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 NEW YORK STATE BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS SYLVIA ROYCE, SCOTT MCKAY, AND DAVID NEVIN

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INTEREST OF *AMICUS CURIAE*[1]

The New York State Bar Association ("NYSBA") respectfully submits this brief in support of the claim of attorney-respondents Sylvia Royce, Scott McKay, and David Nevin that they have standing to pursue this lawsuit under Article III of the U.S. Constitution. This case implicates issues of critical importance to the NYSBA: an attorney's obligation to abide by rules of ethics such as the New York Rules of Professional Conduct and the impact of technology on an attorney's ethical obligation to keep client information confidential. The government argues that the costs the attorneys in this case incur in meeting their ethical obligations are "self-inflicted" and "self-imposed." This Court should not regard an attorney's decision to comply with ethical rules as a matter of choice. Instead, the Court should affirm that lawyers are obligated to comply with rules of professional conduct.

The NYSBA is the largest and oldest voluntary state bar organization in the nation. For more than 135 years, the NYSBA has shaped the development of the law, educated and informed the profession and the public, and responded to the demands of a changing society. The NYSBA today has a membership of over 77,000 lawyers, includ-

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[1] This *amicus* brief is filed with the consent of the parties and letters confirming that consent are being filed herewith in accordance with this Court's Rule 37.3(a). Pursuant to Rule 37.6, *amicus curiae* certifies that this brief was not written in whole or in part by counsel for any party, and no person or entity other than *amicus curiae* and its counsel has made a monetary contribution to the preparation and submission of this brief.

ing members in all fifty states and in over 100 countries around the world.

Among the principal objectives of the NYSBA is one that has remained unchanged since the Association's founding in 1877: to "elevate the standards of integrity, honor, professional skill and courtesy." In furtherance of this objective, the NYSBA proposes ethical rules to the New York state courts. New York's Rules of Professional Conduct govern all attorneys in the state and are based upon the NYSBA's proposals. As in all but one state, New York's Rules of Professional Conduct are based on the American Bar Association's Model Rules of Professional Conduct ("Model Rules").[2] Though the New York rules differ in some important respects from the Model Rules, an attorney's duty of confidentiality—the ethical obligation that is the focus of this brief—is the same under both and is common to lawyers in all American jurisdictions. *See* Pet. App. 379a (Gillers Decl. ¶ 5).

The FISA Amendments Act of 2008 (the "FAA") has expanded the government's authority to intercept communications to an unprecedented degree. As a result, the attorney-respondents have a well-founded belief that the government will intercept their international telephone calls and e-mails containing confidential client information. Their duty of confidentiality and applicable rules of pro-

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[2] The Declaration of Professor Stephen Gillers, which is dated December 2008, states that every state but New York, California, and Maine "have rules that derive substantially from the Model Rules." Pet. App. 378a (Gillers Decl. ¶ 4). In 2009, both New York and Maine adopted ethical rules based on the ABA Model Rules.

fessional conduct therefore require the attorney-respondents to take affirmative steps to prevent the government from acquiring their clients' confidential information. These affirmative steps, including international travel, constitute actual and imminent injuries, and the attorney-respondents therefore satisfy the injury-in-fact and causation requirements for standing under Article III of the U.S. Constitution.

STATEMENT OF FACTS

I. An Attorney's Duty of Confidentiality

A. History of the Duty

An attorney's duty of confidentiality is perhaps the most well-known and celebrated ethical obligation of lawyers. It appears in American legal-ethics codes dating to at least the mid-nineteenth century. New York adopted the Field Code in 1849, which required an attorney to "maintain inviolate the confidence, and, at every peril to himself, to preserve the secrets of his clients." L. Ray Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 Emory L.J. 909, 941-42 & n.128 (1980). In 1887, Alabama adopted the nation's first formal code of ethics, which stated that "[c]ommunications and confidence between client and attorney are the property and secrets of the client, and can not be divulged, except at his instance; even the death of the client does not absolve the attorney from his obligation of secrecy." *Id.* at 941.

In 1908, the American Bar Association ("ABA") adopted the Canons of Professional Ethics to set

national standards for legal ethics. Roger N. Walter, *An Overview of the Model Rules of Professional Conduct*, 24 Washburn L.J. 443, 444 (1985). By 1920, all but 13 states had adopted some version of the Canons. *Id.* As enacted in 1908, Canon 6 required an attorney "not to divulge [a client's] secrets or confidences." In 1928, the ABA added Canon 37, which stated that

> [t]he duty to preserve his client's confidences outlasts the lawyer's employment, and extends as well to his employees . . . . A lawyer should not continue employment when he discovers that this obligation prevents the performance of his duty to his former or to his new client.

In 1969, the ABA adopted the Model Code of Professional Responsibility to replace the Canons of Professional Ethics. Walter, *supra*, at 445. A majority of the states adopted some version of the Model Code the following year. *Id.* Canon 4 of the Model Code stated that "A Lawyer Should Preserve the Confidences and Secrets of a Client."

