No. _____

IN THE

Supreme Court of the United States

AMERICAN CIVIL LIBERTIES UNION, ET AL.,

Petitioner,

—v.—

NATIONAL SECURITY AGENCY, ET AL.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that plaintiffs who have been injured because of government surveillance are precluded from challenging the lawfulness of that surveillance if the government refuses to disclose whether plaintiffs' communications have been intercepted.

2. Whether the President possesses authority under Article II of the Constitution to engage in intelligence surveillance within the United States that Congress has expressly prohibited.

PARTIES TO THE PROCEEDINGS

The petitioners in this case are the American Civil Liberties Union, American Civil Liberties Union Foundation, American Civil Liberties Union of Michigan, Council on American-Islamic Relations, Council on American-Islamic Relations Michigan, Greenpeace, Inc., National Association of Criminal Defense Lawyers, James Bamford, Larry Diamond, Christopher Hitchens, Tara McKelvey, and Barnett R. Rubin.

The respondents are the National Security Agency / Central Security Service, and Lieutenant General Keith B. Alexander, in his official capacity as Director of the National Security Agency and Chief of the Central Security Service.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, petitioners confirm that none of the petitioners have parent companies nor do any publicly held companies own ten percent or more of their stock.

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The American Civil Liberties Union *et al.* respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 493 F.3d 644 (6th Cir. 2007) and reprinted in the Appendix ("App.") at 66a-235a. The opinion of the district court is reported at 438 F.Supp.2d 754 (E.D. Mich. 2006) and reprinted in the Appendix at 1a-62a.

JURISDICTION

The Court of Appeals entered its judgment on July 6, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The underlying complaint raises claims under the Administrative Procedures Act ("APA"), 5 U.S.C. § 551 *et seq.*, the principle of separation of powers, and the First and Fourth Amendments. The claims raised under the APA and the principle of separation of powers relate to alleged violations of the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. § 1801 *et seq.* (2006), and Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III"), 18 U.S.C. § 2510, 2522 *et seq.* The relevant provisions of FISA and Title III are reprinted in the Appendix at 236a-241a. The Protect America Act of

2007 ("PAA"), Pub. L. No. 110-55, 121 § 552 (2007), which amended FISA and which President Bush signed into law on August 5th, 2007, is reprinted in the Appendix at 250a-264a.

STATEMENT OF THE CASE

A. The NSA Program and Commencement of This Lawsuit.

In the fall of 2001, President Bush secretly authorized the National Security Agency ("NSA") to inaugurate a program of warrantless electronic surveillance within the United States (the "Program").[1] President Bush publicly acknowledged the Program after the *New York Times* reported its existence in December 2005.[2] Since December 2005, senior government officials have explained the nature and scope of the Program in significant detail.[3] According to their public statements, the

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[1] James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times, Dec. 16, 2005.

[2] Court of Appeals Joint Appendix ("C.A. App.") 81 (President's Radio Address, 41 Weekly Comp. Press. Doc. 1880, Dec. 17, 2005 (hereinafter "President's Dec. 17 Radio Address")).

[3] C.A. App. 112 (*Hearing Before the S. Judiciary Committee on the Wartime Executive Power and the NSA's Surveillance Authority*, 109th Cong. (2006) (hereinafter "Senate Judiciary Hearing")); C.A. App. 84 (Press Briefing by Attorney Gen. Alberto Gonzales & General Michael Hayden, Dec. 19, 2005, *available at* http://www.whitehouse.gov/news/releases/2005/12/print/20051219-1.html (hereinafter "Gonzalez & Hayden Dec. 19 Press Briefing")); C.A. App. 92 (General Michael Hayden, Address to the National Press Club, Jan. 23, 2006, *available at*

Program involved the interception of e-mails and telephone calls that originated or terminated inside the U.S.[4] The interceptions were not predicated on judicial warrants or any other form of judicial authorization,[5] nor were they predicated on any determination of criminal or foreign-intelligence probable cause.[6] Instead, NSA "shift supervisors"[7] initiated surveillance when in their judgment there was a "reasonable basis to conclude that one party to the communication [was] a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda."[8]

The Program operated in violation of statutory law, and the two judges who have considered the question in the course of the instant lawsuit have both reached this conclusion. Congress has provided that the government can conduct electronic surveillance within the United States only if it

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http://www.dni.gov/speeches/20060123_speech.htm (hereinafter "Hayden Jan. 23 Press Briefing").

[4] C.A. App. 81 (President's Dec. 17 Radio Address); C.A. App. 84 (Gonzales & Hayden Dec. 19 Press Briefing).

[5] C.A. App. 81 (President's Dec. 17 Radio Address; C.A. App. 84 (Gonzales & Hayden Dec. 19 Press Briefing); C.A. App. 112 (Senate Judiciary Hearing).

[6] C.A. App. 84 (Gonzales & Hayden Dec. 19 Press Briefing); C.A. App. 92 (Hayden Jan. 23 Press Briefing); C.A. App. 112 (Senate Judiciary Hearing).

[7] C.A. App. 84 (Gonzales & Hayden Dec. 19 Press Briefing, Statement of Gen. Hayden).

