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

AMICUS CURIAE BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENTS AND URGING AFFIRMANCE

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QUESTION PRESENTED

Whether respondents lack Article III standing to seek prospective relief.

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INTEREST OF AMICUS CURIAE[1]

Amicus National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

NACDL was founded in 1958. It has a nationwide membership of approximately 10,000 and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates.

NACDL files numerous amicus briefs each year in this Court and other courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. Because the surveillance challenged in this action poses a direct, concrete threat to the confidentiality that is critical to an

[1] Under Sup. Ct. R. 37.6, counsel for amicus curiae state that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court under Rule 37.3(a).

effective defense in criminal cases, NACDL has decided to present its views for the Court's consideration.

SUMMARY OF ARGUMENT

Confidentiality is essential to the work of criminal defense lawyers. Under the standards of professional responsibility that guide the work of defense counsel, including both the relevant rules of professional conduct and the American Bar Association Standards for Criminal Justice, counsel must preserve the confidentiality of information relating to the representation of a client.

In light of this duty of confidentiality, petitioners are wrong to contend that respondents McKay and Royce--both criminal defense lawyers--have alleged merely "speculative" and "self-inflicted" injuries from potential surveillance under the FISA Amendments Act, 50 U.S.C. § 1881a ("FAA"). That surveillance may target regions, persons, and subjects heavily implicated by the matters in which McKay and Royce serve as criminal defense counsel. As the court of appeals recognized, they have good reason to believe that their communications in particular will be intercepted in the course of surveillance under the FAA. Pet. App. 37a-38a. They thus must choose between foregoing international communications about sensitive matters or incurring the expense and burden of traveling overseas for in-person communication. The substantial, specific burdens that the FAA imposes on McKay and Royce create a personal stake in the

outcome of the controversy and guarantee the "concrete adverseness" necessary for standing. *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) (quotation omitted). Their challenge to the constitutionality of the FAA should be permitted to proceed to decision on the merits.

ARGUMENT

1. Keeping a client's information confidential is among a lawyer's most fundamental duties. The principle of confidentiality manifests itself in the attorney-client privilege, "one of the oldest recognized privileges for confidential communications." *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998). It finds expression in the work-product doctrine, recognized by this Court sixty-five years ago in *Hickman v. Taylor*, 329 U.S. 495 (1947). And the American Bar Association Model Rules of Professional Conduct, on which lawyers' ethics codes in most states are based, Pet. App. 378a, prohibit attorneys from "reveal[ing] information relating to the representation of a client" absent the client's consent, except under narrowly circumscribed conditions. American Bar Association, Model Rules of Professional Conduct ("MRPC"), Rule 1.6(a) (1983).

Confidentiality serves crucial functions in the American legal system. In the context of litigation, this Court has found that

> it is essential that a lawyer work with a certain degree of privacy, free from

> unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.

Hickman, 329 U.S. at 510-11. Similarly, the protections of the attorney-client privilege "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice." *Swidler & Berlin*, 524 U.S. at 403 (quotation omitted).

2. Confidentiality also serves important interests outside the context of litigation. The ethical prohibition on "reveal[ing] information relating to the representation of a client" is broader than the attorney-client privilege and the attorney work-product doctrine. It establishes the duty of confidentiality in circumstances not involving lawful compulsion (such as a subpoena or a lawful discovery request). *See, e.g., X Corp. v. Doe*, 805 F. Supp. 1298, 1307-10 (E.D. Va. 1992) (explaining difference between attorney-client privilege and duty of confidentiality), *aff'd mem.*, 17 F.3d 1435 (4th Cir. 1994); MRPC 1.6, Comment 3 ("The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law."). The ethical duty of confidentiality

> contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

MRPC 1.6, Comment 2.

