No. 09-468

In the Supreme Court of the United States

AMERICAN CIVIL LIBERTIES UNION, ET AL.,

Petitioners,

vs.

NATIONAL SECURITY AGENCY, ET AL.,

Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Do Plaintiffs have standing to challenge the lawfulness of the Terrorist Surveillance Program based on their impaired ability to practice their professions?

2. Does the President possess the authority under Article II of the Constitution to engage in the Terrorist Surveillance Program?

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STATEMENT OF FACTS AND PROCEEDING BELOW

Congress has passed two statutes that together provide "the exclusive means by which electronic surveillance . . . and the interception of domestic wire, oral, and electronic communications may be conducted." 18 U.S.C. § 2511(2)(f). The first, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2522 ("Title III"), was created by Congress to enact into law this Court's holding in *Katz v. United States*, 389 U.S. 347 (1967), that a person's privacy interest in content of their telephone calls is constitutionally protected. (R. at 8.) Title III provides a legal framework for oral and electronic surveillance and allows the government to perform "minimized" surveillance if it obtains prior judicial approval by demonstrating probable cause and necessity. 18 U.S.C. 2516, 2518. At that time, Title III did, however, allow an exception to these safeguards when President used surveillance to protect national security. *See* 18 U.S.C. § 2511(3) (1976).

The second statute, the Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801-1871 ("FISA"), was explicitly created by Congress to protect U.S. citizens after the executive branch had abused the exception in Title III by using it to wiretap numerous non-threatening U.S. citizens without warrants. *See* S. Rep. No. 94-755 (1976). FISA regulates electronic surveillance against foreign powers and their U.S. agents and creates a special court to grant or deny government requests

to perform electronic surveillance. 50 U.S.C. § 1803(a). Like Title III, FISA provides many procedural safeguards including a requirement that the government to show probable cause for each surveillance target and follow "minimization procedures" to limit the scope of surveillance to necessity. 50 U.S.C. § 1805(a)(3), § 1802(a)(1). After enacting FISA, Congress solidified its new safeguards by amending Title III to provide that Title III and FISA will be "the exclusive means" through which the government may conduct electronic surveillance. 18 U.S.C. § 2511(2)(f).

Against this legal background, in 2001, Congress passed the Authorization for Use of Military Force ("AUMF") which allowed the President to "use all necessary and appropriate force" against entities the President deemed responsible for the September 11 terrorist attacks. (R. at 226.); *see* Pub. L. No. 107-40, 115 Stat. 224 (2001). Under the AUMF, the President authorized the National Security Agency to begin a secret electronic surveillance program which the President later entitled the "Terrorist Surveillance Program" (the "Program"). (R. at 65); *see President Bush Speaks at Kansas State University*, Washingtonpost.com, Jan. 23, 2006. Through the Program, the NSA intercepts, retains, and disseminates electronic communications of U.S. citizens inside the United States without probable cause, warrants, or compliance with FISA regulations. (R. at 65-69.) Instead of using an impartial judge, an NSA "shift supervisor" authorizes

interceptions of communications when the supervisor believes that there is "a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, a member of an organization affiliated with al Qaeda, or working in support of al Qaeda." (R. at 66, 69-70.) The President has reauthorized the Program continually since 2001 and has stated that he intends to continue doing so. (R. at 65-66.)

Plaintiffs are prominent journalists, scholars, attorneys, and national nonprofit organizations whose professions often require them to communicate by telephone and email with people outside of the United States, including people in the Middle East who have been accused of terrorism or are affiliated with terrorist organizations (R. at 4, 116, 125, 131-32, 173-74.) Plaintiffs challenged the legality of the Program and brought suit against the NSA and its director ("Defendants") in 2006. (R. at 59); *ACLU v. NSA*, 438 F. Supp. 2d 754 (E.D. Mich. 2006). Based on the nature of their communications and the identities of people they communicated with, Plaintiffs argued that they had a well-founded belief that their communications were being intercepted by the Program. (R. at 4, 18.) Plaintiffs claimed that the Program's safeguard-free surveillance prevented them from making such communications for fear of violating their duties of confidentiality to their contacts. *Id.* As a result of reducing and stopping their electronic communications, Plaintiffs claimed that the Program forced them to incur

significant additional expenses in travel to make those communications in person. (R. at 203, 207.) By impairing their ability to practice their professions, Plaintiffs claimed, the Program violated their free speech under the First Amendment, their privacy rights under the Fourth Amendment, the principle of separation of powers, and the Administrative Procedures Act ("APA") through violation of Title III and FISA. (R. at 61.)

