

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JAMES R. CLAPPER, JR., DIRECTOR :

4 OF NATIONAL INTELLIGENCE, ET AL., :

5 Petitioners : No. 11-1025

6 v. :

7 AMNESTY INTERNATIONAL USA, ET AL. :

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9 Washington, D.C.

10 Monday, October 29, 2012

11

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 10:03 a.m.

15 APPEARANCES:

16 DONALD B. VERRILLI, JR., ESQ., Solicitor General,
17 Department of Justice, Washington, D.C.; on behalf of
18 Petitioners.

19 JAMEEL JAFFER, ESQ., New York, New York; on behalf of
20 Respondents.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 11-1025, Clapper v. Amnesty International.

General Verrilli.

ORAL ARGUMENT OF DONALD B. VERRILLI, JR.,

ON BEHALF OF THE PETITIONERS

GENERAL VERRILLI: Mr. Chief Justice, and may it please the Court:

The question in this case is whether Respondents have standing to bring a facial challenge to the 2008 amendments to the Foreign Intelligence Surveillance Act. Those amendments provide authority to the executive to conduct surveillance targeted at foreign persons located abroad for foreign intelligence purposes.

Along with that grant of authority, Congress imposed statutory protections designed --

JUSTICE SOTOMAYOR: General, is there anybody who has standing?

As I read your brief, standing would only arise at the moment the government decided to use the information against someone in a pending case. To me, that --

1 GENERAL VERRILLI: Several points,
2 Your Honor --

3 JUSTICE SOTOMAYOR: -- would seem to say
4 that the Act -- if there were a violation; I'm not
5 suggesting there is -- but that if there was a
6 constitutional violation in the interception, that no
7 one could ever stop it until they were charged with a
8 crime, essentially.

9 GENERAL VERRILLI: Your Honor, under the
10 statute, there are two clear examples of situations in
11 which the individuals would have standing.

12 The first is if an aggrieved person, someone
13 who is a party to a communication, gets notice that the
14 government intends to introduce information in a
15 proceeding against them. They have standing. That
16 standing could include a facial challenge like the one
17 here.

18 JUSTICE GINSBURG: General Verrilli, can you
19 be specific on who that person would be? Because, as I
20 understand it, it's unlikely that, for example, the
21 lawyers in this case would be charged with any criminal
22 offense. It's more probable that their clients would
23 be; but, according to the government, their clients have
24 no Fourth Amendment rights because they are people who
25 are noncitizens who acted abroad.

1 So it's hard for me to envision. I see the
2 theoretical possibility, but I don't see a real person
3 who would be subject to a criminal charge who could
4 raise an objection.

5 GENERAL VERRILLI: Well, if the
6 information were -- if anyone gets notice, including the
7 client, then the lawyer would know, and the lawyer would
8 be in a position at that point to act.

9 JUSTICE GINSBURG: So the client is somebody
10 who is abroad and who acted abroad, and is not a U.S.
11 citizen.

12 GENERAL VERRILLI: That's certainly true.
13 But, in addition, Your Honor, the statute provides that
14 -- that electronic communication service providers can
15 challenge authorizations under the Act, so you -- there
16 certainly would be standing in that instance.

17 There was such a case.

18 JUSTICE GINSBURG: How likely is it that a
19 service provider would object?

20 GENERAL VERRILLI: Well, the service
21 provider did object to the immediate statutory
22 predecessor to the 2008 amendments. And the -- and the
23 FISA court litigated that constitutional challenge. So
24 there's a concrete context there in which it arises.
25 But even -- but beyond that --

1 JUSTICE GINSBURG: And the litigation was
2 unsuccessful.

3 GENERAL VERRILLI: Well, that's right. The
4 Court found there was no Fourth Amendment violation
5 there.

6 But I think the point here, Your Honor,
7 is -- the key point is this, that the -- in a normal
8 case, a plaintiff would challenge the application of the
9 authority to that plaintiff. In a situation like this
10 one, we acknowledge that it may be difficult for a
11 plaintiff to do so because an -- a challenge to the
12 application gets into classified information pretty
13 quickly.

14 I think what the Respondents have tried to
15 do here is to find a theory of the case that avoids that
16 difficulty.

17 JUSTICE GINSBURG: Well, using what you just
18 mentioned, suppose -- just let's suppose that the Court
19 should hold there is standing. Couldn't the government
20 then say as far as the merits of the complaint, this
21 information is classified, these are state secrets, we
22 can't -- we can't go forward with the litigation?

23 GENERAL VERRILLI: That is a possibility.
24 Of course, there's a procedure that the executive branch
25 would have to go through, but that's a possibility.

1 But I don't think we can get to that point,
2 Your Honor, because I do think the key point here is
3 that the Respondents' claims about this statute depend
4 on a cascade of speculation. This statute only grants
5 authority. It doesn't command anything. And in order
6 for the Respondents to make a claim that they are
7 injured, in fact, by this statute --

8 JUSTICE SOTOMAYOR: General, I don't know
9 that you've answered my question. Perhaps you have, but
10 I just want to make sure that I'm clear.

11 Given that lawyers are unlikely to be the
12 targets of an investigation, if they -- if their
13 conversations would be intercepted, according to you
14 they'd never have standing.

15 GENERAL VERRILLI: I don't think it's
16 appropriate, Your Honor, to relax the Article III
17 standing requirement of injury in fact based on the
18 reality that the specific applications of this statute
19 may involve classified information.

20 JUSTICE SCALIA: Mr. Verrilli, we've had --
21 we've had cases in the past where it is clear that
22 nobody would have standing to challenge what is -- what
23 is brought before this Court.

24 GENERAL VERRILLI: That's exactly right,
25 Justice Scalia.

1 JUSTICE SCALIA: And we've said that that
2 just proves that under our system of separated powers,
3 it is none of our business.

4 GENERAL VERRILLI: That the Court's
5 authority cannot be invoked in that circumstance. And
6 the mere fact that a specific application requires
7 getting into classified matters can't change that basic
8 Article III requirement.

9 JUSTICE KENNEDY: Is the test that you
10 propose that the injury -- I think your brief used the
11 word imminent -- is another way of saying that -- is it
12 unfair to characterize the government's position as
13 saying that you're submitting that the injury must be
14 certain?

15 GENERAL VERRILLI: No. The key point, I
16 think, is narrower than that, Justice Kennedy.

17 This is a case in which the speculation is
18 about the government's conduct, not the connection
19 between the government action and an ultimate effect on
20 the Plaintiff.

21 JUSTICE KENNEDY: Well, let's assume --
22 let's assume for the moment that the lawyer would be --
23 that the lawyer would be injured if his communication
24 with the client were intercepted, or at least that he
25 would have standing to prove injury. Let's assume that

1 for the moment.

2 If that is an acceptable premise, assume
3 that it is, are you saying that it has to be certain to
4 occur? And another test is there's a reasonable
5 likelihood, and then we get in the middle, is it a
6 substantial likelihood. You have to say -- you say
7 imminent.

8 GENERAL VERRILLI: The government conduct
9 being challenged has to either have occurred or be
10 certainly impending. And here, we have the polar
11 opposite, Your Honor. I think it is important to think
12 about --

13 JUSTICE KENNEDY: Certainly impending.

14 GENERAL VERRILLI: Certainly impending.
15 That's the language from this Court's opinions.

16 And I think -- I think, if the Court thinks
17 about it, every single case in which the Court has found
18 standing, there's never been a dispute about whether the
19 government was going to act or not; the dispute was only
20 about the connection between the government action and
21 the plaintiff's injury.

22 Here, they're fighting about what --

23 JUSTICE GINSBURG: General Verrilli, but in
24 this case the Complainant can never know. I mean, I
25 know you emphasize the speculative nature of this claim,

1 but it's not speculative if the government being given
2 this authority by Congress is going to use it. Isn't
3 that so?

