No. 07-468

IN THE

Supreme Court of the United States

AMERICAN CIVIL LIBERTIES UNION, ET AL.,

Petitioners,

—v.—

NATIONAL SECURITY AGENCY, ET AL.,

Respondents.

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

REPLY BRIEF OF PETITIONERS

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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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INTRODUCTION

This suit challenges an unlawful NSA surveillance program that was in operation for more than five years and that the President has said he may resurrect at any time. The suit was filed by organizations and individuals that have indisputably been injured by the program (the "Program"). The government contends, however, that the case is moot because the President has indefinitely discontinued the Program, and that the plaintiffs lack standing to challenge the Program because they cannot prove – because the government refuses to confirm or deny the allegation – that they have been monitored under it.

Notwithstanding the government's arguments, the need for this Court's review is pressing and clear. The President has stated repeatedly that he retains the authority to resurrect the Program at any time; indeed, he has said that in some circumstances it would be his *duty* to do so. In this context, there is clearly no merit to the government's claim that the case is moot. Further, the government's brief only underscores the need for this Court's guidance on the issue of standing. The government does not dispute that plaintiffs have suffered injury as a result of the challenged program; its argument, put plainly, is that plaintiffs' injuries simply *do not count.*

This Court should intervene to make clear that innocent people who suffer concrete injuries because of government surveillance have standing to challenge that surveillance in court. Without this Court's intervention, plaintiffs' injuries will be irremediable and the President's expansive claim of

executive power will be altogether insulated from judicial review.

ARGUMENT

I. NEITHER THE GOVERNMENT'S VOLUNTARY CESSATION OF THE PROGRAM NOR THE ENACTMENT OF THE PROTECT AMERICA ACT RENDERS PETITIONERS' CLAIMS MOOT

The government asserts that its cessation of the Program renders this case moot. Government's Dec. 7, 2007 Brief for Respondents in Opposition ("BIO") at 18-21. What the government fails even to acknowledge, however, is that its decision to suspend its Program of congressionally prohibited and therefore unlawful warrantless surveillance, its decision to submit the Program to approval by the Foreign Intelligence Surveillance Court ("FISC") pursuant to a secret judicial order that is no longer in effect, and even its decision to abide by the terms of the Protect America Act (a law that temporarily permits expansive warrantless surveillance),[1] are entirely voluntary and non-binding. Although the government may be following the law (for now), it insists that the President has the right and in some contexts the duty to disregard statutory limits imposed on his authority to conduct foreign intelligence surveillance inside the United States. If this radical claim of executive power is left

[1] The Protect America Act was signed into law on August 5, 2007, and expires 180 days after its enactment. Pub. L. 110-55, § 6(c), 121 Stat. 552 (2007).

unreviewed, there is nothing to stop the government from resuming the Program tomorrow.

This Court has repeatedly held that "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953) (citations omitted). If voluntary cessation of conduct rendered a case moot, "courts would be compelled to leave 'the defendant . . . free to return to his old ways.'" *United States v. Concentrated Phosphate Export Assn., Inc.*, 393 U.S. 199, 203 (1968) (quoting *W.T. Grant Co.*, 345 U.S. at 632). For this reason, a defendant's voluntary cessation of challenged activity moots a case only "if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 189 (2000) (quotation marks omitted).

There is no question that the government's cessation of the Program was wholly voluntary. Throughout this litigation, the government has asserted its constitutional authority to ignore FISA when it sees fit. *See* ACLU's Petition for Writ of Certiorari, *ACLU v. NSA*, No. 07-468 (Oct. 3, 2007) ("Pet.") at 28-29 (collecting statements to this effect). Even after the January 2007 FISC orders prompted the government to suspend the Program, the government rejected any suggestions that it was actually bound by the orders. It insisted it could ignore the FISC orders just as it could ignore statutory law. Pet. at 216a (Gilman, J., dissenting); *see also* James Risen, *Administration Pulls Back on Surveillance Agreement,* N.Y. Times, May 2, 2007,

(reporting that "Senior Bush administration officials told Congress on Tuesday that they could not pledge that the administration would continue to seek warrants from a secret court for a domestic wiretapping program, as it agreed to do in January"). In any event, the January 2007 FISC authorization no longer exists. According to Director of National Intelligence Mike McConnell, a May 2007 FISC ruling modified or vacated the January orders, leaving the government with "significantly less capability" to conduct foreign intelligence surveillance in the manner preferred by the government. *Transcript: Debate on the Foreign Intelligence Surveillance Act*, El Paso Times, Aug. 22, 2007.

The government's decision to conduct foreign intelligence surveillance in compliance with the Protect America Act or any superseding legislation is – in the President's view – wholly discretionary. Government officials have stated that the President retains the inherent authority to ignore statutory limits placed on the executive's foreign intelligence surveillance powers, whether those limits take the form of FISA as originally enacted, the Protect America Act, or FISA as it may be amended in the future. *See, e.g.*, *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"); *id.* (in which DNI Mike McConnell responded to the question whether the government has "any plans to do any surveillance independent of the FISA statute"

by stating: "None that we are formulating or thinking about currently. But I just highlight, Article II is Article II. So in a different circumstance, I can't speak for the President what he might decide."); James Risen, *Administration Pulls Back on Surveillance Agreement,* N.Y. Times, May 2, 2007; 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 once again use what they have said in other instances is his constitutional authority to act outside the regulations set by Congress").