The district court held that the publicly acknowledged facts about the Program were enough to establish a *prima facie* case for Plaintiffs and to grant summary judgment on their request for declaratory and injunctive relief. *ACLU*, 438 F. Supp. 2d at 782. The court further held that Plaintiffs' contentions of diminished capacity to work constituted injury in fact for standing purposes under Article III of the Constitution. *Id.* at 767. The court did this despite upholding Defendants' invocation of the State Secrets Doctrine to bar discovery or admission of the specific facts of the program. *Id*. at 764.

Defendants appealed the district court decision to the Sixth Circuit court of appeals. *See ACLU v. NSA*, 493 F.3d 644, 685-86 (6th Cir. 2007). Writing alone for a divided court, Judge Batchelder overturned the district court's decision, holding that Plaintiffs lacked standing for all of their claims. *Id.* at 648. The opinion used a separate standing analysis for each of Plaintiffs' six claims. *Id.* at 658. However, each of the analyses employed the same basic argument: that

Plaintiffs did not have a claim because they "do not – and because of the State Secrets Doctrine cannot – produce any evidence that any of their own communications have ever been intercepted by the NSA, under the TSP, or without warrants." *Id.* at 653. Now Plaintiffs appeal the question of whether Plaintiffs have standing for their claims and further argue that the President exceeded Constitutional limits on his power by authorizing the Program.

SUMMARY OF ARGUMENT

Plaintiffs have standing to bring this case because they have demonstrated that the Program's electronic surveillance of their communications has caused them to suffer injuries to their professions and because Plaintiffs have demonstrated that a declaration and injunction preventing the government's use of the program will remedy those injuries. Plaintiffs have also demonstrated that Article II of the Constitution does not grant the President power to authorize the Program because the Constitution explicitly rejects the President's infringement of Congress' legislative powers and Plaintiffs' constitutional rights.

Through the Program, Defendants, by their own admission, conduct electronic surveillance of U.S. citizens without warrants, without judicial authorization, and outside the regulatory constraints of Title III or FISA. This surveillance targets people like Plaintiffs who, as part of their professions, must communicate with people affiliated with terrorist organizations. Because this surveillance is without any legal safeguards, there are no procedures to ensure that surveillance is only used when absolutely necessary and only for legitimate purposes. Although the government may have intercepted Plaintiffs' communications before the program, the risk of interception, particularly for non-legitimate purposes, was low due to the procedural safeguards the government was forced to follow.

Now that there are no legal safeguards, and because of the nature of Plaintiffs' communications, the risk that Plaintiffs' communications will be intercepted and used illegitimately is too great. Plaintiffs must reduce or sometimes completely stop all electronic communication with their overseas contacts for fear of violating their contacts' confidentiality and for fear that their communications may be misused by the government. Plaintiff's inhibitions, caused by their reasonable fear, constitute injury in fact for standing purposes. If this Court were to enjoin Defendants from continuing the Program and declare the Program unconstitutional and illegal, the risk that Plaintiffs' face would be removed and Plaintiffs could resume their professions as usual. Further, Plaintiffs have standing to sue under the Administrative Procedure Act ("APA") because this surveillance by the NSA violates Title III and FISA and constitutes "agency action."

Aside from standing, the Program is not legal because the President overreached his authority under Article II of the Constitution by authorizing it. The President is limited to those powers granted to him by the Constitution and by Congress. The President must uphold the laws Congress creates and does not have the power to create laws himself. The Program violates Title III and FISA which Congress made the only set of regulations that can govern surveillance. Thus, the President has overstepped his authority under Article II by infringing upon Congress' power to make laws.

Further, Plaintiffs have constitutionally protected rights to privacy and freedom of expression in their phone calls. The Program abrogates those rights. Thus, the President has also overstepped his constitutional authority by infringing Plaintiffs constitutional rights. The AUMF does not allow the President to infringe Congress' powers or Plaintiffs' rights. This Court has already held that the AUMF does not allow the President to ignore Congress' laws and regulations or the constitutional protections of individuals.