4 I mean, are we to assume that --

5 GENERAL VERRILLI: Yes, that's not
6 speculative, Justice Ginsburg, but what is speculative
7 is the connection between the grant of authority and a
8 claim of injury. I do think it's important --

9 JUSTICE KENNEDY: Is it -- you were
10 talking -- you wanted to say there's a cascade of
11 inferences, I think was your phrase.

12 GENERAL VERRILLI: There's a cascade of
13 speculation --

14 JUSTICE KENNEDY: You want to tell us that
15 in your view these -- all these inference that we're
16 required to go through, if the Respondents' theory is
17 adopted, you were going to tell us about --

18 GENERAL VERRILLI: I'd like very much to do
19 that. Thank you, Your Honor, yes.

20 First, the Respondents have to speculate
21 about what the intelligence priorities and objectives of
22 the executive branch are.

23 Second, they have to speculate about how the
24 executive branch officials are going to exercise their
25 judgment to translate those priorities into procedures

1 and procedures that comply with the statutory targeting
2 and minimization requirements.

3 Third, they have to speculate about the
4 independent judgment of an Article III court assessing
5 the lawfulness of those procedures and assessing whether
6 those procedures comply with the Fourth Amendment.

7 JUSTICE GINSBURG: Is there much of a
8 speculation involved in how -- I think it's only one
9 time, and it was under the pre-amended statute, that the
10 FISA court ever -- ever turned down an application.

11 GENERAL VERRILLI: Yes, but that, Your
12 Honor, is, I think, not a fair assessment of the
13 process. It's really very much an iterative process in
14 which there's a dialogue between the executive branch
15 and the FISA court in which the court can demand more
16 information, raise objections. Those get worked out,
17 and then there's a final order.

18 So I don't think it's fair to infer from the
19 fact that there's only one rejection that this -- that
20 it's a process that isn't rigorous.

21 But, in addition to the speculation I just
22 described, once you get through all that, you still have
23 to speculate about whether the communication that --
24 whether the persons with whom the Respondents are
25 communicating are going to be targeted, and that

1 Respondents' communications will get picked up and --

2 JUSTICE BREYER: Well, here is -- I assume
3 that it is an injury for an American speaking in America
4 to have his communication intercepted against his will
5 by the American government. We take that as a harm; is
6 that right?

7 GENERAL VERRILLI: It may be a harm, yes.

8 JUSTICE BREYER: Okay. So the question is
9 how likely is that to occur?

10 GENERAL VERRILLI: No, I think the question
11 under this Court's cases, Your Honor, is whether the
12 government is going to take an action that makes that
13 certainly impending.

14 JUSTICE BREYER: All right. Fine. That's
15 why I say certainly -- it might not be a storm tomorrow.
16 I mean, you know, nothing is certain. But I see it's
17 some degree of what you say -- some people say
18 certainly, some people say likelihood, etc. So put that
19 to the side.

20 What I want to know is, we have the
21 declaration of Mr. Scott McKay. Now, Mr. Scott McKay
22 says he's represented two of the people who are
23 allegedly part of al Qaeda and committed crimes, and he
24 has represented them for some time. One was in
25 Guantanamo. Another is charged with various crimes and

1 is subject to many, many civil suits.

2 In the course of that, he has to phone and
3 has phoned lots of people in Saudi Arabia, in the
4 various Arab states, and in the past the U.S.
5 intercepted some 10,000 telephone calls and
6 20,000 e-mail communications involving his client.

7 So isn't it a fair inference, almost pretty
8 certain, maybe about as much as the storm, that if the
9 security agencies are doing their job, they will, in
10 fact, intercept further communications involving this
11 particular individual, the two that he's representing?

12 GENERAL VERRILLI: Actually, Your Honor --

13 JUSTICE BREYER: And why doesn't that meet
14 the test?

15 GENERAL VERRILLI: -- I think that gets to
16 the last speculative inference that needs to be drawn in
17 order for them to make out their chain of causation, and
18 it's this: They have to speculate that whatever
19 surveillance occurs will occur under this authority, as
20 opposed to other forms of lawful authority that they do
21 not challenge.

22 And Mr. McKay, that situation is a very good
23 example of this. We point out in footnote 11 at page 32
24 of our brief that Mr. McKay says, yes, my client was
25 subjected to 10,000 interceptions of phone calls, 20,000

1 interceptions of e-mails. Every one of those, it's a
2 matter of public record, was under the authority of FISA
3 before it was amended in 2008 --

4 JUSTICE BREYER: But why can't we get an
5 answer to that question? I mean, I see your point. I'm
6 interrupting because I -- I see where you're going. And
7 it seems to me that, at least, if held in camera, I
8 can't imagine what security it would violate, whether
9 the government were to say, if necessary privately to a
10 judge, would say, no, we do not intend to use this new
11 authority for this purpose.

12 GENERAL VERRILLI: But he's just --

13 JUSTICE BREYER: Or it could say the
14 contrary. And so couldn't we find out whether he has
15 standing there without jeopardizing any concern of
16 national security?

17 GENERAL VERRILLI: I think you can't get
18 there without establishing that there's a case of
19 controversy. And they haven't --

20 JUSTICE BREYER: Well, there is if, in fact,
21 the government is going to use this statute to continue
22 to do some of the 10,000 or 20,000 --

23 GENERAL VERRILLI: But this case is at
24 summary judgment now, and the --

25 JUSTICE BREYER: Yes.

1 GENERAL VERRILLI: -- Respondents moved for
2 summary judgment based on the declarations that they
3 submitted. And the declarations that they submitted
4 contain the information I described.

5 And so the only information that's in front
6 of the Court in making a decision now is information
7 that that surveillance occurred under another authority
8 that still exists and could still be applied --

9 CHIEF JUSTICE ROBERTS: I don't see how that
10 is pertinent. What you're saying is they don't have
11 standing to challenge program A because they may also be
12 injured under program B. And do you have an example of
13 a case where we've held that?

14 GENERAL VERRILLI: I think it's -- I think
15 the problem, Mr. Chief Justice, is redressability, in
16 that the argument of the lawyers is that we have a duty
17 to incur costs to avoid the surveillance, but that duty
18 is triggered by, according to their expert affidavit --

19 CHIEF JUSTICE ROBERTS: Well, there again,
20 it depends how you phrase their injury. If you phrase
21 their injury as being subject to surveillance under a
22 particular statutory provision that they think is
23 facially invalid, saying that, well, you're not going to
24 get any relief because you're going to be subject to
25 surveillance under a different provision, I mean, they

1 may say, well, we may, or we may not, but we still have
2 the right to cure the injury of being subject to
3 surveillance under 1881a.

4 GENERAL VERRILLI: But they still have to
5 show a concrete application of the authority they're
6 challenging. That's what this Court faces --

7 JUSTICE SCALIA: Do -- do we parse injury
8 that finely? I mean, the injury, it seems to me, is
9 being overheard. Does it -- by the government. Do we
10 say, oh, well, it's one injury to be overheard under
11 this statute, it's another injury to be overheard under
12 another statute? Do you know any case where we've --
13 we've cut the baloney that fine?

14 GENERAL VERRILLI: No, I don't. But -- but
15 I do think the redressability point is a valid one.
16 They have to show --

17 JUSTICE KAGAN: General Verrilli --

18 JUSTICE SCALIA: Well, the thing is they are
19 going to be injured by being overheard. And you're
20 saying that they will be overheard anyway, and,
21 therefore, by preventing the government from overhearing
22 them under this statute, we're not redressing their
23 grievance, which is being overheard by the government.

24 GENERAL VERRILLI: That's precisely what I'm
25 saying.

1 JUSTICE KAGAN: But, General Verrilli, this
2 statute greatly expands the government's surveillance
3 power. Nobody denies that. And so if the question from
4 these lawyers' perspective is, what chance do I have of
5 being overheard, and what precautions do I have to take,
6 this statute makes them think about that question in an
7 entirely different way, doesn't it?