[8] *Id.* (Statement of Attorney Gen. Gonzales).

complies with FISA and Title III. 18 U.S.C. § 2511(2)(f). Both statutes generally prohibit electronic surveillance except with prior judicial authorization based on probable cause, 18 U.S.C. § 2518(3); 50 U.S.C. § 1805 (2006), and Congress has provided civil and criminal penalties for those who violate the statutes' proscriptions, 18 U.S.C. §§ 2511, 2520; 50 U.S.C. §§ 1809, 1810 (2006). Together, FISA and Title III provide the "exclusive means" by which the executive branch can lawfully engage in electronic surveillance within the nation's borders. 18 U.S.C. § 2511(2)(f).

Petitioners are prominent attorneys, journalists, scholars, and national advocacy organizations whose work requires them to communicate by telephone and e-mail with likely targets of the government's warrantless surveillance activities. They commenced this suit on January 17, 2006, asserting claims under the APA, the principle of separation of powers, and the First and Fourth Amendments. On March 9, 2006, plaintiffs moved for partial summary judgment seeking a declaration that the NSA's warrantless wiretapping activities were unlawful and seeking an injunction to stop those activities.[9] In support of their motion, plaintiffs submitted, *inter alia*, the declaration of Nancy Hollander, a criminal defense attorney and a member of plaintiff National Association of Criminal Defense Lawyers ("NACDL"). Hollander, like many

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[9] Plaintiffs' complaint also raised claims with respect to the NSA's "datamining" activities but plaintiffs did not move for summary judgment on those claims. The datamining claims were dismissed by the district court and are not at issue here.

other members of NACDL, represents defendants accused of terrorism-related crimes and her representation of these defendants requires her to communicate by telephone and e-mail with fact witnesses, experts, co-counsel, and investigators located overseas. App. 283a-286a (Hollander Decl. ¶¶ 12-15, 18-19, 21-23). Because of her concern that the government was monitoring her communications under the Program, Hollander ceased engaging in certain communications important to the representation of her clients and took expensive and time-consuming trips abroad to obtain information that she would otherwise have obtained by telephone or e-mail. App. 283a-287a (*Id.* ¶¶ 13, 16-17, 20, 23-25). Hollander believed these measures were necessary to protect the confidentiality of her clients' information, including information covered by the attorney-client privilege. App. 283a-287a (*Id.* ¶¶ 12, 16, 20, 23, 25).

Plaintiffs also submitted the declaration of Nabih Ayad, a criminal defense attorney and member of plaintiff ACLU of Michigan. Ayad, like Hollander, represents defendants accused of terrorism-related crimes and his representation of these defendants requires him to obtain information from individuals overseas, including individuals suspected of being affiliated with terrorist groups. App. 325a-329a (Ayad Decl. ¶¶ 5-9, 11). Some individuals from whom he otherwise would have been able to obtain information had refused to communicate with him directly because they feared that their communications were being monitored under the Program. App. 326a (*Id.* ¶ 6). The Program also caused him to forgo privileged

communications important to the representation of his clients. App. 325a-326a, 328a (*Id.* ¶¶ 4, 6-9). Like Hollander, Ayad believed that the measures he had taken were necessary to protect the confidentiality of his professional communications, including those protected by the attorney-client privilege. App. 325a, 327a (*Id.* ¶¶ 4, 7).

To underscore that the attorney-plaintiffs had acted reasonably in taking measures to protect the confidentiality of their professional communications, plaintiffs submitted the declaration of ethics expert Leonard Niehoff. Professor Niehoff declared that "[p]rofessional responsibility rules generally require an attorney to maintain as confidential information that relates to the representation of the client"; that this ethical obligation "is expansive and is substantially broader than the attorney-client privilege"; and that the Program imposed an "immediate, substantial, and gravely serious burden upon the representation being provided by [the plaintiff] attorneys to their clients." App. 334a-335a (Niehoff Decl. ¶¶ 12, 16). Prof. Niehoff explained:

> The [Program] requires the attorneys to cease – immediately – all electronic and telephonic communications relating to the representation that they have good faith reason to believe will be intercepted. And the [Program] requires the attorneys to resort – immediately – to alternative means for gathering information.

App. 336a (*Id.* ¶ 19).

The government responded to plaintiffs' motion by seeking dismissal of the entire action on the basis of the state secrets privilege. The government did not contest plaintiffs' declarations or their statement of undisputed facts.[10]

B. The District Court's Decision.

The district court (Taylor, J.) issued a decision on August 17, 2006 granting plaintiffs' motion for partial summary judgment. App. 1a.[11] The court rejected the government's argument that the case was non-justiciable under *Totten v. United States*, 92 U.S. 105 (1875), and *Tenet v. Doe*, 544 U.S. 1 (2005), finding that the rule of those cases was limited to disputes concerning secret espionage agreements. App. 16a. While the court found that the government had "appropriately invoked" the state secrets privilege over certain information relating to the Program, App. 16a, it determined that plaintiffs could prove both their standing and their claims on the basis of information that the government had

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[10] In addition to the declarations of Hollander, Ayad, and Niehoff, plaintiffs filed declarations of attorneys Mohammed Abdrabboh, Joshua L. Dratel, and William W. Swor; journalist Tara McKelvey; and scholars Larry Diamond and Barnett R. Rubin. The declarations are reprinted in the Appendix at 265a-278a, 289a-313a, 319a-323a.