ARGUMENT

I. PLAINTIFFS HAVE STANDING TO CHALLENGE THE LAWFULLNESS OF THE PROGRAM BASED ON THEIR IMPAIRED ABILITY TO PRACTICE THEIR PROFESSIONS

A. Plaintiffs Have Standing for their Constitutional Claims Because they Have Demonstrated Injury in Fact, Causation, and Redressability

Article III of the Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies." U.S. Const. art. III, § 2. The standing doctrine is the most important aspect of Article III's "case or controversy" requirement. *Allen v. Wright*, 468 U.S. 737, 750 (1984). Standing requires that a plaintiff allege "such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction." *Warth v. Seldin*, 422, U.S. 490, 498 (1975). "The irreducible constitutional minimum of standing contains three elements:" (1) injury in fact, (2) causation, and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

1. Plaintiffs' Impaired Ability to Contact Clients, Witnesses, and Sources Abroad Constitutes an Actual Injury that is Concrete and Particularized.

Plaintiffs' impaired ability to represent clients, locate witnesses, obtain information from sources abroad, conduct scholarly research, and engage in

advocacy is an actual, concrete, and particularized injury which satisfies the "injury in fact" requirement of Article III standing. *See Lujan*, 50 U.S. at 560. To have standing, a plaintiff must "personally" suffer an "injury in fact" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *See Valley Forge Christian Coll. V. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982); *Id.* (internal quotations omitted). Plaintiffs' inhibition to communicate greatly diminishes their ability to perform their jobs and increases the costs of doing so to unsupportable levels. (R. at 4.) As a result, each of the Plaintiffs personally suffers a concrete injury that satisfies the injury in fact requirement of Article III standing without relying on information privileged by the State Secret Doctrine.

This Court's decision in *Friends of the Earth, Inc. v. Laidlaw Envtl. Services, Inc.*, 528 U.S. 167 (2000), demonstrates that inhibition caused by a reasonable fear of illegal conduct can constitute injury in fact for standing purposes. In *Laidlaw*, plaintiff environmental groups sought declaratory and injunctive relief against defendant waste treatment company for discharging pollutants into a river against federal regulations. *Id.* at 175-77. Although the plaintiffs had proof that the defendant was illegally discharging pollutants, the plaintiffs were unable to prove harm to the environment itself, such as demonstrated toxicity levels in the river or damage to wildlife. *Id.* at 181. Rather,

the plaintiffs submitted affidavits averring that their knowledge of the pollutants inhibited them from using the river for recreational activities such as fishing and swimming. *Id.* at 181-83. This Court held that the plaintiffs' "reasonable concerns" expressed in the affidavits were enough to show injury in fact for purposes of standing, even though the plaintiffs chose to refrain from using the river based on their own apprehensions. *Id.* at 183-85.

Because of the State Secrets Doctrine, Plaintiffs in this case cannot demonstrate that they have *actually* been under surveillance, just as the plaintiffs in *Laidlaw* could not demonstrate that the river was *actually* dangerous to swim in. Plaintiffs in this case have submitted affidavits averring their reasonable inhibitions: that they have had to restrain their constitutionally protected electronic communications and use other costly means as alternatives. The knowledge that the defendant in *Laidlaw* was polluting was enough evidence to show that the plaintiffs' fear was reasonable in that case. *Laidlaw*, 528 U.S. at 183. Similarly, the evidence available in this case – multiple admissions to the existence and character of the Program by the executive branch – shows that Plaintiffs' fear of illegal wiretapping is reasonable in Plaintiffs' specific circumstances. *See* (R. at 113.) Going further than the impediment of recreational enjoyment in *Laidlaw*, the reasonable fear of Plaintiffs in this case has caused damage to their businesses and

professions. Thus, Plaintiffs have demonstrated injury in fact without needing any of the information in this case that is privileged by the State Secrets Doctrine.

Laidlaw's facts are not distinguishable because the plaintiffs in that case filed their claim under a citizen suit provision of an environmental statute. *See ACLU*, 493 F.3d at 685-86. This Court used the exact same constitutional analysis to find standing in *Laidlaw* that the Court of Appeals used in this case: injury in fact, causation, and redressability. *See Laidlaw*, 528 U.S. at 521. More importantly, this Court found injury to the *Laidlaw* plaintiffs' right to enjoy the river, not any separate right created by the citizen suit provision. Additionally, there is no legal precedent to say that *Laidlaw* is differentiable just because it involves environmental claims.

Like *Laidlaw*, *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518 (9th Cir. 1989), presents another case where inhibition to participate in constitutionally protected activities constituted injury in fact for standing purposes. Plaintiff churches in *Presbyterian Church* sought declaratory and injunctive relief against the U.S. Immigration and Naturalization Service for covertly entering the plaintiffs' churches and recording church services without warrants. *Id.* at 250. The plaintiffs asserted that individual congregants had been dissuaded from using church resources (services, classes, confessionals), as evidenced by decreased church participation, because of their fear of being spied on by the government. *Id.*

at 521-22. The court held that the individual congregants' inhibition constituted injury in fact for standing purposes. *Id.* Similarly, the individual professionals in this case have been inhibited from using their business resources (i.e. electronic communication) because of their fear of being spied on. In particular, the attorneys must limit disclosure of information for fear of violating their ethical duties of confidentiality, just as the congregants in *Presbyterian Church* limited disclosure to their clergymen for fear that their (ethically mandated) confidentiality would be violated. *See id.* at 522.