"Confidences" are not limited to communications between an attorney and her client. Ethical Consideration 4-2 of the Model Code explained that the duty of confidentiality extends far beyond the attorney-client privilege, "exist[ing] without regard to the nature or source of information or the fact that others share the knowledge." In 1983, the ABA promulgated the Model Rules of Professional Conduct. Forty-nine states (including New York) and the District of Columbia today base their professional-conduct rules on the Model Rules. The Model Rules make clear that a lawyer's

duty of confidentiality extends to "all information relating to the representation" of a client. Model Rule 1.6(a) states that "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent." Comment 3 explains that the duty "applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."

B. The Duty of Confidentiality Is Essential to the Rule of Law

The duty of confidentiality promotes the administration of justice in an adversarial legal system. Lawyers and their clients have repeatedly gone to court to protect confidences learned by counsel—whether directly from clients or from other sources in the course of representation. Although the government might call the expense of such litigation "self-inflicted," litigants in these cases properly viewed protecting confidences as a matter of obligation, not of choice. And this Court has repeatedly upheld an attorney's assertion of her duty of confidentiality and explained the societal value of recognizing that duty. For instance, in discussing the attorney-client privilege in 1826, this Court stated that the rule "that confidential communications between client and attorney, are not to be revealed at any time" is "indispensable for the purposes of private justice." *Chirac v. Reinicker*, 24 U.S. (11 Wheat.) 280, 294 (1826). In 1888, this Court explained the necessity of confidentiality to the administration of justice:

> The rule which places the seal of secrecy upon communications between client and

> attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.

Hunt v. Blackburn, 128 U.S. 464, 470 (1888). One hundred years later, this Court quoted the ABA's Model Code to explain the interplay of the duty of confidentiality and the effective functioning of our legal system:

> "A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system . . . . The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance."

Upjohn Co. v. United States, 449 U.S. 383, 391 (1981) (quoting ABA Model Code of Prof'l Responsibility, EC 4-1).

This Court's concern for protecting information relating to the representation of a client is not limited to the positive impact on clients. The Court has also explained the positive impact on our society and the system of justice. In his concurring opinion in *Hickman v. Taylor,* 329 U.S. 495 (1947), Justice Jackson wrote about the risk of a narrow view of protecting an attorney's work product:

> The primary effect of the practice advocated here would be on the legal profession itself. But it too often is overlooked that the lawyer and the law office are indispensable parts of our administration of justice. Law-abiding people can go nowhere else to learn the ever changing and constantly multiplying rules by which they must behave and to obtain redress for their wrongs. The welfare and tone of the legal profession is therefore of prime consequence to society, which would feel the consequences of such a practice as petitioner urges secondarily but certainly.

Hickman, 329 U.S. at 514-15 (Jackson, J., concurring).

C. Attorneys Are Required to Comply with the Duty of Confidentiality

An attorney has an ethical obligation to abide by the duty of confidentiality, but more than that, it is part of the law governing lawyers. Lawyers are governed not only by aspirational ethical guidelines, but by rules of professional conduct. Though the ABA's Model Rules are themselves not binding, the rules as adopted by state bars and courts are. Every attorney swears an oath to uphold these rules. An attorney who negligently reveals confidential client information may be liable to the client. *See Thiery v. Bye*, 228 Wis. 2d 231 (Ct. App. 1999). And as this Court has recognized, "[a]n attorney who violates his or her ethical obligations is subject to professional discipline, including sanctions, suspension, and disbarment." *Connick v. Thompson*, 131 S. Ct. 1350, 1362-63

(2011); *see also Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1622 (2010) ("Model rules of professional conduct adopted by many States impose outer bounds on an attorney's pursuit of a client's interests." (citing ABA Model Rules of Professional Conduct 3.1, 4.1)); *Nix v. Whiteside*, 475 U.S. 157, 168 (1986) (stating that Disciplinary Rule 7-102 of the ABA's Model Code of Professional Responsibility "has been adopted by Iowa, and is binding on all lawyers who appear in its courts").

D. Technology Has Changed How Attorneys Must Meet Their Duty of Confidentiality

Technological developments have transformed lawyering, and, as a result, lawyers have had to transform how they meet their ethical responsibilities. The changes over the last twenty years have been staggering. Communication by mail, fax, or landline has been supplemented by e-mail, cordless telephone, cell phones, Skype, Facebook, Twitter, and an ever-growing list of alternatives. Bar associations that promulgate ethical rules, such as the ABA and the NYSBA, have been at the forefront in recognizing how changes in technology affect the affirmative steps attorneys must take to satisfy their ethical obligations to their clients.

The NYSBA has warned attorneys that their duty of confidentiality requires them to assess the risk that their electronic communications will be intercepted and to take appropriate precautions. In 1998, the NYSBA Committee on Professional Ethics issued a formal opinion that concluded that "the criminalization of unauthorized interception

of e-mail" and "developing experience from the increasingly widespread use of Internet e-mail" made it generally permissible to communicate confidential client information by e-mail. NYSBA Comm. on Prof'l Ethics, Op. 709 (1998). However, the NYSBA Ethics Committee warned that "in circumstances in which a lawyer is on notice for a specific reason that a particular e-mail transmission is at heightened risk of interception . . . the lawyer must select a more secure means of communication than unencrypted Internet e-mail." *Id.* Further, "[a] lawyer who uses Internet e-mail must also stay abreast of this evolving technology to assess any changes in the likelihood of interception." *Id.*; *see also* NYSBA Comm. on Prof'l Ethics, Op. 820 (2008) (attorney would breach obligation to preserve client confidentiality "if the service provider reserved the right to disclose [the attorney's] e-mails or the substance of the communications to third parties without the sender's permission").