[11] The court granted defendants' motion to dismiss plaintiffs' claims relating to datamining, finding that plaintiffs could not "establish a *prima facie* case to support their datamining claims without the use of privileged information" and that "further litigation of this issue would force the disclosure of the very thing the privilege [was] designed to protect." *Id.* at 765. As noted above, *see supra* note 9, the datamining claims were dismissed and are not at issue here.

already acknowledged publicly, App. 19a. The court also found that the information over which the government had invoked the state secrets privilege was unnecessary to any valid defense. App. 20a-21a.[12] It noted that the government had "repeatedly" assured the public that there was a "valid basis in law" for the Program and that the government had "supported [its] arguments without revealing or relying on any classified information." App. 20a.

The court found that plaintiffs had standing to challenge the Program because they were suffering "a concrete, actual inability to communicate with witnesses, sources, clients and others without great expense which [had] significantly crippled [them], at a minimum, in their ability to report the news and competently and effectively represent their clients." App. 28a. The court also found, on the basis of information that had been publicly confirmed by the government, that the Program violated FISA and the principle of separation of powers. App. 53a. Because the Program operated without judicial oversight, the court found that the Program violated the First and Fourth Amendments as well. App. 44a, 47a. The court thus enjoined the government from conducting electronic surveillance without complying with FISA. App. 61a, 64a.

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[12] The court reviewed both publicly filed and classified versions of the declarations of Director of National Intelligence John D. Negroponte and NSA Signal Intelligence Director Major General Richard J. Quirk. App. 16a, 20a-21a.

C. The Suspension of the Program and the Sixth Circuit's Decision.

The government filed a notice of appeal on August 17, 2006, and the Sixth Circuit granted a stay pending appeal. On January 17, 2007, just two weeks before oral argument in the Sixth Circuit, then-Attorney General Gonzales announced that a judge of the Foreign Intelligence Surveillance Court ("FISC") had issued orders authorizing certain surveillance that had previously been conducted without judicial oversight and that, as a result, the President had "determined not to reauthorize" the Program. Letter from Attorney General Alberto R. Gonzales to Hon. Patrick Leahy & Hon. Arlen Specter, Jan. 17, 2007. In a supplemental filing with the Sixth Circuit, however, the government "continue[d] to maintain that the [Program] was lawful," *ACLU v. NSA* Nos. 06-2095, 06-2140, Dkt. No. 89, at 7 n.4 (6th Cir., Jan. 24, 2007) (Government's Supplemental Submission Discussing the Implications of the Intervening FISA Court Orders of January 10, 2007), and indicated that the President might "renew[ ]" the Program "after a hypothetical modification of the FISA orders," *id.* at 11. As discussed in Section III below, the President continues to assert the authority to disregard FISA at any time.

A divided Court of Appeals reversed. Judges Batchelder and Gibbons, writing separately, concluded that plaintiffs lacked standing. In Judge Gibbons's view, the entire case turned on a fact that plaintiffs had not established and could not establish without access to information protected by the state secrets privilege – namely, that their

communications had been monitored under the Program. App. 159a (Gibbons, J., concurring). Judge Batchelder addressed each of plaintiffs' claims individually but arrived at essentially the same conclusion. App. 93a-109a (Batchelder, J., addressing plaintiffs' First Amendment claim); App. 123a-126a (addressing plaintiffs' Fourth Amendment claim); App. 126a-132a (addressing plaintiffs' separation of powers claim). She found, in addition, that under this Court's decision in *Laird v. Tatum,* 408 U.S. 1 (1972), plaintiffs would not have standing to bring their First Amendment claim even if they *could* prove that they had been monitored under the Program, because the Program was not "regulatory, proscriptive, or compulsory in nature." App. 102a. She also found that plaintiffs could not prove causation or redressability, because in her view plaintiffs' injury stemmed not from the Program but from government surveillance more generally, App. 112a-113a; App.121a, and in any event the injury was either "self-imposed," App. 100a, or caused by the "independent decisions of [plaintiffs'] third-party overseas contacts," App. 116a.[13]

Judge Gilman, dissenting, found that plaintiffs had standing. Addressing Judge Batchelder's reliance on *Laird v. Tatum*, Judge Gilman wrote:

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[13] Judge Batchelder also found that plaintiffs could not sue under the APA because the Program did not constitute "final agency action" within the meaning of that statute, App. 138a, and that plaintiffs could find no recourse in Title III's exclusivity provision because they had not established that the Program involved "electronic surveillance" within the meaning of FISA, App. 148a.

> In contrast to *Laird*, the attorney-plaintiffs here complain of specific present harms, not simply of some generalized fear of the future misuse of intercepted communications. The TSP forces them to decide between breaching their duty of confidentiality to their clients and breaching their duty to provide zealous representation. Unlike the situation in *Laird*, the attorney-plaintiffs in the present case allege that the government is listening in on private person-to-person communications that are not open to the public. These are communications that any reasonable person would understand to be private. The attorney-plaintiffs have thus identified concrete harms to themselves flowing from their reasonable fear that the TSP will intercept privileged communications between themselves and their clients.