Numerous other cases support the holdings of *Laidlaw* and *Presbyterian Church* that inhibition caused by reasonable fear is sufficient injury for standing purposes under Article III. In *Meese v. Keene*, 481 U.S. 465 (1987), the plaintiff was inhibited from publicly displaying certain films because of a federal law requiring the films to be labeled "political propaganda." *Id.* at 473. Granting standing, the court held that although the law did not *prevent* the plaintiff from displaying the films, the law gave rise to a justified fear that his reputation would be harmed if he did. *Id.* at 473-74. In *Ozonoff v. Berzak*, 744 F.2d 224 (1st Cir. 1984), an executive branch order requiring a "loyalty" investigation for certain jobs inhibited the plaintiff from expressing his views and associating with certain groups for fear of rejection from the jobs. *Id.* at 228. Finding injury in fact for standing purposes, the court held that the plaintiff's first amendment speech was

sufficiently curtailed even though the order did not *prevent* the plaintiff from expressing his views or associating with certain groups. *Id.* at 228-29. The plaintiffs in *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149 (4th Cir. 2000), were inhibited using a lake for commercial and recreational activities because of their knowledge that the defendant was discharging pollutants into a connected waterway. *Id.* at 152-53. The court held that the plaintiffs' fears of pollution and their resultant diminished use of the lake constituted injury in fact, even though the plaintiffs restrained themselves from using the lake without proof that the lake itself was contaminated. *Id.* at 155. In all of these cases, inhibition caused by reasonable fear constituted injury in fact.

Laird v. Tatum, 408 U.S. 1 (1972), does not control this case. *See ACLU*, 493 F.3d at 660-61. This Court in *Laird* held that allegations that "[a]llegations of a *subjective* 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm [for standing purposes]." *Id.* at 13-14 (emphasis added). The plaintiffs in *Laird* tried to prevent the Army from using a civil disobedience data gathering system which consisted of gathering information from mass news publications and from public meetings. *Id.* at 2, 6. Dismissing plaintiffs' claim that the system "chilled" their First Amendment rights, the court found that "the information gathered is nothing more than a good

newspaper reporter [could] gather by attendance at public meetings and [by] clipping of articles . . . available on any newsstand." *Id.* at 9.

In this case, the "chill" is not subjective and the information is not gathered through publicly available newspapers; it is private information protected by the constitution that is gathered by espionage. In *Laird*, this Court was dealing with a non-invasive public data gathering system which the respondents claimed might gather "information . . . beyond the responsibilities of the military." *Id.* at 9-10. The opinion in *Laird* emphasizes that this Court was not "cited to any clandestine intrusion." *Id.* at 9. In this case, professionals are *currently* unable to communicate with their clients because of the risk that their *private* communications will be illegitimately intercepted by the government. Some of the Plaintiffs in this case are attorneys who represent terrorist suspects against the government. (R. at 121-29, 135-40.) Those attorneys' fears are objectively reasonable when the government they fight in court is able to spy on their conversations with their clients without limit.

Many cases have distinguished *Laird*, understanding that this Court's holding in *Laird* was a fact-specific holding as opposed to a general rule to be followed by courts. *See Meese*, 481 U.S. at 473-74 (holding that the plaintiff had demonstrated more than a "subjective chill" by showing that his professional career would likely be damaged by the defendant's conduct); *Socialist Workers*