The ABA has taken a similar approach. In 1997, the ABA created the Ethics 2000 Commission to reevaluate the Model Rules. The Commission was created in part due to "new issues and questions raised by the influence that technological developments are having on the delivery of legal services." Charlotte Stretch, *Overview of Ethics 2000 Commission and Report* (2002). One such issue was unauthorized access to client information. On the basis of the Commission's report, in February 2002 the ABA adopted new comments to Model Rule 1.6, clarifying that an attorney's obligation not to "reveal" confidential information includes a duty to protect confidential information from

unauthorized access or inadvertent disclosure. An attorney must "act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision." Model Rule 1.6, cmt. 16 (2002 ed.) (a revised version of this comment is now comment 18 to Model Rule 1.6).

This duty to act competently to safeguard information relating to the representation of a client is especially acute when a lawyer electronically transmits confidential information. The 2002 amendments to the Rule 1.6 comments further provided that

> [w]hen transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients . . . . Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement.

Model Rule 1.6, cmt. 17 (2002 ed.) (this is now comment 19 to Model Rule 1.6).

In 2011, the ABA's Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 11-459, which considered a lawyer's duty to protect confidential information

from unauthorized access. The Committee considered a hypothetical scenario in which a lawyer represents an employee in connection with a potential claim against her employer; the employee-client sends confidential e-mail to her attorney from her employer-issued computer; and the employer has a stated policy that allows it to access all employees' computers and e-mail files, including those relating to employees' personal matters. ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 11-459, Duty to Protect the Confidentiality of E-mail Communications with One's Client (Aug. 4, 2011) at 1-2.

Citing the above 2002 comments to Model Rule 1.6, the Committee concluded broadly that

> [w]henever a lawyer communicates with a client by e-mail, the lawyer must first consider whether, given the client's situation, there is a significant risk that third parties will have access to the communications. If so, the lawyer must take reasonable care to protect the confidentiality of the communications by giving appropriately tailored advice to the client.

Id. at 4. Because of the risk, in the Committee's hypothetical, that the employer would at some time in the future review the employee-client's communications with her lawyer, the lawyer

> should instruct the employee-client to avoid using a workplace device or system for sensitive or substantive communications, and perhaps for any attorney-client communications, because even seemingly ministerial communications involving

> matters such as scheduling can have substantive ramifications.

Id. at 3. "This ethical obligation arises when the lawyer knows or reasonably should know that the client is likely to send or receive substantive client-lawyer communications . . . where there is a significant risk that the communications will be read by the employer or another third party." *Id.* The risk was viewed as significant even though, in the hypothetical, there was no reason to believe that the employer was in fact reviewing the employee's e-mails. The possibility that review might occur at some point in the future was sufficient to impose a duty to avoid that means of communication.

Rapid technological advancements after 2002 made it necessary for the ABA recently to undertake another global review of the Model Rules. This was because "[t]echnology and globalization have transformed the practice of law in ways the profession could not anticipate in 2002." ABA Comm'n on Ethics 20/20, *Introduction and Overview* (2012). As part of its continuing interest in the impact of technology on ethical obligations, the ABA formed the Commission on Ethics 20/20 "to tackle the ethical and regulatory challenges and opportunities arising from these 21st century realities." *Id.* As the Commission concluded in its report to the ABA's House of Delegates,

> [t]echnology can increase the quality of legal services, reduce the cost of legal services to existing clients, and enable lawyers to represent clients who might not otherwise have been able to afford those services. Lawyers, however, need to

> understand that technology can pose certain risks to clients' confidential information and that reasonable safeguards are ethically required.

ABA Comm'n on Ethics 20/20, *Report to Resolution 105A Revised*, § VII (2012). The risks to clients' confidential information prompted amendments in 2012 to Model Rule 1.6 and the accompanying comments.

E. Model Rule 1.6(c) Requires an Attorney to Protect from Unauthorized Access Confidential Information Relating to the Representation of a Client

As a result of the Commission on Ethics 20/20's report, on August 6, 2012 the ABA House of Delegates added a new paragraph to Model Rule 1.6. Model Rule 1.6(c) now requires that "[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." Although the text is new, the obligation is not. As the Commission reported,

> [t]his duty is already described in several existing Comments, but the Commission concluded that, in light of the pervasive use of technology to store and transmit confidential client information, this existing obligation should be stated explicitly in the black letter of Model Rule 1.6.

ABA Comm'n on Ethics 20/20, *Report to Resolution 105A Revised*, Introduction (2012); *see also* NYSBA Comm. on Prof'l Ethics, Op. 709

(1998) (duty of confidentiality requires attorney to assess risk of interception of e-mail).