App. 180a (Gilman, J., dissenting). Judge Gilman found that the measures the plaintiff-attorneys had taken to protect the confidentiality of their professional communications were reasonable, and that "the 'reasonableness of the fear' of the attorney-plaintiffs [was] well beyond what is needed to establish standing to sue." App. 184a.[14]

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[14] Because Judge Gilman found that the attorney-plaintiffs had standing, he found it unnecessary to determine whether the other plaintiffs had standing as well. App. 174a ("The position of the attorney-plaintiffs, in my opinion, is the strongest for the

On the merits, Judge Gilman found that the Program clearly violated FISA. App. 219a ("Congress has . . . unequivocally declared that FISA and Title III are the exclusive means by which electronic surveillance is permitted"). He rejected the government's contention that Congress had authorized the Program when it passed the Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224 (2001), noting that the AUMF nowhere mentioned electronic surveillance whereas FISA addressed it exhaustively, App. 222a-227a (Gilman, J., dissenting). After determining that the Program violated statutory law, Judge Gilman applied the framework set out by Justice Jackson in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (Jackson, J., concurring), determined that the President's authority was at its "lowest ebb," and concluded that the Program violated the principle of separation of powers, App. 231a.

D. Developments Since the Sixth Circuit's Decision.

In the spring of 2007, administration officials began to lobby Congress to amend FISA to permit the kinds of electronic surveillance that the NSA had, prior to January of that year, been conducting in violation of that statute.[15] Legislation was

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purpose of the standing analysis. This is not to say that the journalists and scholars do not have standing. They might. But because only one plaintiff need establish standing, I will focus my discussion on the attorney-plaintiffs.").

[15] The administration's decision to seek amendments to FISA was apparently motivated by a May FISC ruling that modified

introduced late in the summer. After four days of primarily closed-door debate, Congress enacted the PAA in August 2007. The PAA allows the government to conduct warrantless electronic surveillance if the surveillance is "directed at" or "concerns" someone reasonably believed to be outside the United States. App. 251a (PAA § 2). The FISA Court's role is limited to reviewing the reasonableness of the procedures used by the executive to determine whether individuals are outside the United States, and even this review is for "clear[] erro[r]." App. 259a (PAA § 3). In sum, the PAA gives the government broad authority to intercept Americans' communications but at the same time narrows the role of the FISC in overseeing that surveillance. The PAA was enacted as a temporary measure, however, and unless Congress enacts reauthorizing legislation it will sunset in February 2008. *Id.* (PAA, § 6(c)). Further, as discussed in Section III below, even if the PAA is reauthorized, executive branch officials have already insisted that the President has the authority to disregard it insofar as it constrains his ability to conduct foreign intelligence surveillance that he considers necessary.

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or vacated the orders that a FISC judge had issued in January. *See* Transcript, Debate on the Foreign Intelligence Surveillance Act, El Paso Times, Aug. 22, 2007; Greg Miller, *Court Puts Limits on Surveillance Abroad*, L.A. Times, Aug. 2, 2007.

REASONS FOR GRANTING THE PETITION

For more than five years, the President authorized and defendants operated a far-reaching and intrusive program of warrantless electronic surveillance within the nation's borders. The Program operated in violation of statutory law. In defense of his decision to inaugurate the Program, the President claimed the authority to violate *any* statute if he concludes that it interferes with his power under Article II to protect the nation during a time of war. He has made this claim repeatedly and continues to stand by it today. This claim, which challenges the very foundations of our constitutional democracy, should not go unreviewed by the courts.

The record shows that plaintiffs here have suffered concrete professional harms because of the Program. They continue to suffer professional harms to the extent executive branch officials are conducting surveillance under the PAA without meaningful judicial review. Based on a misreading of this Court's precedent, the decision below renders these harms irremediable and the President's claim of authority unchallengeable. While the legislative landscape has changed since plaintiffs filed this suit, the issues presented here remain live and indeed extraordinarily pressing. The PAA invests the President with sweeping authority to monitor the communications of U.S. citizens and residents, but the Sixth Circuit's theory of standing forecloses petitioners from amending their complaint to challenge the constitutionality of that act. In addition, the President continues to claim the authority to disregard *any* Congressional enactment, including the PAA, that regulates his power to collect

foreign intelligence. If the Sixth Circuit's decision is left in place, the President will be able to disregard whatever statutory restrictions on foreign intelligence that Congress enacts. For these reasons and the further reasons discussed below, the questions presented by this petition warrant this Court's review.

I. The Extent to Which Statutory and Constitutional Limits on Government Surveillance are Judicially Enforceable is an Issue of Overriding Importance.

Two members of the Sixth Circuit panel held that litigants cannot challenge the lawfulness of a government surveillance program unless they can establish with certainty that they have been monitored under it. Aside from being inconsistent with this Court's standing jurisprudence (a point discussed in Section II below), the panel's decision gives the executive branch the ability to shield its surveillance activities from judicial review simply by refusing to disclose the identities of those whom it has monitored. It should not be left to the executive branch alone to determine what legal limitations apply to government surveillance and whether those limits are being observed. The courts have a critical and constitutionally mandated role to play in ensuring that government surveillance is conducted in compliance with statutory law and the Constitution.