Party v. Atty Gen. of the U.S., 419 U.S. 1314, 1318-19 (1974) (holding that plaintiffs' claims, that covert government infiltration of their political events would dissuade attendance at the events, constituted injury in fact for standing purposes and distinguished the case from *Laird*); *Ozonoff*, 744 F.2d at 229-30 (holding that threatened injury to the plaintiff's career was not speculative like the injury in *Laird* was); *Paton v. La Prade*, 524 F.2d 862, 868 (3rd Cir. 1975) (holding FBI's retention of records of plaintiff's contact with a political group was unlike the threat in *Laird* in that it posed a significant threat to plaintiff's future educational and employment opportunities); *Initiative and Referendum Inst. v. Walker*, 450 F.3d 1082, 1090 (10th Cir. 2006) (distinguishing *Laird* by noting that the plaintiffs' in *Laird* "piled speculation upon speculation" and provided "no objective basis" for their truth). This Court held in *Laird* that its "conclusion is a *narrow* one, namely, that *on this record* the respondents have not presented a case for resolution by the courts." *See Laird*, 408 U.S. at 15 (emphasis added); *See also Morrison v. Bd. of Educ. Of Boyd County*, 507 F.3d 494, 503 (6th Cir. 2007) (holding *Laird* to be a "narrow decision" and noting that "the [*Laird*] Court took pains to cabin its holding to the particular facts of that case"). The above cases are not distinguishable simply because they concern a regulation, law, or discrete action that was proven to exist. *See ACLU*, 493 F.3d at 664. The harm in these cases came from the plaintiffs' inhibitions caused by their reasonable fears that

they would be harmed, not because of documentation proving that the respective regulations actually exist.

Lastly, *City of Los Angeles v. Lyons*, 461 U.S. 95 (1982), is not comparable to this case because the plaintiff's fear in *Lyons* was not reasonable. *See ACLU*, 493 F.3d at 686. In *Lyons*, the plaintiff, who had once been subject to a harmful "chokehold" restraint by the police, attempted to enjoin the local police force from using such restraints at all based on his assertion that "*any*" contact he has with that police force "*may*" result in his being choked. *Id.* 97-98 (emphasis added). To have standing, this Court found that the plaintiff would have to establish that "*all*" local police officers "*always*" apply the restraint to any citizen they have an encounter with. *Id*. at 105-06. The problem for the plaintiff in *Lyons* was that he was no more likely to be choked by a police officer than anyone else was; he could not show that he, in particular, had a good chance of being injured. In this case, Plaintiffs have established numerous facts to show that each of them *individually* is likely subject to electronic surveillance. (R. at 114-40, 162-89.) Plaintiffs have a high risk of injury that is factually based, whereas the plaintiff in *Lyons* did not.

2. Plaintiffs' Impaired Ability to Contact Clients, Witnesses, and Sources Abroad Was Caused by the Program

The impairment of Plaintiffs' ability to practice their professions was caused by the program, satisfying the "causal connection" requirement of Article III

standing. *See Lujan*, 504 U.S. at 560. In addition to injury in fact, a plaintiff seeking standing in a federal court must show that its injury is "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Id.* (internal quotations and ellipsis omitted). In this case the chain of causation is simple. Before the existence of the Program, Plaintiffs' could safely assume that the government's surveillance of their electronic communications would first have to clear the legal safeguards of judicial review in obtaining a warrant and/or administrative review in fulfilling FISA's minimization procedures. These safeguards provided enough independent review of the government's actions to assure Plaintiffs that the information gathered was limited and truly necessary. Although this did not necessarily prevent the government from gathering information which would break Plaintiffs' obligations to their contacts, it minimized that risk to acceptable levels. Now that the Program exists, the risk that Plaintiffs' confidential communications will be intercepted (forcing them to break confidentiality with their contacts) is to too great, especially because the publicly acknowledged scope of the Program is very broad and covers Plaintiffs and their contacts. (R. at 73-113.) Now Plaintiffs, because of this increased risk, must limit their electronic communications and incur great expense to make in-person communications with their contacts. Thus,

the existence of the Program has interfered with Plaintiffs' ability to do their jobs and has added to their costs.

Plaintiffs can show causation regardless of the fact that the States Secrets Doctrine prevents Plaintiffs from proving their conversations were *actually* intercepted. *See ACLU*, F.3d at 667. As discussed in-depth in Part I.A.1 above, Plaintiffs injury is based upon their reasonable fear that their communications are *probably* intercepted, not upon evidence that they *actually* are intercepted. Additionally, Plaintiffs can show causation despite the fact that wiretaps on Plaintiffs' communications would still be secret even if the government followed FISA and Title III. *Id.* at 667-69. Plaintiffs do not complain that the existence of wiretaps in general causes them injury. Rather, Plaintiffs argue that wiretaps *without procedural safeguards* cause them injury because the risk of overbroad interception increases to unacceptable levels without those safeguards. As discussed above in this Part, Plaintiffs understand that there is always some risk that their confidential communications will be intercepted. However, considering the scope of the Program, the Program increases that risk to such a degree as to leave Plaintiffs with no option but to break their ethical duties or cease their legally protected communications. To hold that alleviating Plaintiffs fears would require the government to stop *all* wiretaps transforms the "fairly traceable" requirement

of causation into a "solely traceable" requirement, a standard that Plaintiffs are not required to prove, nor do they attempt to. *See Lujan*, 504 U.S. at 560.