The comments to Model Rule 1.6 explain that there is a two-step process to consider in navigating this duty: whether it is reasonable to expect that a communication is private and, if not, whether the precautions taken to preserve privacy are reasonable. "When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients." Model Rule 1.6, cmt. 19. A lawyer meets this obligation if she uses a method of communication in which there is a "reasonable expectation of privacy." *Id.* In determining whether there is a reasonable expectation of privacy, a lawyer is to consider "the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement." *Id.* Importantly, it is the risk of unauthorized access that is key to a lawyer's ethical obligation, not whether unauthorized access actually occurs.

If a lawyer does not have a reasonable expectation of privacy in a mode of communication, she must take "special precautions." *Id.* Factors in determining whether a lawyer has made "reasonable efforts" to prevent unauthorized access to confidential information include (1) the sensitivity of the information, (2) the likelihood of disclosure if additional safeguards are not employed, (3) the cost of employing additional safeguards, (4) the difficulty of implementing the safeguards, and (5) the extent to which the safeguards adversely

affect the lawyer's ability to represent clients. Model Rule 1.6, cmt. 18.

In this case, the FAA is the starting point of the analysis. An understanding of the statute is necessary to understanding whether the attorney-respondents have a reasonable expectation of privacy in their electronic communications on behalf of their clients. The reasonableness of actions taken to preserve privacy requires consideration not only of the FAA, but also of the identity of the attorney-respondents' clients, the nature of the representation, and the type of information exchanged in the communications between the attorneys and persons located outside the United States.

II. The FISA Amendments Act of 2008

The FAA significantly broadens the government's surveillance powers in ways that can affect a lawyer's duty to protect confidential client information. The FAA allows for broader interception of communications than ever before—including expanding the number and kind of persons whose communications are subject to interception. It significantly reduces the judicial safeguards against improper interception that existed under the Foreign Intelligence Surveillance Act ("FISA") before it was amended. Meanwhile, new technology has greatly increased the government's capacity to store and search the contents of electronic communications.

A. Broader Interception of Foreign Intelligence Information

The Second Circuit explained that "[t]he FAA was passed specifically to permit surveillance that was not permitted by FISA." Pet. App. 37a (*Amnesty Int'l USA v. Clapper*, 638 F.3d 118, 138 (2d Cir. 2011) (citing 154 Cong. Rec. S227, 227-28 (daily ed. Jan. 24, 2008) (statement of Sen. Rockefeller); *id.* at 235 (statement of Sen. Hutchison))). "[P]roponents of the statute argued that it was necessary precisely because it made possible expanded surveillance that would not have been permitted under prior law." Pet. App. 121a (*Amnesty Int'l USA v. Clapper*, 667 F.3d 163, 167 (2d Cir. 2011) (Lynch, J., concurring) (citing 154 Cong. Rec. H5756 (daily ed. June 20, 2008) (statement of Rep. Smith); 154 Cong. Rec. S6178-79 (daily ed. June 26, 2008) (statement of Sen. Graham))).

Both before and after the FAA, FISA authorizes interception of communications concerning "foreign intelligence information." The phrase "foreign intelligence information" is defined broadly to include, among other things, all information concerning "international terrorism," "the national defense or security of the United States," and "the conduct of the foreign affairs of the United States." 50 U.S.C. § 1801(e). But the FAA expands by an exponential order of magnitude the persons whose communications about foreign intelligence information can be intercepted. Before the FAA, such a communication could be intercepted only if one of the parties to the communication was a "foreign power" or an agent thereof. 50 U.S.C. §§ 1804(a)(3)(A), 1805(a)(2)(A). But under the

FAA, any such communication can be intercepted so long as one of the parties to it is located outside of the United States and is not a U.S. citizen. 50 U.S.C. § 1881a(a).

Thus, under the original version of FISA, an attorney's reasonable expectation of privacy when communicating with non-citizens outside of the United States about foreign intelligence information turned on whether the person was an agent of a foreign power. That was a factor that the attorney could understand and account for in assessing the confidentiality of the communication. Now, a communication about foreign intelligence information with any third party can be subject to interception if the third party is a non-citizen located in a country other than the United States.

B. Reduced Judicial Safeguards Against Interception of Communications

The FAA reduces the role of the FISA Court in overseeing surveillance and eliminates many of FISA's safeguards that protected against the possibility of government overreach.[3] Two such differences are particularly relevant to the attorney-respondents' ethical obligations.

First, the FAA eliminates the requirement that the government show probable cause for surveilling a particular target or facility. In fact, the government does not even have to reveal to the FISA Court the identity of the particular per-

[3] The government has alluded to secret procedures that limit the authority it seems to have under the plain language of the FAA. Whatever those procedures might be, they have no bearing on the attorney-respondents' ethical obligations, which are determined in regard to known, not unknown, facts.

sons or facilities it wants to surveil. Pet. App. 11a–12a (*Amnesty Int'l*, 638 F.3d at 124). Rather, as the Second Circuit noted, as the plaintiffs allege, and as the government does not dispute, under the FAA "an acquisition order could seek, for example, '[a]ll telephone and e-mail communications to and from countries of foreign policy interest—for example, Russia, Venezuela, or Israel—including communications made to and from U.S. citizens and residents.'" Pet. App. 12a (*Amnesty Int'l*, 638 F.3d at 125-26).