History amply demonstrates the dangers of government surveillance that is not subject to meaningful regulation or judicial oversight. Indeed,

it was in part this history that motivated Congress to enact FISA in 1978. During the 1950s, 60s, and 70s, the FBI routinely installed electronic surveillance devices on private property to monitor the conversations of suspected communists. *See* S. Rep. 95-604, at 11 (1977), reprinted in 1978 U.S.C.C.A.N. 3904, 3909. The FBI's COINTELPRO, authorized by President Nixon in the 1970s, wiretapped Martin Luther King, Jr., and other civil rights and anti-war activists solely because of their political beliefs. *See generally Intelligence Activities and the Rights of Americans*, Book II, Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, United States Senate, S. Rep. No. 94-755, 96 (1976) (hereinafter "Church Comm. Book. II"). The CIA illegally surveilled as many as 7,000 Americans in Operation CHAOS, including individuals involved in the peace movement, student activists, and black nationalists. *See generally Halkin v. Helms*, 690 F.2d 977 (D.C. Cir. 1982). After years of investigating such practices, the Church Committee concluded that "[u]nless new and tighter controls are established by legislation, domestic intelligence activities threaten to undermine our democratic society and fundamentally alter its nature." Church Comm. Book. II, at 2.

This Court has similarly recognized the dangers of unchecked government surveillance. *See, e.g., Berger v. New York*, 388 U.S. 41, 62-63 (1967) ("[W]e cannot forgive the requirements of the Fourth Amendment in the name of law enforcement. . . . Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices.");

United States v. United States Dist. Court for the Eastern Dist. of Michigan ("*Keith*"), 407 U.S. 297, 314 (1972) ("The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power. Nor must the fear of unauthorized official eavesdropping deter vigorous citizen dissent and discussion of government action in private conversation. For private dissent, no less than open public discourse, is essential to our free society."). In *Keith*, the Court described the risks presented by surveillance conducted in the name of national security:

> National security cases . . . often reflect a convergence of First and Fourth Amendment values not present in cases of 'ordinary' crimes. Though the investigative duty of the executive may be stronger in such cases, so also is there greater jeopardy to constitutionally protected speech. . . . The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect 'domestic security.' Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent.

Id. at 313-14.

The dangers that this Court identified in *Berger* and *Keith* are now presented even more starkly because the government's covert surveillance activities have increased dramatically. The

government submitted more than twice as many surveillance applications to the Foreign Intelligence Surveillance Court in calendar year 2006 than it did in calendar year 2000. In 2003, FISA wiretap applications for the first time exceeded the total number of Title III wiretaps by federal and state authorities combined. *See* Rebecca Carr, *Terror Wiretaps Exceed Criminal Wiretaps for First Time*, Palm Beach Post, May 10, 2004. In March 2007, the Justice Department's Inspector General reported that the FBI had issued more than 140,000 national security letters between 2003 and 2005 – according to news reports, a "hundredfold increase over historic norms." Barton Gellman, *The FBI's Secret Scrutiny*, Wash. Post, Nov. 6, 2005. The additional surveillance that the President conducted under the Program, of course, is not accounted for in any publicly available statistic.

Judicial oversight is crucial to ensuring that government surveillance remains subject to democratic control. By erecting a new and nearly insuperable barrier to suits challenging such surveillance, the Sixth Circuit has severely limited the circumstances in which this oversight will be available. More troubling still, the Sixth Circuit's decision effectively invests executive branch officials with the ability to determine which surveillance activities will be subject to judicial review and which will not. Congress is currently debating further changes to FISA, but restrictions on government surveillance – whether statutory or constitutional – will be meaningless if, as the Sixth Circuit has effectively held, courts are left with no meaningful role in construing FISA and determining whether the

executive branch is complying with the statute. As this Court has recently said, "[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion). This Court should grant review to ensure that government surveillance remains subject to the oversight of the courts.

II. The Court Should Grant Review to Clarify the Circumstances in Which Litigants Have Standing to Challenge Acknowledged Government Surveillance Activities.

Because the last six years have seen a dramatic expansion in the government's surveillance activities, it is critically important for this Court to address the question of who has standing to challenge the lawfulness of government surveillance. There is considerable confusion in the lower courts on this issue. Some courts have applied this Court's traditional standing rules – requiring plaintiffs to show a concrete injury traceable to the surveillance and redressable by a favorable decision. Other courts, however, departing from the standing framework that this Court has applied in other contexts, have disregarded evidence of concrete injury and denied standing unless plaintiffs are able to establish with certainty that they have in fact been monitored under the surveillance program they seek to challenge. As discussed above, this showing

is often impossible to make because the government refuses, by invoking the state secrets privilege, to confirm or deny whether the plaintiffs have been monitored. Through the combination of standing requirements and the state secrets doctrine, the government is given the ability to insulate its surveillance activities from judicial scrutiny. This Court should grant review to clarify the circumstances in which litigants can challenge government surveillance programs.