3. Plaintiffs' Injury will be Redressed by a Declaratory Judgment and an Injunction Against the Program

A declaration that the Program is unconstitutional and an injunction preventing the government's further use of the Program will remedy Plaintiffs impaired ability to practice their professions, satisfying the redressability requirement of Article III standing. *See Lujan*, 504 U.S. at 560-61. After showing injury in fact and causation, a plaintiff seeking standing in a federal court must show that it is "likely, as opposed to merely speculative," that its injury "will be redressed by a favorable decision." *Id.* at 561 (citing *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976)) (internal quotations omitted). Plaintiffs in this case have had to reduce or stop electronic communications with their contacts because the Program has increased risk of interception to unacceptable levels. Therefore, an injunction preventing the government's use of the Program would reduce the level of risk to what it was before the Program's existence. Additionally, it would be unlikely that the government would institute a different surveillance program to the same effect because this Court would have declared the previous program unconstitutional, thus diminishing the chances that a new program would survive judicial scrutiny.

The standard for redressability is not whether a favorable decision will "guarantee" remedy of the injury. *See ACLU*, 493 F.3d at 672. Rather, the standard is whether the injury is "*likely* to be redressed by a favorable decision," as opposed to a "purely speculative" assumption that it will be redressed. *See Simon*, 426 U.S. at 38, 42 (upheld by *Lujan*, 504 U.S. at 561; *Allen*, at 751; *Valley Forge Christian Coll.*, 454 U.S. at 472; *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998) (emphasis added)). It is a faulty analysis of *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973) and *Leeke v. Timmerman*, 454 U.S. 83 (1981), to hold that Plaintiffs' requested relief must "guarantee" remedy of their injury. *See ACLU*, 493 F.3d at 670-72. This Court in *Leeke* held that the plaintiffs in that case did not have standing to sue because it was not "guarantee[d]" that their requested relief would prevent future misconduct by the defendants. *See Leeke*, 454 U.S. at 86. The "guarantee" language in *Leek* was incorrectly derived from *Linda R.S. See id.* ("Our holding in *Linda R.S.* controls disposition here."). In *Linda R.S.*, this Court denied standing because of "an insufficient showing of a direct nexus between the [injury] and the [requested relief]." *See Linda R.S.*, 410 U.S. at 619. The word "guarantee" is not mentioned anywhere in the *Linda* opinion, nor does the opinion's language implicate the need for a "definite" or "guaranteed" result from the relief requested. Thus, the assertion in *Leeke* that the *Linda R.S.* holding was

founded on a lack of "guarantee" is incorrect and cannot be used to deny redressability in this case.

B. Plaintiffs Have Standing Under the Administrative Procedures Act Because the Program Violates the Statutory Limitations of Title III and FISA

In addition to constitutional standing requirements, a plaintiff bringing a claim under a particular statute must show that the plaintiff's interest is "arguably within the zone of interests" that the statute protects. *See Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 395-96 (1987) (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp,* 397 U.S. 150, 153 (1970)). The "zone of interest" test "is not meant to be especially demanding." *Id.* at 399. When applying the zone of interest test to an APA claim, courts look to the "substantive provisions of the [relevant statute and] the alleged violations of which serve as the gravamen of the complaint." *Bennett v. Spear,* 520 U.S. 154, 175 (1997).

1. The Program's Electronic Surveillance is Governed by FISA and Title III

Looking to the "substantive provisions" of FISA and Title III, the type of surveillance used in the Program falls under the regulation of those two statutes and violates them. *See Bennett,* 520 U.S. at 175. Title III generally governs interception of oral, wire, and electronic communications: "[A]ny person who . . .

intentionally intercepts . . . any wire, oral, or electronic communication . . . shall be punished . . . ." 18 U.S.C. §2511(1); *see also United States v. Ojeda Rios*, 495 U.S. 257, 259 (1990). The only exception to Title III's regulation of electronic surveillance is surveillance regulated by FISA: "[P]rocedures in this chapter and [FISA] shall be the exclusive means by which electronic surveillance . . . may be conducted." 18 U.S.C. § 2511(2)f). This clause, referred to as the "exclusivity provision," makes Title III and FISA the only regulatory frameworks available under which the government may conduct electronic surveillance.