Second, under the FAA, the FISA Court no longer monitors the government's compliance with minimization procedures. *See* Pet. App. 12a (*Amnesty Int'l*, 638 F.3d at 126 ("[U]nder the FAA, the judiciary may not monitor compliance on an ongoing basis; the FIS[A Court] may review the minimization procedures only prospectively, when the government seeks its initial surveillance authorization.")).

A particularized warrant requirement and ongoing judicial oversight of government surveillance for conversations occurring inside the United States have long stood as critical protections against government overreaching—and have served to assure that counsel have a reasonable expectation of privacy with respect to most communications occurring in this country. By authorizing what Second Circuit Judges Raggi and Lynch described as "dragnet surveillance," largely free of judicial supervision, of communications outside the United States, Pet. App. 130a (*Amnesty Int'l*, 667 F.3d at 171 (Lynch, J., concurring)); Pet. App. 161a (*Amnesty Int'l*, 667 F.3d at 187 (Raggi, J., dissenting)), the FAA substantially changes the analysis about whether the attorney-

respondents have a reasonable expectation of privacy when communicating on behalf of their clients with non-citizens outside of this country.

C. The Technology Available to the Government

The extent to which advances in technology have increased the government's ability to store and sort a large number of intercepted communications is not the subject of this brief. An exhaustive discussion can instead be found in the brief also submitted in support of respondents by fellow *amicus curiae* Electronic Privacy Information Center. A few facts, as recently reported by the *New York Times*, suffice to make the point here. Whereas "[n]ot so long ago" "the cost of data storage was too high and the capacity too low to keep everything," "[i]t will soon be technically feasible and affordable to record and store everything that can be recorded about what everyone in a country says or does." Scott Shane, *Data Storage Could Expand Reach of Surveillance*, N.Y. Times, Aug. 14, 2012 (citing the opinion of John Villasenor, an electrical engineer at the University of California, Los Angeles and a senior fellow at the Brookings Institution). According to Mr. Villasenor, "to store the audio from telephone calls made by an average person in the course of a year would require about 3.3 gigabytes and cost just 17 cents to store, a price that is expected to fall to 2 cents by 2015." *Id.* Just as acquisition and storage capacity has increased exponentially, so, too, has the ability to sort acquired and stored information. *Id.* ("And a government sleuth would, of course, be able to efficiently find anything of interest in the data because of the parallel revolution in search tech-

nology. It is hard to exaggerate how dramatic the change has been.").

The ability to store vast quantities of information and to search through this information with great efficiency, when coupled with broad government power to intercept communications, makes it reasonable to be concerned that *any* communication with a non-citizen in a country of interest to the United States might be intercepted and stored, subject to review by the government on an as-needed basis at a later time. This is not so different from the concern, addressed above, that an employee's e-mails on her employer's computers might be reviewed by the employer at a later time. That risk directly affects any reasonable expectation of privacy in the communication.

III. The Circumstances of the Attorney-Respondents

A. The Lawyers' Ethical Obligations

Attorney-respondent Sylvia Royce practices law in Washington, D.C. Pet. App. 349a (Royce Decl. ¶ 1). Attorney-respondents Scott McKay and David Nevin practice in Idaho. Pet. App. 369a (McKay Decl. ¶¶ 1-2). Like New York, both jurisdictions have professional conduct rules that are substantially the same as the ABA's Model Rules. Pet. App. 378a (Gillers Decl. ¶ 4). Although the rules governing attorney conduct in Idaho and Washington, D.C. vary in some ways from the Model Rules and from each other, the duties at issue in this case "are common to lawyers in all American jurisdictions." Pet. App. 379a (Gillers Decl. ¶ 5); *see also* D.C. Rule of Prof'l Conduct 1.6; Idaho Rule of Prof'l Conduct 1.6.

Mr. McKay and Mr. Nevin are subject to the Idaho Bar Commission Rules, which, much like the New York rules, are promulgated by the Commissioners of the Idaho State Bar and adopted by the Idaho Supreme Court. These rules state that violations of "Idaho Rules of Professional Conduct, as amended, or any other ethical canon or requirement adopted by the Supreme Court" may lead to sanctions, including disbarment. Idaho Bar Comm'n Rules 505(a), 506. Ms. Royce is subject to District of Columbia Bar Rule XI, which states as follows:

> The license to practice law in the District of Columbia is a continuing proclamation by this Court that the holder is fit to be entrusted with professional and judicial matters, and to aid in the administration of justice as an attorney and an officer of the Court. It is the duty of every recipient of that privilege at all times and in all conduct, both professional and personal, to conform to the standards imposed upon members of the Bar as conditions for the privilege to practice law.

D.C. Bar Rule XI § 2(a). Violations of an attorney's oath of office or the rules of professional of conduct can likewise lead to sanctions by the District of Columbia Bar, including disbarment. *Id.* §§ 2(b), 3(a).