The Court has held that litigants seeking to invoke the authority of federal courts must show they have suffered injuries traceable to the defendants' challenged conduct and likely to be redressed by a favorable decision. *See, e.g. Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). The injury requirement is satisfied if plaintiffs can demonstrate that they have suffered concrete and particularized harm that is actual or imminent rather than conjectural or hypothetical. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180-81 (2000); *Lujan,* 504 U.S. at 560. The injury requirement "cannot be defined so as to make application of the constitutional standing requirement a mechanical exercise." *Allen v. Wright*, 468 U.S. 737, 751 (1984). Rather, the requirement must be understood in light of the purpose of the standing inquiry – to ensure that the plaintiff has "alleged such a personal stake in the outcome of the controversy as to assure the concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*,

369 U.S. 186, 204 (1962); *see also Mass. v. EPA*, 127 S.Ct. 1438, 1453 (2007).

Some lower courts, applying this Court's traditional standing principles, have properly held that litigants have standing to challenge government surveillance programs if they can demonstrate an injury that is traceable to the surveillance and that would be redressed by a favorable decision. *See, e.g., Presbyterian Church v. United States*, 870 F.2d 518, 522 (9th Cir. 1989) (recognizing "distinct and palpable" injury to church where surveillance prevented "*individual congregants* from attending worship services, and . . . interfered with the churches' ability to carry out their ministries." (emphasis in the original)); *Ozonoff v. Berzak*, 744 F.2d 224, 229-230 (1st Cir. 1984) (finding standing where plaintiff refused to apply for position at the World Health Organization for fear that his political activities and speech might be subject to surveillance by the FBI).

The D.C. Circuit, however, like the Sixth Circuit, has imposed a unique burden on litigants who seek to challenge government surveillance programs, requiring them to go beyond traditional standing requirements and demonstrate that they themselves were monitored under the program they seek to challenge. *United Presbyterian Church v. Reagan*, 738 F.2d 1375, 1378 (D.C. Cir. 1984) (stating that "fear of being subjected to illegal surveillance . . . which deters [plaintiffs] from conducting constitutionally protected activities[ ] is foreclosed as a basis for standing by the Supreme Court's holding in *Laird* [ ] "); *Halkin v. Helms*, 690 F.2d 977 (D.C. Cir. 1982) (holding that "appellants' inability to

adduce proof of actual acquisition of their communications now prevents them from stating a claim cognizable in the federal courts"); *Halkin v. Helms*, 598 F.2d 1, 6 (D.C. Cir. 1978) (dismissing challenge to government wiretapping after finding that "the acquisition of the plaintiffs' communications [was] a fact vital to their claim" and that plaintiffs could not establish acquisition without access to evidence protected by the state secrets privilege).[16]

The confusion in the lower courts stems in part from divergent readings of this Court's decision in *Laird*. In *Laird*, the plaintiffs sought to enjoin the Department of the Army from gathering and distributing information about lawful and peaceful civilian activity. The plaintiffs conceded that there was no evidence that the surveillance at issue was conducted pursuant to unlawful means; in fact, the record demonstrated that "the information gathered [was] nothing more than a good newspaper reporter would [have been] able to gather by attendance at public meetings and the clipping of articles from publications available on any newsstand." *Id.* at 9. The plaintiffs also admitted that they had not been at all "cowed and chilled" by the threat of Army surveillance. *Id.* at 14 n.7. This Court held that plaintiffs lacked standing to challenge the Army's actions. While the Court noted that governmental

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[16] *See also Sinclair v. Schriber*, 916 F.2d 1109, 1115 (6th Cir. 1990) (dismissing First Amendment claim even where plaintiff could show that government intercepted his communications because plaintiff could not point to concrete injury beyond the surveillance itself).

action "may be subject to constitutional challenge even though it has only an indirect effect on the exercise of First Amendment rights," it held that the plaintiffs had failed to demonstrate that they had suffered *any* present or future harm as a result of the challenged surveillance program. *Id.* at 12-13. The Court also noted that its previous "chilling effect" cases had involved government power that was "regulatory, proscriptive, or compulsory in nature." *Id.* at 11. The Court held that plaintiffs could not establish standing by pointing to the "mere existence, *without more*, of a governmental investigative and data-gathering activity that is alleged to be broader in scope than is reasonably necessary." *Id.* at 10 (emphasis added).

Laird turned on the plaintiffs' failure to demonstrate injury and plainly did not set out a new (and virtually prohibitive) standing rule for challenges to government surveillance. Indeed, in *Laird* the Court expressly cautioned that its decision should not be understood to foreclose suits by those who could demonstrate actual or threatened injury:

> [W]hen presented with claims of judicially cognizable injury resulting from military intrusion into the civilian sector, federal courts are fully empowered to consider claims of those asserting such injury; there is nothing in our Nation's history or in this Court's decided cases, including our holding today, that can properly be seen as giving any indication that actual or threatened injury by reason of unlawful

> activities of the military would go unnoticed or unremedied.

Id. at 15-16. Moreover, two years after *Laird*, Justice Marshall (writing as Circuit Justice) expressly rejected the reading of *Laird* that the D.C. and Sixth Circuits have since adopted:

> In this case . . . the applicants have complained that the challenged investigative activity will have the concrete effects of dissuading [Youth Socialist Alliance] delegates from participating actively in the [national convention] and leading to possible loss of employment for those who are identified as being in attendance. Whether the claimed "chill" is substantial or not is still subject to question, but that is a matter to be reached on the merits, not as a threshold jurisdictional question. The specificity of the injury claimed by the applicants is sufficient, under *Laird*, to satisfy the requirements of Art. III.

Socialist Workers Party v. Attorney Gen. of the United States, 419 U.S. 1314, 1319 (1974).