8 GENERAL VERRILLI: Well, I think, as
9 compared to -- let me make two points about that.
10 First, in terms of the expansion of authority, yes,
11 that's fair with respect to the authority that existed
12 immediately preceding the statute.

13 I actually think -- a bit of context is
14 relevant here -- that what this statute was trying to do
15 is reset the initial balance that Congress struck under
16 FISA in 1978, when the large majority of overseas
17 communications were carried by satellite and, therefore,
18 not within FISA.

19 And, of course, what --

20 JUSTICE KAGAN: Yes, but if you take the
21 baseline position before this statute and the position
22 after this statute, these lawyers and other people in
23 their situation are going to understand that this is
24 just true, that the government is intercepting more
25 material, and that they have to take greater precautions

1 in order to keep their conversations confidential, if
2 that's what they want to do, which lawyers want to do.

3 So they're going to take precautions that
4 they wouldn't have had to take the day before this
5 statute was passed, it seems to me, just from a kind of
6 commonsensical point of view.

7 GENERAL VERRILLI: I don't agree with that,
8 Justice Kagan. I think -- this statute does not
9 regulate them. It confers authority on the government.
10 They take whatever precautions they choose to take based
11 on their beliefs about how that authority's going to be
12 exercised. That depends on the speculation I described.

13 What this Court held in Summers is that you
14 have to have a concrete application of the authority in
15 order to meet the minimum constitutional requirement for
16 Article III standing.

17 JUSTICE SOTOMAYOR: Now we're back at the
18 same circle we started with, which is the one that
19 Justice Breyer started with. He pointed to one person
20 under -- who has been surveilled continuously, tens of
21 thousands of interceptions. Can you really say that the
22 government's not going to target him under this greater
23 authority that it sought just for the purpose of
24 ensuring that it casts a broader net?

25 GENERAL VERRILLI: I think -- I think it is

1 speculation. I think you do not have a concrete
2 application of this authority against anyone, and
3 therefore you cannot meet the basic Article III
4 requirement of standing that's set forth in Summers.

5 JUSTICE KAGAN: I guess I don't see why,
6 General Verrilli, this case is any different from
7 Monsanto. In Monsanto, the government deregulates
8 genetically modified alfalfa, says, go plant it.

9 Now, there were these farmers who were
10 complaining, and they said, we don't know if that will
11 contaminate our crops or not; we think that there's a
12 significant risk that it will contaminate our crops.
13 Because we think that there's that significant risk, we
14 have to take precautions.

15 Now, why isn't that exactly what's happening
16 in this case? We now think, says the -- say the
17 lawyers, that there is a significant risk that our
18 conversations will be surveilled, a risk that didn't
19 exist before. Because of that significant risk, we have
20 to take precautions of the exact same kind that the
21 farmers in Monsanto took; therefore, there is standing.

22 GENERAL VERRILLI: I think the difference
23 between this case and Monsanto illustrates our point.
24 If the plaintiff in Monsanto had come into court and
25 said, Congress has enacted a statute that gives the

1 government agency the authority to deregulate
2 genetically modified seeds, we think there is an
3 objectively reasonable likelihood that the government is
4 going to exercise that authority to deregulate
5 alfalfa --

6 JUSTICE KAGAN: I don't see that difference
7 at all, General Verrilli --

8 GENERAL VERRILLI: -- and then --

9 JUSTICE KAGAN: -- because, in fact, what
10 Monsanto did -- it's not Congress; it's an agency -- but
11 the agency issued a rule saying that farmers could go
12 plant genetically modified crops.

13 And then there was the question whether,
14 because of that, essentially, delegation of authority,
15 the plaintiffs in that case were going to be burdened.
16 And the plaintiffs said, you know, we might be harmed,
17 and we have to take precautions in order not to be
18 harmed.

19 So it's the same thing. It's a different
20 actor, but it's a delegation of authority and a -- and a
21 fear that that delegation of authority will result in
22 harm leading to a set of precautions.

23 GENERAL VERRILLI: There is at least two
24 differences, Justice Kagan, with all due respect.

25 First, there is an exercise of the

1 delegation of authority in Monsanto that is not present
2 here. Here, there is speculation about how the
3 authority will be exercised.

4 Second, with respect to the authority, the
5 record in that -- in Monsanto showed the seeds were in
6 the ground, and the only question was a question of
7 scientific assessment about the likelihood that the
8 plaintiff farmers' crops were going to be affected, and
9 that was a scientific judgment based on the pollination
10 radius of the bumblebee, whether it would affect their
11 crops.

12 But what we're talking about here is
13 speculation about how government officials are going to
14 exercise policy judgments to implement the statute
15 and --

16 JUSTICE KAGAN: Well, is it really such
17 speculation, General? I mean, just imagine
18 that -- yourself in this lawyer's position, and the
19 lawyer says, I'm representing a person associated with a
20 terrorist organization, I'm representing KLM in the case
21 of one of these lawyers, and I'm going to be talking to
22 that person's family members and associates and trying
23 to find out everything that I can.

24 Now, as a lawyer, would you take
25 precautions, or would you pick up the phone and start

1 writing e-mails to all those people?

2 GENERAL VERRILLI: If I took precautions, it
3 would be because of a belief that I had to comply with
4 an ethics rule, and the ethics rule would be the cause
5 of me taking those precautions. It doesn't change the
6 standard.

7 JUSTICE KAGAN: I don't even think it has to
8 do with an ethics rule. If you're a good lawyer --
9 forget the ethics rule and how the ethics rules apply.
10 Are you really going to tell me that you, as a lawyer,
11 would just pick up the phone in the face of this statute
12 and talk to -- these terrorists' associates?

13 GENERAL VERRILLI: Your Honor, it seems to
14 me that that hypothetical is a variant of exactly the
15 argument that the Court rejected in Summers. There
16 isn't a concrete application.

17 In Summers, the Court said, even in a
18 situation where it would be likely that some members of
19 the Sierra Club would be affected by the exercise of
20 authority that the statute conferred, that you cannot --
21 you do not have a case --

22 JUSTICE KAGAN: In Summers, the Court
23 said --

24 GENERAL VERRILLI: -- or controversy absent
25 the exercise of the authority.

1 JUSTICE KAGAN: Excuse me. In Summers, the
2 Court said, well, we don't know that this person is just
3 going to stumble upon a piece of land that's affected by
4 this government action.

5 I asked you a different question. You're a
6 lawyer representing a terrorist and talking to the
7 terrorist's affiliates, and the question is, is this
8 statute going to make you not use the e-mail in the way
9 that you ordinarily would use the e-mail?

10 Well, given the availability of traditional
11 FISA surveillance, surveillance under Executive Order
12 12333, surveillance by foreign governments, I don't
13 think it depends on this statute.

14 But -- but, in any event, whatever the
15 reasonable judgment of a lawyer in those circumstances,
16 there isn't a concrete application of the statute that
17 creates a case or controversy here.

18 JUSTICE GINSBURG: You never know. There
19 may be dozens of concrete applications affecting the
20 Plaintiffs in this case, but we will never know.

21 GENERAL VERRILLI: Well, I do think the
22 problem here, Justice Ginsburg, really is -- the heart
23 of the matter here really is that in a normal lawsuit a
24 plaintiff would challenge the application of a statute,
25 of the authority conferred under the statute.

1 Here, that would run into classified
2 information. So the Respondents have tried to plead a
3 theory that allows them to avoid that problem. But it
4 is inherently based on speculation, and I --

5 JUSTICE BREYER: Well, you think it's
6 speculation. The government has a statute that says you
7 can wiretap in the United States organized crime when
8 life is at stake and you show it to a judge. Then they
9 say, that isn't good enough. We pass a new statute, and
10 it says, suppression of organized crime, wiretap when
11 you want, without a judge.