B. Identity of the Lawyers' Clients and Nature of the Representation

Ms. Royce, Mr. McKay, and Mr. Nevin all represent individuals with actual or alleged ties to

notorious anti-U.S. terrorist organizations.[4] Ms. Royce represents Mohammedou Ould Salahi, who the United States alleges has "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. ¶¶ 3-4). Ms. Royce represents Mr. Salahi in a *habeas corpus* proceeding and in connection with several lawsuits filed under the Freedom of Information Act and Detainee Treatment Act. Pet. App. 349a (Royce Decl. ¶ 3). The United States is Mr. Salahi's adversary in each of these lawsuits. Mr. Salahi has been declared an enemy combatant by the United States and has been held at Guantanamo Bay since 2002. *Id.* (Royce Decl. ¶ 3). In the course of her representation, Ms. Royce learned that "[d]uring [Mr. Salahi's] interrogation, the government interrogators told Mr. Salahi that his family members would be arrested and mistreated if he did not cooperate." *Id.* at 350a–351a (Royce Decl. ¶ 5). This allegation has been confirmed by the Department of Justice. Office of the Inspector General, Dep't of Justice, *A Review of the FBI's Involvement in and Observation of Detainee*

[4] For the facts set forth in this section, we rely on the September 12, 2008 Declaration of Sylvia Royce (Pet. App. 348a–353a) and the December 15, 2008 Declaration of Scott McKay (Pet. App. 368a–375a), which was submitted on behalf of both Mr. McKay and his partner Mr. Nevin. We understand that, although each lawyer's clients and circumstances might have changed in the four years since, the statements in Ms. Royce's and Mr. McKay's 2008 declarations have not been disputed in any manner by the government and must be assumed to be true at this stage in the litigation.

Interrogations in Guantánamo Bay, Afghanistan, and Iraq, at 122-28 (2008).

Mr. McKay and Mr. Nevin represent Sami Omar Al-Hussayen, who was acquitted of criminal charges in a federal court in June 2004 and is currently a defendant in several civil cases arising out of the September 11, 2001 terrorist attacks. Pet. App. 369a–370a (McKay Decl. ¶ 3). In the course of that representation, Mr. McKay learned that "the U.S. government had intercepted some 10,000 telephone calls and 20,000 email communications involving Mr. Al-Hussayen." *Id.* at 370a (McKay Decl. ¶ 6).

Mr. McKay and Mr. Nevin also represent Khalid Sheik Mohammed, whom the United States has charged with "international terrorism and an alleged criminal conspiracy involving the events of September 11, 2001, al Qaeda, various charged and uncharged co-conspirators, and acts taking place in a number of countries." *Id.* at 369a, 373a (McKay Decl. ¶¶ 3, 12). Mr. Mohammed, who confessed to having been the mastermind of the September 11, 2001 attacks on the United States, was captured in Pakistan in 2003 and has been held at Guantanamo Bay since September 2006. *Id.* at 374a (McKay Decl. ¶ 18).

C. Location of the Lawyers' Clients, Potential Witnesses, and Other Sources of Information Relating to the Lawyers' Representation of Their Clients

Both Mr. Salahi and Mr. Mohammed are currently being held at Guantanamo Bay, Cuba. Mr. Al-Hussayen is in Saudi Arabia.

In connection with her representation of Mr. Salahi, Ms. Royce regularly communicates with persons located outside of the United States: Mr. Salahi's brother, Yahdih Ould, who lives in Germany; co-counsel Brahim Ould Ebety, who lives in Mauritania (Mr. Salahi's country of origin), and Emmanuel Altit, who lives in France; foreign journalists working for print media such as *Der Spiegel* (a German publication) and the Toronto *Globe and Mail* (a Canadian publication); and employees of human-rights organizations in offices outside of the United States. Pet. App. 350a–353a (Royce Decl. ¶¶ 5, 6, 8).

In connection with their representation of Mr. Mohammed, Mr. McKay and Mr. Nevin regularly communicate with "experts, investigators, attorneys, family members of Mr. Mohammed and others who are located abroad," including "journalists, government officials, political figures, and other third parties." Pet. App. 371a–374a (McKay Dec. ¶¶ 7, 9, 12).

Finally, in connection with their representation of Mr. Al-Hussayen, Mr. McKay and Mr. Nevin regularly engage in communications with Mr. Al-Hussayen himself and "witnesses, experts, and others based abroad." *Id.* at 370a, 373a (McKay Decl. ¶¶ 5, 11).

D. The Lawyers' Communications Relate to Foreign Intelligence Information

To be able to competently represent their clients, Ms. Royce's, Mr. McKay's, and Mr. Nevin's international communications necessarily involve matters that fit within FISA's definition of "foreign intelligence information." Ms. Royce's inter-

national communications with Mr. Salahi's brother, human-rights organizations, and members of the media "relate to international terrorism and the foreign affairs of the United States." Pet. App. 350a, 352a–353a (Royce Decl. ¶¶ 5, 8). Her international communications with human-rights organizations and media members "include discussions of the policies of the U.S. government relating to the detention and interrogation of enemy combatants, the connections or lack thereof between my client and others held at Guantanamo, and the propriety or impropriety of government decisions with respect to classification of national security information." *Id.* at 353a (Royce Decl. ¶ 8). And her international communications with her Mauritanian and French co-counsel involve "legal strategy and the U.S. government's policies with respect to the detention of prisoners at Guantanamo Bay." *Id.* at 351a (Royce Decl. ¶ 6).