3. The duty of confidentiality has particular significance for criminal defense lawyers. The American Bar Association's Standards for Criminal Justice, to which this Court has looked often in determining the professional duties of criminal defense lawyers,[2] emphasize the importance of protecting the client's confidentiality. Standard 4-3.1(a) provides that "[d]efense counsel should seek to

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[2] *See, e.g., Padilla v. Kentucky*, 130 S. Ct. 1473, 1482 (2010); *Gonzalez v. United States*, 553 U.S. 242, 249 (2008); *Rompilla v. Beard*, 545 U.S. 374, 386 (2005); *Roe v. Flores-Ortega*, 528 U.S. 470, 479 (2000).

establish a relationship of trust and confidence with the accused," and it adds: "Defense counsel should explain the necessity of full disclosure of all facts known to the client for an effective defense, and defense counsel should explain the extent to which counsel's obligation of confidentiality makes privileged the accused's disclosures." American Bar Association, Standards for Criminal Justice, Defense Function, Standard 4-3.1(a) (3d ed. 1993) ("ABA Standards"). The Commentary explains that "[n]othing is more fundamental to the lawyer-client relationship than the establishment of trust and confidence. Without it, the client may withhold essential information from the lawyer. Thus, important evidence may not be obtained, valuable defenses neglected, and, perhaps most significant, defense counsel may not be forewarned of evidence that may be presented by the prosecution." ABA Standard 4-3.1, Commentary.

The Standards address a circumstance analogous to the surveillance at issue here. Standard 4-3.1(b) provides that "[t]o ensure the privacy essential for confidential communication between defense counsel and client, adequate facilities should be available for private discussions between counsel and accused in jails, prisons, courthouses and other places where accused persons must confer with counsel." ABA Standard 4-3.1(b). The Commentary declares: "It is fundamental that the communication between client and lawyer be untrammeled. The reading by prison officials of correspondence between prisoners and their lawyers inhibits communication and impairs the attorney-

client relationship, *may compel time-consuming and expensive travel by the lawyer to assure confidentiality*, or even prevent legitimate grievances from being brought to light." *Id.*, Commentary (emphasis added).

The ABA Standards confirm, in the criminal defense context, that Professor Gillers' opinion is correct; lawyers have a duty to "safeguard confidential information." Pet. App. 380a. Professor Gillers is correct as well, with respect to criminal defense lawyers, that "[i]f an attorney has reason to believe that sensitive and confidential information related to the representation of a client and transmitted by telephone, fax, or e-mail is reasonably likely to be intercepted by others, he or she may not use that means of communication in exchanging or collecting the information. He or she must find a safer mode of communication, if one is available, which may require communication in person." Pet. App. 381a. The Standards contemplate a similar course; if attorney-client mail is intercepted by government officials, defense counsel may be compelled to undertake "time-consuming and expensive travel . . . to assure confidentiality." ABA Standard 4-3.1, Commentary; *see* Pet App. 371a-372a (Declaration of Scott McKay) (given likelihood of surveillance, "[w]henever possible, I . . . collect information in person rather than by telephone or email. . . . Collecting information in person sometimes requires travel that is both time-consuming and expensive.").

4. In light of the obligations imposed under the relevant professional responsibility rules, plaintiffs McKay and Royce--both criminal defense lawyers--allege concrete, specific injuries from potential surveillance under the FAA. That surveillance may target regions, persons, and subjects heavily implicated by the matters in which McKay and Royce serve as criminal defense counsel. As the court of appeals recognized, they have good reason to believe that their communications in particular will be intercepted in the course of surveillance under the FAA. Pet. App. 37a-38a. The minimization provisions of the FAA do nothing to cure the harm. The FAA does not allow judicial supervision of the minimization process, and the statute permits the government to retain evidence of a crime "which has been . . . committed." 50 U.S.C. § 1801(h)(3). That description encompasses communications that any criminal defense lawyer is likely to have with clients, witnesses, consultants, and co-counsel.