12 Now, a lawyer who represents organized crime
13 says, my clients have been wiretapped under the first
14 statute 400,000 times.

15 Now, I'll tell you, when the government gets
16 ahold of this second statute, it's going to be a million
17 times, because they want to suppress organized crime.
18 I'm not saying my clients are guilty, but we all know.
19 Okay. So.

20 Now, the question, which I haven't thought
21 of before, you are saying no standing, no standing,
22 can't raise it --

23 GENERAL VERRILLI: In a case like that, the
24 lawyer -- the normal course would be for the lawyer to
25 challenge the application of the statute. Here, you

1 have the classified information problem.

2 But I will say --

3 JUSTICE BREYER: No, you can't. You can't
4 do that here. So -- so what I'm thinking is, he seems
5 to be separate from other people. He seems very likely
6 to have a concrete injury. If they -- if they aren't
7 wiretapping the people who are described here, who are
8 they wiretapping? And they passed this statute in order
9 to have extra authority.

10 So put those three things together, and they
11 seem to spell mother, perhaps, you know.

12 GENERAL VERRILLI: No, they don't.

13 And the other thing I think that's critical
14 here is that I think Congress was sensitive to the
15 probability that you could not have facial challenges of
16 the kind that Respondents want to bring. And so there
17 is an entire --

18 JUSTICE KENNEDY: But you're -- you are
19 saying that the government has obtained this
20 extraordinarily wide-reaching power and we have
21 extraordinary risks that face this country and the
22 government's not going to use it. That's just, it --
23 it's hard for me to think that the government isn't
24 using all of the powers at its command under the law --

25 GENERAL VERRILLI: I'm not --

1 JUSTICE KENNEDY: -- in order to protect
2 this country. And you -- you want to say: Oh, well,
3 don't worry that it's not happening. There is another
4 statute. That -- that's the problem I have with this
5 line of argument.

6 GENERAL VERRILLI: I -- I'm not saying that
7 at all, Justice Kennedy. But it remains the case that
8 the way -- that in order for there to be an Article III
9 case or controversy, a concrete application of that
10 authority has to be demonstrated and it hasn't
11 been under the theory of the plaintiffs' case.

12 JUSTICE KENNEDY: Well, it's Justice Kagan's
13 hypothetical. The lawyer -- and I don't forget
14 about the -- I think the ethics problem is, is a very
15 substantial one. I think the lawyer would engage in
16 malpractice if he talked on the telephone with some of
17 these clients, given this statute.

18 GENERAL VERRILLI: And -- and I think it
19 would be the ethics rule that caused the lawyer to take
20 those steps, not the statute. He would still have the
21 same inferences.

22 JUSTICE KENNEDY: But it's still the
23 reality. He still has to change his conduct.

24 GENERAL VERRILLI: I would like to make one
25 more point, if I could, Justice Kennedy, that I think

1 goes to this and then I would like to reserve the
2 balance of my time.

3 Congress was aware of the difficulty that
4 -- of bringing facial challenges, and so Congress put
5 into place an alternative structure of accountability
6 here. There are -- this is not unbounded authority.
7 There are targeting requirements, minimization
8 requirements, certification by the highest level --
9 highest levels of the executive, and there is
10 independent review by an Article III judge to ensure
11 compliance not only with the statute, but also with the
12 Fourth Amendment, and there is ample congressional
13 oversight. So it's not the case that this is a
14 free-ranging authority at all.

15 Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you, General.

17 Mr. Jaffer.

18 ORAL ARGUMENT OF JAMEEL JAFFER

19 ON BEHALF OF THE RESPONDENTS

20 MR. JAFFER: Mr. Chief Justice, and may it
21 please the Court:

22 Plaintiffs have standing here because there
23 is a substantial risk that their communications will be
24 acquired under the Act and because this substantial risk
25 has effectively compelled them to take immediate

1 measures to protect information that is sensitive or
2 privileged. Plaintiffs are lawyers, journalists and
3 human rights researchers who routinely engage in
4 communications that the Act is designed to allow the
5 government to acquire. Plaintiffs communicate, for
6 example, foreign intelligence information, the kind of
7 information that the statute expressly authorizes the
8 government to collect, to retain and disseminate.

9 CHIEF JUSTICE ROBERTS: Our cases, of
10 course, say, do say "certainly impending," not
11 "substantial risk."

12 MR. JAFFER: Well, Your Honor, I think that
13 there is a -- a question even in cases that involve only
14 a future injury, whether "certainly impending" is in
15 fact the standard. But leaving that to the side, this
16 is not a case that involves only an allegation of future
17 injury. Our --

18 CHIEF JUSTICE ROBERTS: No, let's leave that
19 aside. You have two arguments; one is likelihood of
20 future injury and the other is present obligations or
21 cause. I want to focus on the former. Our standard is
22 certainly impending, and you articulated it by saying,
23 substantial risk. There is obviously a vast difference
24 between those two.

25 MR. JAFFER: Well, I don't think, Your

1 Honor, that the Court has settled on certainly
2 impending. The cases that the -- the government cites
3 are cases like -- I think that the one that the
4 government cites, relies on most heavily is Summers.
5 But in Summers, the distinction between likelihood and
6 certainly impending was not one that the Court relied on
7 in -- in that decision. The Court said that plaintiffs
8 couldn't meet even the lower standard. So I think that
9 the discussion of certainly impending --

10 JUSTICE KENNEDY: But both in Summers and
11 Monsanto the government tells us: We knew that the
12 governmental act was occurring, and then once we knew
13 that, the question was substantial risk.

14 MR. JAFFER: Justice Kennedy, the -- the --
15 the cases that we rely on, Monsanto, Laidlaw,
16 Meese v. Keene, these are cases in which the Court
17 didn't look to the certainly impending standard at all.
18 The question that the Court asked in those cases was:
19 Is there a substantial risk? Is there a substantial
20 risk that effectively compels the plaintiff to act in
21 the way they are -- they are acting?

22 You are right that the government points out
23 this distinction in Monsanto. They say Monsanto is a
24 case in which the government was actually doing
25 something, was known to -- to be doing something. But

1 even, in this case, first of all, we know that the
2 government is using the statute. They have acknowledged
3 that they are using the statute. So there -- there is a
4 certainty of government conduct.

5 But aside from that, those cases like
6 Monsanto and Laidlaw and Meese are not cases that --
7 that actually turned on the fact that the government was
8 doing something. They are cases that turned on the fact
9 that there was a substantial risk of future injury, and
10 the substantial risk compelled plaintiffs to do
11 something immediately.

12 CHIEF JUSTICE ROBERTS: It's not enough, of
13 course, to know that the government is using the
14 statute. The whole question is whether or not your
15 clients have been injured, not whether the statute's
16 being used.

17 MR. JAFFER: I -- I agree with that. I
18 don't think it would be enough for a plaintiff to walk
19 into court and say the government is using the statute
20 and therefore we have standing. But our plaintiffs are
21 not in that position. Our plaintiffs --

22 JUSTICE SOTOMAYOR: Counsel, I have an
23 issue --

24 CHIEF JUSTICE ROBERTS: I'm sorry, do you
25 want to finish? If it's all right, could you finish the

1 answer?

2 MR. JAFFER: Sure. I was just going to say
3 that our -- our plaintiffs have -- have reasons to
4 believe that their own communications will be monitored
5 under the statute. One relates to the kind of
6 information that they routinely exchange over the phone
7 and by e-mail, foreign intelligence information. But
8 it's also that -- that plaintiffs communicate with the
9 kinds of people the government is likely to -- to
10 monitor under the statute.

11 JUSTICE SCALIA: Does that assessment take
12 into account the fact that a court is going to pass upon
13 the government's ability to intercept these
14 communications?