This case presents an opportunity for the Court to clarify the circumstances in which litigants who have been injured by government surveillance have standing to challenge the lawfulness of that surveillance. The three opinions from the Sixth Circuit panel offer three different understandings of this Court's standing jurisprudence. Judge Gilman found that plaintiffs had satisfied the injury

requirement because they had "identified concrete harms to themselves flowing from their reasonable fear that the [Program] will intercept privileged communications between themselves and their clients." App. 180a (Gilman, J., dissenting). He observed that this Court and others have repeatedly recognized that the kinds of injuries asserted here are sufficient to support standing. App. 187a-189a (citing *Meese v. Keene*, 481 U.S. 465 (1980); *Ozonoff*, 744 F.2d 244). Judges Batchelder and Gibbons, on the other hand, found that plaintiffs did not have standing to challenge the Program because they could not demonstrate that they themselves had been monitored under it. App. 93a-109a (Batchelder, J., addressing plaintiffs' First Amendment claim); App. 123a-126a (addressing plaintiffs' Fourth Amendment claim); App. 126a-132a (addressing plaintiffs' separation of powers claim); App. 159a (Gibbons, J.) ("[t]he disposition of all of the plaintiffs' claims depends upon the single fact that the plaintiffs have failed to provide evidence that they are personally subject to the [Program]"). Judge Batchelder also found that plaintiffs would not have standing to bring their First Amendment claim even if they *could* show that they had been monitored under the Program because the challenged surveillance was not "regulatory, proscriptive, or compulsory in nature." App. 189a-190a; *see also* App. 168a (Gibbons, J., concurring) ("The implication of [Judge Batchelder's] reasoning is that even if the plaintiffs had evidence that they were personally subject to the [Program], they would not have standing if the government was only conducting surveillance.").

Judge Gilman's dissenting opinion read *Laird* correctly. As Judge Gilman noted, the plaintiffs in *Laird* had suffered no injury at all; rather they asserted a "generalized fear" stemming from the "mere existence" of the challenged government program. App. 180a, 188a. To deny standing to those who have suffered concrete injury from a challenged government surveillance program because they cannot establish with certainty that they have been monitored under the program (a fact that the government refuses to disclose) would erect a barrier that does not exist in analogous contexts. *See, e.g., Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S.Ct. 2738 (2007); *Laidlaw*, 528 U.S. at 184 (finding that plaintiffs had standing to challenge defendant's pollution of lake because there was "nothing improbable about the proposition that a company's continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms" (internal quotation marks omitted)); *Bennett v. Spear*, 520 U.S. 154, 168 (1997) (finding injury where plaintiffs alleged reduction in aggregate water supply because "given . . . that the amount of available water will be reduced . . . it is easy to presume specific facts under which petitioners will be injured"); *Skinner v. Railway Labor Executives' Ass'n.*, 489 U.S. 602, 617 (1989) (allowing facial challenge to mandatory and discretionary employee drug testing policies where plaintiffs had demonstrated risk that they would be subject to the policies). The barrier would be insuperable where the government invoked the state secrets privilege, as it has here, and would effectively

invest the executive branch with the ability to insulate far-reaching and intrusive surveillance programs from judicial review.[17]

Petitioners have suffered concrete injury because of the Program and they continue to suffer injury to the extent that executive branch officials are conducting surveillance under the PAA without meaningful judicial review. Plaintiffs who have suffered concrete injury because of a government surveillance program should not be barred from the courthouse simply because the government refuses to disclose whether plaintiffs themselves were targeted under the program. This is true whether the surveillance is conducted according to statute or in violation of it. This Court should grant review to make this clear.

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[17] There is no assurance that the lawfulness of the Program will be tested in the context of criminal proceedings. The government may decide not to initiate criminal proceedings in any case where the lawfulness of the Program may become an issue. Even if the government chooses to use evidence obtained under the Program in a criminal prosecution, the defendant may never learn the source of the government's evidence. Notably, numerous criminal defendants have asked the government to disclose whether it monitored their communications under the Program. The government has refused to do so. *See, e.g., United States v. Aref*, No. 04-cr-00402 (N.D.N.Y. filed Aug. 6, 2004), *appeal docketed*, No. 07-0981 (2d Cir. Mar. 27, 2007).

III. The Court Should Grant Review to Make Clear That the President Lacks Authority to Engage in Intelligence Surveillance that Congress Has Expressly Prohibited.

From the fall of 2001 until January 2007, the President operated a far-reaching and intrusive program of warrantless electronic surveillance within the nation's borders. The two judges that reached the question correctly found that the Program operated in violation of statutory law. In defense of the Program, the President has claimed the authority to violate *any* statute if he concludes that it interferes with his power under Article II to protect the nation during a time of war. This dangerous claim – essentially a claim that the President is above the law – should not go unreviewed by this Court.