Title III also disclaims regulation of foreign surveillance by the Government done by means other than electronic communication:

> "Nothing contained in this chapter . . . shall be deemed to affect the acquisition by the United States Government of foreign intelligence information from international or foreign communications, or foreign intelligence activities conducted in accordance with otherwise applicable Federal law involving a foreign electronic communications system, utilizing a means other than electronic surveillance as defined in [FISA] . . . . "

18 U.S.C. § 2511(2)(f). The first part of this clause (before the first comma above) cannot be read separately from the last part of the clause, "utilizing a means *other than electronic surveillance* as defined in [FISA]" because the entire clause is a single thought. *Id.* (emphasis added); *see ACLU*, 493 F.3d at 679-680. Read alone, the first part of the clause would remove the Governments use of electronic surveillance on foreign communications from Title III and FISA's regulation.

However, the first part of the clause cannot be divorced from the last part which modifies the two parts before it; all three parts are part of the same statement. Thus, as it is written, this clause gives the Government the power to acquire information from foreign communications *as long as it is not done through electronic surveillance*.

As the counterpart to Title III, FISA regulates physical and electronic surveillance of foreign intelligence information between or among foreign powers. *See* 50 U.S.C. § 1802(a)(1)-(a)(1)(A)(i). FISA specifically regulates warrantless electronic surveillance by the executive branch and provides tight regulation of the procedures and scope of that surveillance:

> "[T]he President . . . may authorize electronic surveillance without a court order under this subchapter to acquire foreign intelligence information for periods of up to one year if the Attorney General certifies in writing under oath that . . . (A) the electronic surveillance is solely directed at . . . communications used exclusively between or among foreign powers . . .[,] (B) there is no substantial likelihood that the surveillance will acquire the contents of any communication to which a United States person is a party[,] and (C) the proposed minimization procedures with respect to such surveillance meet the definition of minimization procedures under section 1801(h) of this title. . . ."

50 U.S.C. § 1802(a)(1). The executive branch's use of warrantless electronic surveillance violates FISA since the President has authorized the Program long past the one year limitation, U.S. citizens are parties to intercepted communications, and there is no reason to believe that the executive has implemented minimization procedures to protect the subjects of the surveillance.

See ACLU, 493 F.3d at 648, (R. at 65.) Thus, because the Program violates the only regulatory framework that governs it, the Program is illegal.

To clarify, the Program does consist of "electronic surveillance" as defined by FISA. FISA defines "electronic surveillance" as "the acquisition by electronic, mechanical, or other surveillance device of the contents of any wire or radio communication sent by or intended to be received by a particular, known United States person who is in the United States. *See* 50 U.S.C. § 1801(f)(1). The executive branch has openly admitted that the Program intercepts communications which U.S. citizens are parties to. (R. at 65.) The executive branch must be interested in and aware of the identities of the parties to the communications it intercepts. It is irrelevant that Plaintiffs themselves do not have evidence of the identities of the particular U.S. citizens, since Plaintiffs do not bring a claim under FISA, only under the APA.

2. Plaintiffs Have Stated a Claim Under the APA

Because the Program violates Title III and FISA, and because Title III and FISA are the exclusive means by which electronic surveillance may be conducted, the executive branch is in violation of the law and Plaintiffs have standing to bring claim under the Administrative Procedure Act, 5 U.S.C. § 551, *et seq* ("APA"). The APA provides a "person suffering legal wrong because of agency action, or

adversely affected or aggrieved by agency action within the meaning of a relevant statute, [with] entitle[ment] to judicial review thereof." 5 U.S.C. § 702. In the APA, "agency action includes the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act . . . ." 5 U.S.C. § 551(13). The legislative history of the APA shows that congress intended the Act to "cover a broad spectrum of administrative actions" and this Court has upheld that intent. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-141 (1967); *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955).

In this case, Plaintiffs are adversely affected by reduced oversight and minimization procedures which result from the NSA's violations of Title III and FISA. Electronic surveillance by the NSA constitutes "agency action" since it is action taken by the agency and is the equivalent of an "agency rule" or "order." Plaintiffs do not argue that "generalized conduct" by the NSA constitutes agency action. *See ACLU*, 493 F.3d at 678. Rather, Plaintiffs contend that the specific characteristics, scope, and purpose of the Terrorist Surveillance Program constitute agency action. (R. at 65-71.) Those characteristics, scope, and purpose are "*circumscribed, discrete agency actions*" and fall under the definition of agency action in the APA. *See ACLU*, 493 F.3d at 678 (quoting *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62 (2004)); (R. at 65-71.) Thus, Defendant agency's actions have violated Title III and FISA, thereby injuring Plaintiffs by

removing procedural safeguards, and Plaintiffs have a cause of action under the APA for those violations.