15 MR. JAFFER: It does, Justice Scalia. I
16 mean you -- you are right that there is a court that in
17 some sense stands between plaintiffs and the future
18 injury that they -- that they fear.

19 JUSTICE SCALIA: With the obligation to
20 apply the Fourth Amendment.

21 MR. JAFFER: I don't think it's that simple.
22 The -- the -- the court, the FISA court, is tasked with
23 assessing the reasonableness of targeting and
24 minimization procedures. But the statute itself
25 forecloses the court from imposing the kinds of limits

1 that plaintiffs think the Fourth Amendment requires. So
2 for example, the statute itself in section (g)(4) says
3 that the government is not required to identify the
4 facilities to be monitored. And the statute itself in
5 defining targeting procedures defines them to be
6 procedures intended to ensure that the targets are
7 outside the United States.

8 JUSTICE SCALIA: But if as you say those
9 procedures violate the Fourth Amendment, it doesn't
10 matter what the statute says.

11 MR. JAFFER: Well, the Court would have
12 to --

13 JUSTICE SCALIA: If those statutory
14 provisions would produce a violation of the Fourth
15 Amendment, they are null and void, right?

16 MR. JAFFER: Well, I think that's right.
17 The -- the court --

18 JUSTICE SCALIA: Okay. So the FISA Court
19 would presumably know that.

20 MR. JAFFER: Well, I think if that had
21 happened over the last 4 years, the government wouldn't
22 be seeking reauthorization of the statute now. But even
23 apart from that --

24 JUSTICE GINSBURG: Mr. Jaffer, could you be
25 clear on the expanded authority under the FAA? As I

1 understood it, it's not like in the old statute, where a
2 target was identified and FISA decided whether there
3 was -- the court decided whether there was probable
4 cause. Under this new statute, the government doesn't
5 say who the particular person or the particular
6 location. So, there isn't that check. There isn't that
7 check.

8 MR. JAFFER: That's absolutely right,
9 Justice Ginsburg. There -- the whole point of the
10 statute was to remove those tests, to remove the
11 probable cause requirement, and to remove the facility
12 of requirement, the requirement that the government
13 identify to the court the facilities to be monitored.
14 So those are gone.

15 That's why we use the phrase "dragnet
16 surveillance." I know the government doesn't accept
17 that label, but it concedes that the statute allows what
18 it calls categorical surveillance, which -- which --
19 which is essentially the surveillance the plaintiffs
20 here are concerned about.

21 JUSTICE SOTOMAYOR: Could you address --

22 JUSTICE ALITO: If we accept the -- if we
23 assume for the sake of argument that "certainly
24 impending" is the, the general standard, if we accepted
25 your other argument, that the plaintiffs have standing

1 because they took preventative measures, wouldn't that
2 undermine completely the -- the "certainly impending"
3 standard? You have a person who is in a situation where
4 there is a certain risk, a certain degree of risk of --
5 of the person's conversation being intercepted, but it's
6 not certainly impending. So then the person simply
7 takes some preventative measures, and acquires standing
8 that wouldn't otherwise be present.

9 MR. JAFFER: I don't think it would
10 undermine the -- the future injuries standard, Your
11 Honor, for a couple of different reasons. The first is
12 that "fairly traceable," which is the standard that the
13 Court has used when there is an actual injury, is a
14 standard that does real work.

15 So if plaintiffs, for example, were acting
16 unreasonably in taking the measures they are taking, if
17 plaintiffs were gratuitously buying flight tickets, they
18 couldn't create standing out of nothing. It would have
19 to be a reasonable reaction to the risk.

20 But the other thing is, and this is just to
21 go back to sort of the -- the basic standing --

22 JUSTICE SCALIA: Excuse me, before we go
23 further. A reasonable reaction to the risk; but it
24 doesn't have to be a reasonable reaction to a certainly
25 impending risk, does it?

1 MR. JAFFER: You are right, Justice Scalia.
2 It doesn't, on -- on our theory.

3 JUSTICE SCALIA: But that's his question.
4 Doesn't it undermine the certainly impending?

5 MR. JAFFER: And the only point I was trying
6 to make is that if there is a distance between these two
7 standards, it's a -- it's a pretty narrow distance. But
8 the other point I want to make is just that the
9 reason -- to the extent the Court has imposed a higher
10 standard for cases involving only future injury -- and
11 again, we don't concede that the Court has imposed a
12 higher standard, but to the extent it has, it has done
13 so because it wants to assure itself that the future
14 injury is sufficiently concrete to warrant the Court's
15 intervention.

16 But if there's an actual injury, the Court
17 is assured of concreteness. The actualness of the
18 injury makes the case concrete on its own. And so I
19 think that the standards do different work. I don't
20 think it's a question of an end-run around the imminent
21 standard. It's a question of the Court assuring itself
22 that there is a concrete case before it.

23 JUSTICE KAGAN: Mr. Jaffer, it seems to me
24 that your -- the government's strongest argument goes
25 something like this -- and I don't think that they would

1 say it in these words, but you have some clients where
2 it actually does seem completely reasonable that they
3 would take precautions, that they would not get on the
4 phone, and that they would not use e-mail in the way
5 that any old person would.

6 But just -- those clients, these lawyers of
7 terrorists, essentially shouldn't be using that e-mail
8 or getting on the phone anyway. Even before the FAA was
9 passed, they would have been wise and, indeed, maybe
10 ethically required to use precautions.

11 So what does the FAA do? I guess this is a
12 point about redressability, it's a point about --

13 MR. JAFFER: Right.

14 JUSTICE KAGAN: -- causation, but that seems
15 to me the strongest of the government's arguments.

16 MR. JAFFER: Well, Justice Kagan, this is
17 something that the declarations address specifically,
18 the distinction between the burden imposed by FISA,
19 traditional FISA, and the -- the burden imposed by the
20 new statute.

21 And it's true that the old -- under the old
22 statute, plaintiffs were required to take precautions
23 with respect to a subset of their communications. And
24 they acknowledge that in their declarations.

25 But the new statute reaches whole categories

1 of people who couldn't have been reached under FISA.
2 FISA had a probable cause requirement. It had to be a
3 foreign agent on one end of the phone. And so when one
4 of the lawyers in this case was talking to somebody who
5 they thought the government might believe to be a
6 foreign agent, they took those precautions even before.

7 But now they have to take those
8 precautions -- some of which are very costly -- they
9 have to take those precautions with respect to people
10 who are, for example, witnesses overseas, of journalists
11 overseas or human rights researchers overseas. As Scott
12 McKay says in his declaration, with respect to every
13 single international communication, I have to make an
14 assessment of the risk that the government --

15 JUSTICE KAGAN: Do you have specifics in the
16 affidavits of things that your clients would have done
17 previously that they cannot do now?

18 MR. JAFFER: Yes, Your Honor. So, for
19 example -- well, I'm not sure that this goes directly to
20 your question, but in the McKay affidavit, as well as in
21 the Sylvia Royce affidavit -- Sylvia Royce is another
22 one of the attorney plaintiffs in this case -- both of
23 those Plaintiffs discuss the additional burden of the
24 FAA. They talk about measures that they are taking
25 because of the FAA specifically. And they mention the

1 kinds of communications they're having with people who
2 could not reasonably be thought to be foreign agents.

3 JUSTICE GINSBURG: What other measures
4 besides having to travel to have conversations?

5 MR. JAFFER: I think it's a spectrum,
6 Justice Ginsburg. It begins with just being more
7 circumspect on the telephone, and it goes to, for
8 example, talking in generalities rather than specifics.

9 Let me see if I can give you actual
10 citations for these. So -- so -- so, the Plaintiffs
11 have in some cases been deterred from communicating over
12 e-mail or the phone. Chris Hedges discusses that at
13 366a of the appendix; Scott McKay discusses it at 371a.