The question whether the President possesses authority under Article II to violate FISA remains a live one. Soon after the President acknowledged the existence of the Program in December 2005, the Justice Department issued a white paper stating that, if FISA and Title III were interpreted to prohibit the Program, "the constitutionality of FISA, as applied to that situation, would be called into very serious doubt," and that "if this difficult constitutional question had to be addressed, FISA would be unconstitutional as applied to this narrow context." U.S. Dep't of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President*, at 3, Jan. 19,

2006.[18] The President advanced similar claims before the district court and the Sixth Circuit. *See ACLU v. NSA,* No. 06-10204, Dkt. No. 34, pp. 30, 38 (E.D. Mich., May 26, 2006) (Memorandum of Points and Authorities in Support of the United States' Assertion of the Military and State Secrets Privilege); *ACLU v. NSA,* Nos. 06-2095, 06-2140, Dkt. No. 1, pp.45-47 (6th Cir., Oct. 13, 2006) (Brief for Appellants). The President suspended the Program in January 2007 but continued to assert the authority to violate statutory law. *See, ACLU v. NSA* Nos. 06-2095, 06-2140, Dkt. No. 89, p.7 n.4 (6th Cir., Jan. 24, 2007) (Government's Supplemental Submission Discussing the Implications of the Intervening FISA Court Orders of January 10, 2007); *Hearing Before the S. Intelligence Committee on the Foreign Intelligence Surveillance Modernization Act of 2007,* 110th Cong. (2007) (in which Assistant Attorney General for National Security Ken Wainstein emphasized that "Article II authority exists independent of [any proposed FISA] legislation and independent of the FISA statute"). The President asserted the same authority even after Congress enacted the PAA. James Risen & Eric Lichtblau, *Concerns Raised on Wider Spying Under New Law,* N.Y. Times, Aug. 19, 2007 (describing an August 2007 meeting at which Justice Department officials "refused to commit the administration to adhering to the limits laid out in the new legislation and left open the possibility that the president could

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[18] The white paper is available at http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/nsa/dojnsa11906wp.pdf.

once again use what they have said in other instances is his constitutional authority to act outside the regulations set by Congress"). Thus, the issue presented here is pressing. Furthermore, it raises a pure question of law that goes to the heart of our constitutional democracy. *United States v. Nixon*, 418 U.S. 683, 715 (1974).

This Court should grant review to make clear that the President does not possess authority to engage in surveillance that Congress has expressly prohibited. The legislative power is vested in Congress, U.S. Const., Art. I, § 1, and it is the President's role to "take Care that the Laws be faithfully executed," U.S. Const., Art. II, § 3. Where Congress has enacted a law within the scope of its constitutionally provided authority, the President lacks authority to disregard it. If the President could disregard duly enacted statutes, "it would render the execution of the laws dependent on his will and pleasure." *United States v. Smith*, 27 F. Cas. 1192, 1230 (C.C.N.Y. 1806). As Justice Kennedy recently cautioned, "[c]oncentration of power puts personal liberty in peril of arbitrary action by officials, an incursion the Constitution's three-part system is designed to avoid." *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2800 (2006) (Kennedy, J., concurring).

The President does not have authority under Article II to disregard a law that Congress has enacted in the proper exercise of its own constitutional powers. *Youngstown*, 343 U.S. at 587 (Jackson, J., concurring) ("The Constitution limits [the President's] functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad"). Applying that

principle in *Hamdan v. Rumsfeld*, in which this Court found that military commissions set up by the President to try prisoners held at Guantanamo did not comply with the Uniform Code of Military Justice, a statute enacted by Congress in exercise of its constitutional war powers. *See Hamdan*, 126 S. Ct. at 2774 n.23 (stating that, in a field of shared authority, the President "may not disregard limitations that Congress has, in proper exercise of its own . . . powers, placed on his powers"). Likewise, in this context, the President is bound by the laws that Congress enacts. He may disagree with those laws, but he may not disobey them.

No derogation from this fundamental principle of checks and balances has ever been permitted, even in times of national security crisis. In *Youngstown*, the President argued that his actions were "necessary to avert a national catastrophe." *Youngstown*, 343 U.S. at 582. In *Hamdan*, the President argued that his actions were a measured response to "the danger to the safety of the United States and the nature of international terrorism." 126 S. Ct. at 2791. The Supreme Court nonetheless held in both cases that the President could not disregard duly enacted statutory law. The government has suggested, as it did in *Youngstown* and *Hamdan*, that the President's actions are a "vital" response to a pressing emergency. *ACLU v. NSA*, Nos. 06-2095, 06-2140, Dkt. No. 1, p.46 (6th Cir., Oct. 13, 2006) (Brief for Appellants). But as this Court has observed in another context, "[e]mergency does not create power." *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 425-26 (1934). "The Constitution was adopted in a period of grave

emergency. Its grants of power to the federal government . . . were determined in the light of emergency, and they are not altered by emergency." *Id.*; *see also Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 120-21 (1866) ("The Constitution of the United States is a law for rules and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government."); *Hamdi*, 542 U.S. at 536 (plurality opinion) (stating that even "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens").

This Court should not leave unreviewed a decision that licenses the President to conduct surveillance that directly violates statutory law. The President has said that he has suspended the Program, but the claim he has made – that he has authority to violate the law – may be implemented at any time, if not by this administration then by a subsequent one. This Court should not allow this claim to go unanswered.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

AMERICAN CIVIL LIBERTIES UNION, ET AL.,
Petitioner,

v.

NATIONAL SECURITY AGENCY, ET AL.,
Respondent

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains 7,630 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 2, 2007

JAMEEL JAFFER