance Powers, Such That Their Injuries Are "Fairly Traceable" to the Government's Challenged Conduct

To establish the requirements of standing, plaintiffs must also prove causation—that is, that their injuries are "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *See Lujan*, 504 U.S. at 560–61 (internal citations and alterations omitted). "The causal chain can be broken where a plaintiff's self-inflicted injury results from his 'unreasonable decision . . . to bring about a harm that he knew to be avoidable.'" *Clapper*, 638 F.3d at 133 (quoting *St. Pierre v. Dyer*, 208 F.3d 394, 403 (2d Cir. 2000)).

Contrary to the government's contention, "[s]tanding is not defeated merely because the plaintiff has in some sense contributed to his own

injury." 13A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3531.5 (3d ed. 2008). Such is foreclosed by several of this Court's precedents. *See, e.g.*, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 184–85 (2000) (holding that plaintiffs' decision to curtail their recreational use of a river polluted by defendant was "entirely reasonable" and thus constituted an injury in fact); *Keene*, 481 U.S. at 475 (finding that plaintiff's "need to take . . . affirmative steps to avoid the risk of harm to his reputation constitutes a cognizable injury"); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (finding that plaintiff's decision to devote significant resources to counteract defendant's racially discriminatory steering practices constituted a "concrete and demonstrable injury"). Although these cases focused on whether the plaintiffs had established injury-in-fact, they nonetheless held that a plaintiff who reasonably changes his or her behavior to avoid the risk of harm caused by the defendant's challenged conduct has standing. *See Laidlaw*, 528 U.S. at 184–85.

In this case, the professional code of conduct governing Ms. Royce and Mr. McKay's behavior as lawyers required them to take certain measures as a direct result of the risk posed by the FAA. Pet. App. 382a–384a (Gillers Decl. ¶¶ 14–17.) As this Court held in *Meese*, "the need to take . . . affirmative steps to avoid the risk of harm . . . constitutes a cognizable injury." *Meese*, 481 U.S. at 475. The reasonableness of Ms. Royce and Mr. McKay's efforts to maintain their clients' confidences is demonstrated by the simple fact that these measures

were required by ethical rules and, therefore, necessary "within the framework of our system of jurisprudence to promote justice and to protect their clients' interests." *See Hickman*, 329 U.S. at 511. Since their change in behavior was reasonable, their own conduct could not have broken the chain of causation between the government's conduct and their injuries. *See Dyer*, 208 F.3d at 403. Therefore, Ms. Royce and Mr. McKay have standing to challenge the constitutionality of the FAA.

The implication in the government's position is that Ms. Royce and Mr. McKay's choice to incur travel costs or to refrain from discussing sensitive information over the phone or by email was "voluntary" or "self-inflicted" because they cannot show with sufficient certainty that they have been or will be monitored. However, as the Second Circuit noted in the decision below, "in cases where plaintiffs allege an injury based solely on prospective government action, they need only show a 'realistic danger' of 'direct injury,'" and plaintiffs have made this showing. *Clapper*, 638 F.3d at 135 (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). In addition, lawyers like Ms. Royce and Mr. McKay have an affirmative duty to avoid discussing confidential information about a client over the phone or by email if they have "a reasonable expectation" that the information will be monitored by a third-party, such as the government. Because the applicable ethical rules *require* Ms. Royce and Mr. McKay to abstain from these communications—i.e., they lack the discretion *not* to abstain if they want to fulfill their mandatory ethical obligations—it cannot credibly be maintained that

their change in behavior is "voluntary" or "self-inflicted." Ms. Royce and Mr. McKay's injuries were caused by the government's challenged conduct, not their own.

CONCLUSION

The government's legal position in this case is deeply troubling because of the implications for lawyers' ability to comply with their ethical obligations. The government's contention that the plaintiff lawyers in this case do not have standing to challenge the FAA, if accepted, would do a disservice to all lawyers who treat their ethical obligations with the solemnity they deserve. The undisputed evidence clearly establishes that Ms. Royce and Mr. McKay's livelihoods have been, and continue to be, detrimentally affected by the risk that their communications with clients are being monitored under the authority granted by the FAA. These harms—which are both real and directly traceable to the government's conduct—confer standing upon the plaintiffs to challenge the constitutionality of the statute.

Respectfully Submitted

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