14 In some instances, the Plaintiffs have
15 talked in generalities rather than specifics. Sylvia
16 Royce at 352a.

17 In some instances, it has even required
18 Plaintiffs to travel overseas to gather information that
19 they might otherwise --

20 JUSTICE GINSBURG: Well, the travel overseas
21 I understand is the one thing that has a dollar amount
22 attached to it.

23 MR. JAFFER: Right.

24 JUSTICE GINSBURG: But these others -- these
25 other precautions, being more circumspect in their

1 questions, talking in generalities --

2 MR. JAFFER: There is no dollar cost,
3 Justice Ginsburg --

4 JUSTICE GINSBURG: Yes.

5 MR. JAFFER: -- but there is a professional
6 cost. And I don't think it's -- it shouldn't be hard to
7 understand the professional cost. If a lawyer is --

8 JUSTICE SOTOMAYOR: Can you go back to being
9 a little bit more specific on this? I think I got it.

10 There is a class of people that they would
11 have spoken to on the phone or e-mailed before because
12 they didn't think they would be covered by other
13 surveillance measures --

14 MR. JAFFER: That's right,
15 Justice Sotomayor.

16 JUSTICE SOTOMAYOR: -- that were in effect
17 before this Act?

18 MR. JAFFER: That's right. The --

19 JUSTICE SOTOMAYOR: Can you talk about what
20 kinds of people those are? Because if the targets are
21 always terrorists --

22 MR. JAFFER: Right. No. Right. Under this
23 statute, there's no requirement that the target be a
24 terrorist or a foreign agent, right?

25 So under this statute, every time, for

1 example, Sylvia Royce has to make a phone call with
2 somebody overseas about the representation of somebody
3 that she is representing, she needs to make an
4 assessment about the sensitivity of the information,
5 about the ways that information might be used against
6 her client.

7 So, for example, if she is talking to a
8 journalist in Afghanistan about the detention of one of
9 her prisoners at Bagram Air Base, that is a conversation
10 that could not plausibly have been picked up under FISA,
11 but it's a conversation that could be picked up under
12 the FAA.

13 CHIEF JUSTICE ROBERTS: Counsel, it seems to
14 me that the concern you're talking about is present in
15 every area of practice. If you're representing someone
16 who is being prosecuted, you don't send an e-mail
17 saying, you know, the government hasn't yet asked where
18 you threw the gun, and we've got to be prepared to
19 answer questions on that because, as you know, that's a
20 real probable.

21 I mean, you don't send messages like that
22 through the e-mails or just talk casually over the phone
23 either.

24 MR. JAFFER: I think that's -- that's right,
25 Mr. Chief Justice, that, to some extent, this exists in

1 every area of practice.

2 But this is a statute that is focused on
3 gathering foreign intelligence information, and our
4 clients include lawyers who represent defendants charged
5 with foreign intelligence-related crimes.

6 And this statute, I think for good reason,
7 makes them especially concerned about the communications
8 they are engaged in with people overseas who couldn't
9 have been covered under FISA, but who are covered under
10 this statute.

11 If I could just address --

12 JUSTICE ALITO: Could I go back to a
13 question that Justice Breyer asked, where he used the
14 analogy of a lawyer who is representing someone who is
15 alleged to be an organized crime figure.

16 Suppose you have a case where a lawyer says,
17 I represent so and so, the government thinks this person
18 is an organized crime kingpin, I know the government has
19 a very extensive wiretapping program for people who fall
20 into this category, I want to raise -- I want to
21 challenge the constitutionality of the statute under
22 which some of this wiretapping occurs. Would that
23 person have stand -- would that lawyer have standing?

24 MR. JAFFER: I think so. I think so,
25 Justice Alito. I mean, assuming that the lawyer could

1 establish that there was a substantial risk that his
2 communications would be -- would be monitored, and that
3 the substantial risk had compelled him to take measures
4 immediately, I think that lawyer would have standing.

5 Whether he would have a claim is a different
6 question, but I think he would have standing.

7 JUSTICE ALITO: Do you know of any case that
8 holds that?

9 MR. JAFFER: Well, I think that -- I don't
10 think it's a novel proposition. I think that in every
11 one of -- for example, in a case like Skinner, which was
12 a challenge to the rules that allowed for blood tests of
13 railway employees who had been in a -- in accidents,
14 that was a facial challenge brought to the statute, and
15 nobody questioned standing in that case.

16 JUSTICE ALITO: The Federal wiretapping
17 statute has been around for 40 years. Has there been a
18 single case that falls into this category that you're
19 talking about?

20 MR. JAFFER: No, but I think that that --
21 that there's a good reason for that, which is under
22 Title III people who are monitored get notice. There is
23 a notice provision, a general notice provision. And so
24 it doesn't -- you know, and people don't have to worry
25 that this is going on secretly.

1 JUSTICE ALITO: Well, there is a notice
2 provision under this statute.

3 MR. JAFFER: Only for prosecutions, right?
4 Only for prosecutions. And the government has made
5 clear that it's not going to -- that the main purpose of
6 this statute is not to gather evidence for law
7 enforcement --

8 JUSTICE BREYER: I think the -- which I
9 think is difficult, because it makes this case somewhat
10 unique, so that what you're worried about most is the
11 definition of foreign intelligence information, which
12 defines it to include information with respect to a
13 foreign power or foreign territory that relates to the
14 conduct of foreign affairs. It's very general.

15 MR. JAFFER: That --

16 JUSTICE BREYER: And then, the
17 Attorney General can, if he decides there are exigent
18 circumstances, wiretap for a year, anyway, without going
19 to any court, something that isn't true of the ordinary
20 wiretapping.

21 Now, you say, look, if there is any special
22 group that's going to apply to, that is the group that
23 they wiretapped 10,000 times when they didn't even have
24 that authority. And the government is saying, maybe,
25 maybe not. And there, we have an argument.

1 Is there a way of resolving it? That is, is
2 it open to the government, if you prevail, and we say,
3 you know, they have this extra broad authority, there is
4 no way to check it through a court, it does cause harm,
5 these are the most likely people to be harmed and there
6 is very good reason, whatever words we use there, to
7 think it will be used for them, that the government --
8 is there some way the government could say, in camera
9 even, no, we are not doing it? Here are our procedures.
10 We are not going to show them to anybody but you, judge.

11 I mean, is there a way for the government to
12 show that you're wrong --

13 MR. JAFFER: Yes.

14 JUSTICE BREYER: -- and that we're wrong
15 when we think you're right?

16 MR. JAFFER: Yes. Absolutely.

17 JUSTICE BREYER: What?

18 MR. JAFFER: If the government were to walk
19 into court either today or after the remand that we are
20 asking for, if the government were to walk into court
21 either in camera or -- or -- or not and say that
22 plaintiffs will never be monitored under this statute, I
23 think the case would be over. Plaintiffs -- plaintiffs
24 are here not because they have a general complaint about
25 the statute, but because they're actually -- they're

1 injured by it, and they're -- they -- they --

2 CHIEF JUSTICE ROBERTS: Well, the plaintiffs
3 aren't going to be monitored under the statute. Other
4 people are, and your concern is collateral, that the
5 plaintiffs' discussions might be picked up. But the
6 plaintiffs are not going to be monitored as targets.

7 MR. JAFFER: Well, Mr. Chief Justice, I
8 don't think that's exactly right. I know that the
9 statute says that the government has to target people
10 abroad, but in targeting people abroad the government is
11 collecting plaintiffs' communications. So, you know,
12 this isn't a situation where plaintiffs are entirely --

13 CHIEF JUSTICE ROBERTS: Well, that's why I'm
14 saying under your circumstances -- what you said is the
15 government could come in and say: We're not going to
16 monitor these people. Under the statute, you can say
17 that today. The question is whether or not your
18 clients' conversations can be picked up in an incidental
19 way.