For these reasons, neither the government's voluntary decision to seek now-vacated FISC approval of the NSA Program nor its decision to abide by the terms of the soon-to-expire Protect America Act makes this case moot. Although the Protect America Act expanded the government's ability to engage in warrantless foreign intelligence surveillance, it is set to lapse on February 4, 2008. When the law lapses FISA's original restrictions on the President's surveillance power will once again be in force. There are a number of pending bills that would replace the Protect America Act and amend FISA, but there is no guarantee that Congress will actually enact any of those bills. More importantly, each of the pending bills would impose more restrictions on the government's surveillance power than does the Protect America Act. *See* H.R. 3773, 110th Cong. (2007); S. 2248, 110th Cong. (2007) (Sen. Judiciary Comm.); S. 2248, 110th Cong. (2007) (Sen. Intelligence Comm.). In fact, each bill would require

judicial oversight (in some form) and minimization – the very constraints the President has disregarded in the past. *See* Pet. at 27; The Association of the Bar of the City of New York et al. as *amicus curiae* Supporting Petitioners, *ACLU v. NSA*, No. 07-468 (2007) ("*Amicus Brief*") at 11-14.

While the Program has been suspended, the President is "free to return to his old ways." Accordingly, the question whether the President possesses authority under Article II to disregard FISA remains a live one.[2]

II. THIS COURT SHOULD GRANT REVIEW TO MAKE CLEAR THAT INDIVIDUALS WHO SUFFER CONCRETE INJURY BECAUSE OF GOVERNMENT SURVEILLANCE MAY SEEK REDRESS IN COURT

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[2] If this Court agrees with the government that the case is moot, it should grant the writ, vacate the judgment, and remand to the court of appeals with instructions to dismiss the case as moot. *Citizens Preserving America's Heritage, Inc. v. Harris*, 515 U.S. 1155 (1995) (granting petition, vacating judgment, and remanding to court of appeals to dismiss as moot); *see also* Robert L. Stern, et al., Supreme Court Practice 327 & n.116 (8th ed. 2002) (collecting cases). Vacating the court of appeals' judgment will ensure that its decision is not res judicata for a future challenge to the government's surveillance. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950) (vacating judgments when case becomes moot on appeal "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance," thus "the rights of all parties are preserved"); *see also* BIO at 20 ("If petitioners . . . wish to file a suit challenging the PAA, they are free to do so.")

The government's brief only underscores the need for this Court's guidance on the issue of standing. In support of their motion for summary judgment, plaintiffs submitted copious evidence that they had suffered concrete injury because of the Program. The government did not contest this evidence. Instead, it contended in the trial court, as it contended in the Sixth Circuit and now contends here, that plaintiffs' injuries are not cognizable under Article III. There is no merit to this argument, and this Court should grant review to make this clear.

Plaintiffs have suffered concrete, real, and ongoing professional injuries because of the Program. Pet. at 4-6. The attorney-plaintiffs, in particular, have provided ample evidence that they have been injured by surveillance that has been conducted without judicial supervision and without compliance with statutorily required minimization procedures. Pet. at 175a (Gilman, J., dissenting). The government does not dispute the veracity of the attorney-plaintiffs' allegations or the reasonableness of the actions they have taken to ensure that they honor their ethical obligations to their clients. Rather, the government argues that plaintiffs' injuries are self-inflicted and therefore insufficient to confer standing. BIO at 13. But the attorney-plaintiffs' "choice" to refrain from communicating with clients or potential witnesses because of unlawful government surveillance is no choice at all.

As explained in the *Amicus Brief* and in the expert affidavit of Leonard Niehoff, these attorneys have an ethical obligation to provide competent, diligent, and zealous representation to their clients while also maintaining the confidentiality of

information relating to that representation. Pet. at 334a-335a (Niehoff Decl. ¶¶ 12, 16); *Amicus Brief* at 16-17. The government's surveillance activities trap these plaintiffs in an ethical dilemma – either discontinue their telephonic and/or electronic communications and risk violating their obligation to competently represent their clients, or continue communicating at the risk of violating their obligation to take all reasonable steps to preserve client confidences. Pet. at 336a-337a (Niehoff Decl. ¶ 19); *Amicus Brief* at 18. The injuries that plaintiffs have suffered are real and concrete and, notwithstanding the government's arguments, sufficient to confer standing.[3]

Furthermore, the government's brief highlights what petitioners themselves have emphasized: that there is considerable confusion about the circumstances in which litigants have standing to challenge the government's surveillance activities. The government insists that plaintiffs do not have standing to challenge government surveillance unless they can show that they were targeted under the Program. But, at the same time, the government invokes the state secrets privilege to ensure that this showing is impossible to make. Whether plaintiffs have the right to challenge government surveillance should not turn the government's willingness to be sued. It should turn,

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[3] The government repeatedly asserts that petitioners did not contest the government's invocation of the state secrets privilege. *See, e.g.*, BIO at 9. Petitioner's position is that the public record in this case is sufficient to establish standing without the need to resort to any information that the government has sought to protect under the state secrets privilege.

rather – as it does in every other context – on whether the plaintiffs have suffered concrete injury because of the actions they challenge. Pet. at 19-27.