5. To understand the injury that plaintiffs McKay and Royce suffer as a result of FAA surveillance, consider a hypothetical surveillance program closer to home. Imagine that Congress enacts a statute that permits the Executive to conduct surveillance targeting the financial services industry in Manhattan.[3] The stated purpose of the statute is to enhance the government's ability to detect and thwart ongoing or planned insider trading. The statute permits the government, with a court's

[3] The legality of such a hypothetical program is irrelevant for purposes of this example, just as the legality of the FAA is not before the Court in this case.

approval, to intercept any electronic communication to or from any person associated with any bank, brokerage, or other financial institution in Manhattan. The statute requires no individualized probable cause showing. Although the statute requires minimization, it (like the FAA) permits the government to retain evidence of crimes that have been committed. As with the FAA, the government administers the surveillance program entirely in secret.

Now suppose that a District of Columbia criminal defense attorney representing a Manhattan hedge fund manager suspected of insider trading wants to communicate with her client, or with potential witnesses at her client's hedge fund. Under the rules of professional responsibility and the ABA Standards, the attorney cannot discuss sensitive matters relating to the case by telephone or email. Given that the attorney's client resides in the target area, works in the target industry, and is suspected of involvement in the targeted conduct, she can reasonably expect that her communications are among those most likely to be intercepted--even though, of course, she cannot be certain because of the secrecy that surrounds the program.

The attorney's ethical obligation to maintain the confidentiality of information relating to the representation requires her either to forego communicating about sensitive matters or to make the trip from D.C. to New York to have the communications in person. The attorney faces, in other words, precisely the choice that the FAA

imposes on McKay and Royce--except that for them in person communication requires international travel, rather than a day trip up the eastern seaboard and back. The criminal defense attorney in this hypothetical example suffers "concrete and particularized" injury from the statute, even though it does not target her directly, and she plainly has standing to challenge its constitutionality. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). McKay and Royce even more clearly have standing to challenge the FAA.

6. The ultimate question concerning Article III standing is whether respondents--and particularly criminal defense attorneys McKay and Royce--"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. at 517 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). The substantial, specific burdens that the FAA imposes on McKay and Royce create precisely such a "personal stake" and guarantee the necessary "concrete adverseness." Their challenge to the constitutionality of the FAA should be permitted to proceed to decision on the merits.

7. There is no reason to believe that other opportunities to challenge the constitutionality of the FAA will arise. Petitioners suggested below that such a challenge could be made in the context of a criminal case in which the government announces its intention to use FAA-derived evidence. *See* 50

U.S.C. §§ 1806(c) (requiring notice of the government's intent to use FISA-derived evidence), 1881e(a) (FAA-derived information subject to the notice provision of § 1806(c)). But in the four years since the FAA was enacted, not a single reported case has appeared in which a criminal defendant challenged the constitutionality of the statute.[4] That may be because the government has not made use of FAA-derived information in criminal cases. It may be because the government has not disclosed, in its FISA notices under § 1806(c), that the surveillance was conducted under the authority of § 1881a rather than the pre-existing provisions of FISA, and has rejected requests for clarification.[5] Regardless of the reason, there have been no reported challenges to the FAA in criminal cases, and the theoretical possibility of review in a future case does not redress the concrete injury that respondents McKay and Royce are now suffering.

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[4] By contrast, during this same period there have been several reported challenges to the constitutionality of FISA surveillance. *See, e.g., United States v. Duka*, 671 F.3d 329, 336-46 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 2764 (2012); *United States v. El-Mezain*, 664 F.3d 467, 563-70 (5th Cir. 2011); *United States v. Abu-Jihaad*, 630 F.3d 102, 117-29 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 3062 (2011).

[5] For example, in *United States v. Hafiz Khan, et al.*, No. 11-cr-20331-RNS (S.D. Fla.), the government's FISA notice did not mention § 1881a. Docket No. 17 (available on PACER). The defense moved for clarification whether the surveillance at issue relied on the FAA, Docket No. 219, and the district court granted the motion, Docket No. 278 at 5. The government sought reconsideration of the disclosure order. Docket No. 284. The district court granted the government's motion and refused to require it to inform the defense whether the surveillance was FAA-derived. Docket No. 285. The court denied a defense motion for reconsideration. Docket No. 351.

CONCLUSION

For these reasons, the Court should find that respondents have Article III standing and affirm the court of appeals' judgment.

Respectfully submitted,

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