20 MR. JAFFER: Right. I -- I guess I'm
21 disagreeing with the word "incidental." It's -- the
22 whole point of this statute was to allow the government
23 to collect Americans' international communications.
24 The -- the executive officials threatened a presidential
25 veto when it was proposed that Americans' communications

1 should be segregated in some way, that in the district
2 court the government was very upfront about this, that
3 the statute's whole purpose was to regulate the -- the
4 surveillance of Americans' international communications.

5 So there is a sense in which Americans --
6 the surveillance of Americans is incidental, but it's
7 a --

8 JUSTICE ALITO: Isn't what you just
9 suggested as a way of resolving this case rather
10 bizarre? Someone who is -- whom the government believes
11 to be a top terrorist and a great threat to the country
12 can stop the use of this surveillance by hiring an
13 American lawyer and then having the American lawyer come
14 into court and say -- you know, challenge the
15 constitutionality of this, and the way to resolve the
16 case would be for the government to go into court and
17 say: Well, we're not going to -- we're not going to
18 target this -- this person whom we believe to be a great
19 security threat?

20 MR. JAFFER: I -- I didn't mean to suggest
21 something like that, Justice Alito. You know,
22 ultimately, the authority that the government has
23 claimed under this statute is what requires the
24 plaintiffs to take the measures that they're taking.
25 And I suppose that if all the government were to do at

1 this point is to say secretly to a judge, "We're not
2 actually going to use this against plaintiffs,"
3 plaintiffs would have to take the same measures they're
4 taking right now. And they would be injured in exactly
5 the same way. What --

6 JUSTICE SOTOMAYOR: To that point, you're
7 conceding the government's position that -- on
8 redressability?

9 MR. JAFFER: No, not at all, Justice --

10 JUSTICE SOTOMAYOR: That even if they
11 promise you they weren't going to intercept you under
12 this statute, that you would still take the same
13 measures?

14 MR. JAFFER: No, no, I wasn't talking about
15 the other programs. I was just saying that plaintiffs'
16 injuries flow from the authority that they're -- that
17 they're claiming under the statute. And if the
18 government were to have a secret -- you know, if there
19 were some sort of secret government memo that said
20 plaintiffs will not in fact be surveilled, their
21 communications won't be picked up, if plaintiffs don't
22 know about that change to the government's authority,
23 they're going to have to take the same measures that
24 they're taking.

25 JUSTICE BREYER: That's on that branch of

1 your argument, which makes me more nervous than the
2 other branch. The other branch, they might say
3 something like: We're supposed to minimize risks of
4 catching in surveillance Americans and this is what we
5 do. And they show that and they say: We go to the FISA
6 court. Except in these very rare instances where there
7 are emergencies, da, da, da.

8 And I guess by that point they might be able
9 to reduce the risks to this kind of plaintiff to where
10 it's the same as virtually anybody else or they might
11 be -- be showing it's constitutional. That's where I --
12 that's why I ask the question. I'm not certain of where
13 I am going.

14 MR. JAFFER: So -- so maybe it's helpful to
15 think of the -- the cases involving pre-enforcement
16 challenges. So you think -- think of a case like
17 American Book Sellers Association, which we cite on I
18 think page 55 of our brief, the case in which there's
19 uncertainty about how the government is going to
20 implement the authority. Nobody knows whether this
21 particular plaintiff is going to be prosecuted. In
22 fact, in that case nobody knew whether anybody would be
23 prosecuted. But the authority was out there and the
24 fact that the authority was out there, the government
25 hadn't disclaimed it, plaintiffs were required to take

1 immediate measures to conform their behavior to the
2 statute, and plaintiffs -- some of the injury there
3 related to the kind of self-censorship that the Court
4 has always been especially concerned about in First
5 Amendment cases.

6 All of those things led the Court to find
7 that plaintiffs had standing to bring a pre-enforcement
8 challenge. And the kind of uncertainty that the
9 government says is present here, uncertainty about how
10 the government will actually implement the statute is
11 the same kind of uncertainty that is present in every
12 single pre-enforcement challenge.

13 JUSTICE SCALIA: Mr. Jaffer, apart -- apart
14 from the government's power that you point out to
15 conduct some of this surveillance without approval by
16 the FISA court in an emergency situation for 1 year,
17 leaving that aside, I don't see how the rest of your
18 challenge or your challenge to the remainder of this
19 statute can be characterized as a facial challenge,
20 because it necessarily assumes that the FISA court will
21 mistakenly say that there has been no Fourth Amendment
22 violation, doesn't it?

23 MR. JAFFER: I don't think that's so,
24 Justice Scalia. Our concern is not -- not that -- that
25 the FISA court will make mistakes, although it well

1 might. The concern -- the main concern is that the
2 reasonableness inquiry that the FISA court engages in is
3 a narrowly cabined one. They court can't say this is
4 unreasonable because you haven't identified the
5 facilities. They can't say this is unreasonable because
6 you haven't identified a specific target.

7 JUSTICE SCALIA: Well, it -- it can say it's
8 unreasonable because you have unreasonably limited us.
9 Don't you think the FISA court is able to say, what
10 we're allowed to look into under this statute does not
11 comport with the Fourth Amendment.

12 MR. JAFFER: I think in --

13 JUSTICE SCALIA: We have to look into more.

14 MR. JAFFER: Right. I think it's within the
15 realm of -- -- of the conceivable that -- that the court
16 could essentially subvert the statute in that way or
17 find it unconstitutional, but the government would not
18 be pressing for reauthorization now, and plaintiffs have
19 to act on the basis of the authority that is delineated
20 in this Federal law. And plaintiffs see that there's a
21 law that is designed to allow the government to mine
22 Americans' international communications for foreign
23 intelligence information. The plaintiffs are people who
24 report on war zones or they investigate human rights
25 abuses in places like Syria and Lebanon and the Yemen

1 and the Sudan, places where the government is likely to
2 use this power. And plaintiffs include people who
3 represent defendants who've been charged in -- in --
4 terrorism crime and foreign intelligence-related crimes.
5 And so they --

6 JUSTICE KAGAN: I'm sorry.

7 MR. JAFFER: In our view, they act entirely
8 reasonably in taking the measures they're taking and
9 they are effectively compelled in the same way that the
10 plaintiffs in Monsanto, in Laidlaw in -- in -- in
11 Meese v. Keene were effectively compelled to take the
12 measures that they -- that they were taking.

13 JUSTICE KAGAN: Mr. Jaffer, you mentioned
14 your journalist clients. Do you have any affidavits or
15 anything else in the record to suggest that those
16 journalists have simply not gotten information from
17 third parties that they otherwise would have gotten? In
18 other words, this would not be a question of what
19 precautions they took and what precautions were
20 reasonable.

21 MR. JAFFER: Right.

22 JUSTICE KAGAN: But if you assume that
23 information is the lifeblood of journalism, that their
24 sources and their information has dried up as a result
25 of this statute.

1 MR. JAFFER: Yes, Justice Kagan. Naomi
2 Klein's declaration at page 338A addresses that. I
3 believe that Chris Hedges' declaration addresses it too,
4 although I don't have a page citation for you. It's
5 certainly in the lawyers' affidavits that some third
6 parties are less willing to share information, Sylvia
7 Royce, 353A.

8 So -- so -- so the declarations were filed
9 early, it was a summary judgment motion, they were filed
10 relatively early. So to some extent, they are making
11 predictions about how third parties will -- will react,
12 but I think it's an entirely fair prediction to -- to
13 predict that third parties who believe that the
14 communications are being surveilled will react in the
15 way you just described. And although it's not in the
16 record, we -- we have spoken to our journalist clients
17 more recently and they have told us that their
18 predictions have actually been realized in some cases.