The government suggests that the Court need not grant review in this case because litigants in other cases will have standing to challenge the Program. BIO at 14-15. This suggestion is disingenuous. The legality of the Program has been challenged in nearly 50 different civil suits, but each case the government has invoked the state secrets privilege and moved to dismiss on the ground that the plaintiffs could not prove with certainty that their communications had been monitored under the Program.[4]

Nor is it likely that the Program's lawfulness will be reviewed in the context of a criminal prosecution. The government has consistently refused to disclose to criminal defendants whether their communications were intercepted under the Program, whether FISA warrants were obtained based on information obtained through the Program, or whether evidence obtained through the Program

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[4] With the exception of the ACLU's suit, these cases have been consolidated as Multi-District Litigation in the Northern District of California. Joint Case Management Statement, *In re Nat'l Sec. Agency Telecommunications Records Litig*, No. 06-1791 (J.P.M.L. Nov. 17, 2006) (hereinafter "Case Management Statement"); *see also* Case Management Statement at 6, 26 (discussing the government's state secrets and standing arguments). In defense of its standing theory, the government has filed two appeals to the Ninth Circuit. *See Hepting v. AT & T Corp.*, 439 F. Supp. 2d 974, 995 (N.D. Cal. 2006), *appeal docketed*, Nos. 06-171321, 06-17137 (9th Cir. 2006); *Al-Haramain v. Bush*, --- F.3d ----, 2007 WL 3407182 (9th Cir. Nov. 16, 2007).

otherwise affected their prosecution. Indeed, the government took this position in one New York prosecution – the prosecution of Yassin Aref and Mohammed Hossain – even after government officials stated to the press that the prosecution had been made possible because of the Program. *See* Lowell Bergman, Eric Lichtblau, Scott Shane and Don Van Natta Jr., *Spy Agency Data after Sept. 11 Led FBI to Dead Ends*, N.Y. Times, Jan. 17, 2006.[5] Last week, the government filed a brief with the Second Circuit Court of Appeals defending its refusal in that case to disclose whether defendants were targets of the Program. It argued that defendants had "failed to identify any specific evidence" obtained illegally; that "the mere fact of interception is protected by the state secrets/classified information privilege"; and that even to admit the *lack* of NSA surveillance would cause harm. *United States v. Aref,* No. 07-981, pp. 180, 182 (2d Cir. Dec. 13, 2007) (Brief for Appellee). To petitioners' knowledge, the government has never disclosed to *any* criminal defendant that she was (or was not) targeted under the Program. The government's contention that a criminal case would provide a better vehicle than this case to challenge the Program's lawfulness is

[5] Instead, the government responded to defendants' motion to suppress with a sealed, *ex parte* filing, *see United States v. Aref,* No. 04-0402, Dkt. No. 205, (N.D.N.Y., Mar. 10 2006) (Notice of Submission of *In Camera, Ex Parte,* Classified Memorandum and Response to Defendant's Motion for Reconsideration), and the court denied the motion in a four-sentence order indicating that a sealed, *ex parte* opinion and order regarding the motion had been lodged with the Clerk of Court, *see United States v. Aref,* No 04-0402, Dkt. No. 206 (N.D.N.Y., Mar. 10, 2006) (Order Denying Motion for Reconsideration).

thus contradicted by the contrary position that the government has taken in actual litigation.

In the government's view, the President's inherent authority to conduct warrantless surveillance in the name of national security is both unlimited and unreviewable. That is not the law nor should it be. Having suffered concrete injury as a result of the government's unlawful surveillance, petitioners have amply demonstrated their standing to challenge the scope of the government's asserted authority.[6]

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[6] The government argues that the legality of the TSP is not properly raised in the petition for certiorari "because the court below did not reach that question." BIO at 9. It is well established, however, that "[a]ny issue *pressed* or passed upon below by a federal court is subject to this Court's broad discretion over the questions it chooses to take on certiorari." *Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 530 (2002) (quotation marks and citation omitted) (emphasis added); *accord United States v. Wells*, 519 U.S. 482, 488 (1997) ("we may address a question properly presented in a petition for certiorari if it was pressed [in] or passed on by the Court of Appeals") (quotation marks omitted; alteration in original). Here, almost half of the ACLU's brief in the court of appeals challenged the merits of TSP program. Pltfs. C.A. Br. at 20-53, *available at* 2006 WL 4055617. Because the ACLU pressed the merits of the TSP in the court of appeals, its challenge is properly presented for this Court's review.

CONCLUSION

The petition for a writ of *certiorari* should be granted for the reasons stated above and in the petition.

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