Mr. McKay's and Mr. Nevin's international communications in connection with their representation of Mr. Al-Hussayen and Mr. Mohammed "concern litigation strategy and other matters relevant to the litigation[s]" involving those individuals. Pet. App. 370a–371a (McKay Decl. ¶¶ 5, 7). "All of these communications are sensitive, and some of them are privileged." *Id.* Because the litigations involving Mr. Al-Hussayen and Mr. Mohammed relate to the September 11 terrorist attacks, communications relating to those litigations necessarily meet FISA's definition of "foreign intelligence information."

E. Methods of the Lawyers' Communications with Persons Located Outside of the United States

Prior to passage of the FAA, Ms. Royce's, Mr. McKay's, and Mr. Nevin's regular international communications in connection with their representation of their clients were conducted by telephone or e-mail. Pet. App. 351a–352a (Royce Decl. ¶ 7); Pet. App. 370a–371a (McKay Decl. ¶¶ 5, 7). These forms of communication are now subject to interception by the government, for immediate or subsequent review. The attorney-respondents contend that, as a result of the FAA, there is no longer a reasonable expectation of privacy in communication by such methods and they are therefore required by their ethical obligations to resort to other, more expensive, means of communication on behalf of their clients. Based on the facts in this record, which are undisputed by the government and which the NYSBA accepts for purposes of this brief, the NYSBA agrees with these conclusions by the attorney-respondents.

SUMMARY OF ARGUMENT

Because of the FAA's expansion of the government's surveillance power, Ms. Royce, Mr. McKay, and Mr. Nevin do not have a reasonable expectation of privacy in their international electronic communications in connection with the representation of their clients. The rules of professional conduct governing these lawyers therefore compel them to take appropriate precautions to protect against government access to those communications. The precautions that they have taken in

their factual circumstances, including international travel, are both reasonable and required.

ARGUMENT

I. The Attorney-Respondents Do Not Have a Reasonable Expectation of Privacy in Their International Electronic Communications Relating to the Representation of Their Clients

"Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement." Model Rule 1.6, cmt. 18. As discussed above, Ms. Royce's, Mr. McKay's, and Mr. Nevin's communications relating to their representation of accused terrorists include sensitive information with non-citizens outside of the United States. And far from protecting those communications, the FAA permits them to be intercepted.

In the course of representing their clients, the attorney-respondents interact with witnesses and sources (*e.g.*, family members of clients, potential witnesses, human-rights organizations, and journalists) that are located outside of the United States. As far as the record reflects, none of these individuals are "foreign powers" or agents thereof, and so their communications would not have been subject to interception under FISA. Because of the FAA's vast increase in the breadth of permitted surveillance, the attorney-respondents' international electronic communications with non-citizens

unaffiliated with any foreign power now fall squarely within the government's surveillance power.

The FAA's reduction of judicial safeguards on the government's deployment of its surveillance power further increases the risk that the attorneys' international communications will be monitored. As legal-ethics expert Professor Gillers stated, "the risk of interception is exponentially expanded over what it would be if the government were obligated to demonstrate probable cause and identify its individual targets, to the satisfaction of a neutral judicial officer, as a prelude to interception." *See* Pet. App. 386a (Gillers Decl. ¶ 21).

It is irrelevant that the lawyers cannot show with certainty that the government will in fact intercept any of their international communications. As Professor Gillers opined, "their ethical obligations do not depend on any such proof. It is triggered by the *risk* that the communications will be intercepted. Or to put it another way, the duty is to *safeguard* confidential information." Pet. App. 384a (Gillers Decl. ¶ 17) (emphasis in original); *see also* ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 11-459 at 3 ("[T]his ethical obligation arises when the lawyer knows or reasonably should know . . . there is a significant risk that the communications will be read by the employer or another third party.").

Ms. Royce, Mr. McKay, and Mr. Nevin have good reason to believe that their international communications will in fact be intercepted. As Professor Gillers stated, "the lawyers have good reason for this belief because of the status of their clients, the identity and location of witnesses and sources,

and the broad authority that the FAA grants the government." Pet. App. 387a (Gillers Decl. ¶ 23). The government did actually intercept thousands of communications involving Mr. Al-Hussayen even before the FAA expanded the government's surveillance authority. Mr. McKay "learned during the course of defending Mr. Al-Hussayen against federal criminal charges in Idaho that the U.S. government had intercepted some 10,000 telephone calls and 20,000 email communications involving Mr. Al-Hussayen." Pet. App. 370a (McKay Decl. ¶ 6). And the government has told Mr. Salahi, Ms. Royce's client, that it intended to target his family members. Pet. App. 350a–351a (Royce Decl. ¶ 5).