19 Just to go to -- to -- to address the --
20 the -- the Monsanto point -- point once more. I mean, I
21 understand the Court's -- that the Court has to struggle
22 with the distinction between cases that involve only
23 future injuries and cases that involve present injuries
24 as well. I think it's just important to recognize that
25 the Court has never found the kinds of present injuries

1 that we are pointing to here to be irrelevant to the
2 analysis.

3 In Monsanto, in Laidlaw, in Meese, in
4 Camreta, the Court looked to -- looked to the present
5 injuries as well as to the likelihood of -- of -- of
6 future harm. And we are not making an argument that we
7 are entitled to a lower -- lower standing -- to lower
8 standing requirements or less stringent requirements
9 than the Court has applied in other cases.

10 JUSTICE ALITO: But in Monsanto, suppose the
11 challenge had been brought by a soybean farmer who said,
12 "I raise soybeans and people around me raise soybeans,
13 I'm afraid that they're going to start planting
14 genetically modified soybeans, but they haven't done it
15 up to this point, but, you know, this might be something
16 they will do in the future and if they do that, then I'm
17 going to have to take precautions."

18 MR. JAFFER: I think that would be a much
19 harder case than the one that they've brought. I mean,
20 in part because the Plaintiff would presumably know
21 when -- when the soybeans had been -- had been planted,
22 and the Plaintiff would then have an opportunity to come
23 into court.

24 And it would be hard to -- to establish, I
25 think, a substantial risk in those circumstances where

1 the Plaintiff couldn't point to any evidence that --
2 that any action had been taken towards the
3 implementation of this policy that -- that he feared.

4 But in our case, again, the government has
5 conceded that the statute is being used. It's
6 conceded -- or it's acknowledged that the statute has
7 been used to collect Americans' communications.

8 It's true that we don't know that our
9 Plaintiffs specifically have been monitored, and we will
10 never know that. But that kind of uncertainty was --
11 was present in Monsanto and in --

12 CHIEF JUSTICE ROBERTS: Maybe it's a
13 difference in how we're using the word monitor. You do
14 know that your Plaintiffs have not been monitored.

15 MR. JAFFER: Been targeted.

16 CHIEF JUSTICE ROBERTS: What you
17 don't -- well, others have been monitored abroad, right?

18 MR. JAFFER: I don't --

19 CHIEF JUSTICE ROBERTS: You're not monitored
20 in the sense that this is the person's e-mail, and
21 that's what we're going to collect information from,
22 right?

23 MR. JAFFER: Well, what -- what happens is
24 that the government identifies some category of targets
25 abroad. In the course of collecting --

1 CHIEF JUSTICE ROBERTS: Right.

2 MR. JAFFER: -- those targets'
3 communications, they collect Americans' international
4 communications. And when they're collecting Americans'
5 international communications, they are monitoring those
6 communications.

7 The statute allows the government to acquire
8 them, to retain them, to disseminate them. It
9 requires -- even if it's not foreign intelligence
10 information, which is, as Justice Breyer says --
11 recognized, is defined very broadly -- the statute
12 allows the government to disseminate that information,
13 just redacting the Americans' name.

14 The statute also allows the government to --
15 to retain evidence of criminal activity. And for
16 criminal defense lawyers, that's -- that's a -- it's a
17 real issue.

18 So you're right that -- that our
19 communications are not being targeted, but they are
20 being monitored.

21 I see my time has expired.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

23 General Verrilli, you have four minutes
24 remaining.

25 REBUTTAL ARGUMENT OF DONALD B. VERRILLI, JR.,

1 ON BEHALF OF THE PETITIONERS

2 GENERAL VERRILLI: Thank you,
3 Mr. Chief Justice.

4 Two specific points and then three broader
5 points.

6 First, Justice Kagan, with respect to the
7 Naomi Klein declaration, what it says on page 338a is,
8 "Some of my sources will decline to share information
9 with me if they believe that their communications are
10 being monitored by the United States."

11 JUSTICE KAGAN: That's a fair point,
12 General. What if it said something different? What if
13 she said -- what if there were even an affidavit from
14 the source saying, "I have stopped talking with this
15 journalist because of the FAA and because of my fear
16 that my communications will be intercepted"?

17 GENERAL VERRILLI: I think you'd still have
18 the problem of speculation there.

19 And if I could, Justice Breyer, go to your
20 proposed solution. I don't think it's a solution. I
21 think it's a mechanism for people who think they may be
22 under surveillance, foreign terrorists who think they
23 may be under surveillance, to find out whether they are
24 or not. I -- I just don't think that's a workable
25 solution at all.

1 Now, three broader points, if I may.

2 First, the -- in every case in which the
3 Court has found standing, every one on which the
4 Respondents rely, the government conduct either happened
5 or was certain to happen.

6 In Meese against Keene, the films had been
7 labeled as political propaganda. It wasn't a question
8 about how authority to do so would be exercised. In
9 Laidlaw, the permit had issued, and the pollution was in
10 the water. There wasn't speculation about that.

11 Monsanto, we already talked about; the
12 government action was certain. That's true in every
13 case.

14 And Summers drew a distinction with those
15 cases because, in Summers, there was no example of a
16 concrete application of the authority.

17 Second, their -- the fact that some of their
18 clients may take steps that incur costs doesn't change
19 the injury. It's still speculative. It's the kind of
20 subjective chill that Laird said was -- was not
21 sufficient to establish standing.

22 And I think, if you take a step back,
23 think -- ask -- think about what they're asking you to
24 do. They are asking you to invalidate a vitally
25 important national security statute based not on a

1 concrete application --

2 JUSTICE KAGAN: No, General Verrilli, this
3 is not about the merits of the statute. They might have
4 no claim on the merits at all, and so there would be no
5 question of invalidation. The question is only: Can
6 they make their argument to a court?

7 GENERAL VERRILLI: But the whole point,
8 Justice Kagan, the basic, most fundamental point about
9 the case or controversy requirement and the
10 injury-in-fact requirement that is embedded in it is to
11 preserve the separation of powers.

12 They are asking the Court to consider
13 invalidating the statute based on an assumption either
14 that there is dragnet surveillance or an assumption
15 that their clients are going to be put under
16 surveillance, without a single fact to substantiate
17 either of those assumptions.

18 I submit to the Court that it would be --

19 JUSTICE GINSBURG: Which they can never,
20 never have, and that's what makes this -- if -- if there
21 could be a person in this category who would know, but
22 the person will never know.

23 You did mention minimization procedures as
24 one safeguard against abuse. What are the minimum --
25 what -- what minimization standards are taken that will

1 protect plaintiffs in this class?

2 GENERAL VERRILLI: It's a little bit hard to
3 talk about, Your Honor, because, to the extent we're
4 talking about the process of acquiring foreign
5 intelligence, that's a very sensitive intelligence
6 method; and, to the extent minimization plays into that,
7 it's -- it's not public information.

8 But there are some steps that are publicly
9 known, and they are, for example, that information
10 acquired can be retained only for certain limited
11 periods of time; that whenever -- when reports are done
12 on information, that the names of U.S. persons or
13 corporations are redacted. There are other restrictions
14 on the ability to use the information. So there are
15 steps of that nature.

16 JUSTICE SCALIA: Are there restrictions on
17 giving the information to other government agencies, in
18 particular, the Justice Department?

19 GENERAL VERRILLI: Well, that -- that --
20 again, Your Honor, there are procedures that govern
21 those issues. They're not public procedures, but there
22 are procedures that govern those issues, yes.

23 But -- but, I do -- I understand the point,
24 Your Honor, but I do think that's why Congress
25 established this alternative structure of

1 accountability, with the statutory protections, with the
2 FISA court review, including review for conformity with
3 the Fourth Amendment, with very robust reporting
4 requirements, semiannual reporting requirements -- I see
5 my time's expired.

6 Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 And so the case is submitted.

9 (Whereupon, at 11:04 a.m., the case in the
10 above-entitled matter was submitted.)

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