Just as an attorney does not have a reasonable expectation of privacy using an employer's e-mail system to communicate with an employee-client when the employer has reserved the right to monitor the e-mail, ABA Standing Comm. on Ethics and Prof'l Resp., Formal Op. 11-459 at 3, Ms. Royce, Mr. McKay, and Mr. Nevin do not have a reasonable expectation of privacy using e-mail and telephone systems whose providers are under a legal obligation to allow the government to monitor those communications. In both situations, the risk of unauthorized access is especially serious because the party with the power to intercept confidential communications is the client's adversary. And in both situations, the risk of unauthorized access is especially high because of a written policy -- in the case of the FAA, a law -- authorizing interception. *Cf.* NYSBA Comm. on Prof'l Ethics, Op. 820 (2008) (attorney would breach duty of confidentiality "if the service provider reserved the

right to disclose [the attorney's] e-mails or the substance of the communications to third parties without the sender's permission"). Even though there is no certainty that the communications will in fact be intercepted, the risk is unacceptably high and the attorney has no reasonable expectation of privacy. *Id.*; *see also* NYSBA 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 . . . the lawyer must select a more secure means of transmission than unencrypted Internet e-mail.").

II. The Attorney-Respondents Are Required to Take Reasonable Precautions to Protect the Confidentiality of Their International Electronic Communications Relating to the Representation of Their Clients

Because the attorney-respondents have no reasonable expectation of privacy in their international electronic communications relating to the representation of their clients, their ethical obligations require that they "take reasonable precautions to prevent the information from coming into the hands of unintended recipients." ABA Model Rule 1.6, cmt. 19. At a minimum, the lawyer must avoid using that method of communication and choose another method that does afford the lawyer a reasonable expectation of privacy. *See id.*

Based on the undisputed factual record, as a result of the risk of interception posed by the FAA, Ms. Royce, Mr. McKay, and Mr. Nevin have taken and will continue to take multiple precautions to

protect the confidentiality of their international communications relating to the representation of their clients. *See* Pet. App. 375a (McKay Decl. ¶ 14) ("Because of the FAA, we now have to assume that every one of our international communications may be monitored by the government."); Pet. App. 351a–352a (Royce Decl. ¶ 7) ("The risk that the government will monitor my communications with co-counsel . . . compel[s] [us] to limit the information we share by telephone and e-mail.").

Specifically, Ms. Royce has, at various times, "exchange[d] generalities rather than specifics," "decide[d] that [my co-counsel and I] cannot exchange the relevant information at all," and "travel[ed] to share information, views and ideas" "[w]here information is both especially important and especially sensitive." *Id.* Likewise, Mr. McKay and Mr. Nevin have, at various times, "[c]ollect[ed] information in person," which "sometimes requires travel that is both time-consuming and expensive," "minimize[d] the amount of sensitive information that [they] communicate by telephone or email," and "forgo[ne] the information altogether" when "travel is impractical or prohibitively expensive." *Id.* at 371a–372a (McKay Decl. ¶¶ 8, 10).

The government argues that the time and money spent by the attorney-respondents to protect the confidentiality of their international communications are "self-imposed" or "self-inflicted" harms. *See* Pet'r's Br. 18, 21–23, 38–43. That is false. This Court should not accept the government's invitation to belittle counsel for complying with their ethical rules. As members of the bar,

they did not have any choice in the matter. Attorneys must comply with their ethical obligations. "An attorney who violates his or her ethical obligations is subject to professional discipline, including sanctions, suspension, and disbarment." *Connick v. Thompson*, 131 S. Ct. 1350, 1362-63 (2011); *see also Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1622 (2010) ("Model rules of professional conduct adopted by many States impose outer bounds on an attorney's pursuit of a client's interests." (citing ABA Model Rules of Professional Conduct 3.1, 4.1)); *Nix v. Whiteside*, 475 U.S. 157, 168 (1986) (stating that Disciplinary Rule 7-102 of the ABA's Model Code of Professional Responsibility "has been adopted by Iowa, and is binding on all lawyers who appear in its courts.").

As Professor Gillers stated, "[t]he lawyers' decision to avoid electronic means of communications is not discretionary. It is obligatory. This limitation on the attorneys' work severely restricts their ability to represent their client effectively." Pet. App. 387a (Gillers Decl. ¶ 23).

CONCLUSION

The declarations of Ms. Royce and Mr. McKay set forth a straightforward and correct analysis of the problem they face. With the passage of the FAA, they no longer have a reasonable expectation of privacy in their communications with non-citizens outside of the United States in connection with client matters. Consistent with the canons of ethics, the attorney-respondents have incurred and will continue to incur time and expense using

alternative means of communication. This is not "self-inflicted" or "self-imposed" harm. Rather, these efforts are the minimum that the attorney-respondents are obligated to undertake in order to protect the confidentiality of their clients' information. This Court has repeatedly recognized the importance of that confidentiality. As *amicus curiae*, the New York State Bar Association respectfully requests that the Court recognize that the costs the attorney-respondents have incurred and will continue to incur are not "self-imposed," but are dictated by the attorneys' ethical obligations and the exponentially increased risk of interception posed by the FAA, causing the attorney-respondents to suffer actual and imminent harm.

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Respectfully submitted,

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