II. THE PRESIDENT DOES NOT POSSES AUTHORITY UNDER ARTICLE II OF THE CONSTITUTION TO ENGAGE IN THE TERRORIST SURVEILLANCE PROGRAM

The President's powers are limited to those granted to him by the Constitution and by Congress. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). Congress holds all power to legislate and create laws. U.S. Const. art. I, § 1, § 8. The President has the duty to "faithfully" execute the laws Congress creates and to protect and defend the Constitution. U.S. Const. art. II, § 1, § 3. The President is given the power of Commander in Chief of the military. U.S. Const. art. II, § 2. All powers not delegated to Congress, the President, or the Judiciary, are reserved to the States or the people. U.S. Const. amend. X.

A. The President Has Infringed Upon Congress' Legislative Powers and Plaintiffs' Privacy and Freedom of Expression Rights

The President has infringed upon Congress' power to create laws and Plaintiffs' rights to privacy and freedom of expression. In *Youngstown*, 343 U.S. 579 (1952), this Court established unequivocally that the "Founders of this Nation entrusted the law making power to the Congress alone in both good and bad times." *Id.* at 589. The president must faithfully execute the laws Congress creates

and cannot authorize actions that go against those laws. *Id.* at 586-87. In this case, the President has authorized electronic surveillance of U.S. citizens that violates laws Congress has created, Title III and FAFSA. *See* Part I.B.1. Thus the President has exceeded the authority granted to him by Article II of the Constitution by infringing upon Congress' power to create laws.

The President has also infringed upon Plaintiffs' Fourth Amendment right to Privacy. In *Katz v. United States*, this Court held that the Fourth Amendment protects a person's privacy interests in his or her phone calls. *Katz*, 389 U.S. at 352. A person on a telephone is "surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world." *Id.* By listening to and recording Plaintiffs' phone calls without a warrant or the safeguards proscribed by Congress, the government conducts a "search and seizure within the meaning of the Fourth Amendment" and violates Plaintiffs' privacy. *See id.* at 353. Plaintiffs' Fourth Amendment claim does not fail because they cannot prove that their particular phone calls were "seized." *See ACLU*, 493 F.3d at 673. The injury in Plaintiffs' Fourth Amendment claim comes from damage done to their privacy through their reasonable fear that their calls will be intercepted. Plaintiffs cannot have a reasonable expectation of privacy in their phone calls while the Program exists and must thus diminish their use of phone calls to contact their clients.

Plaintiffs' freedom of expression under the First Amendment is also infringed by the President's authorization of the Program. In addition to violating privacy, "search and seizure [can] also be an instrument for stifling liberty of expression. *Marcus v. Search Warrants*, 367 U.S. 717, 729 (1961). Fear of having their private phone calls intercepted can cause diminished participation in a legal activity and thus encroach on a people's First Amendment rights. *Zweibon v. Mitchell*, 516 F.2d 594, 634 (D.C. Cir. 1975). In this case, Plaintiffs reasonable fears that the government will listen and record their private phone calls without sufficient legal safeguards have caused Plaintiffs to diminish or cease their constitutionally speech over the phone. *See* Parts I.A.1, 2. Thus the President's authorization of the Program has infringed upon Plaintiffs' First Amendment rights.

B. The AUMF Does Not Allow the President to Infringe Upon Congress' Powers or Plaintiffs' Rights

The AUMF does not allow the President to infringe upon Congress' and Plaintiffs' constitutional rights. The AUMF states that "the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines" contributed to the September 11, 2000 attacks on the United States. Pub. L. No. 107-40, 115 Stat. 224 (2001). First, as a matter of textual interpretation, the general language if this law says nothing regulating

intelligence or surveillance whereas Title III makes clear that it and FISA are the only laws that regulate surveillance. *See* Part I.B.1. Without evidence to the contrary, "a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment. *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974). Thus, on its face, the AUMF does not override Title III or FISA.

Second, the AUMF does not grant the President an "implied" authority to infringe upon the constitutional powers of Congress. *See ACLU*, F. Supp. 2d at 779. Justice Jackson's concurrence in *Youngstown* has become the standard this Court uses to evaluate the President's power when it encroaches upon Congress' power. *See Youngstown*, 343 U.S. at 634-55. Justice Jackson sorts the level of Presidential power into three categories: (1) when acting pursuant to an express or implied authorization by Congress, the President's authority "is at its maximum"; (2) when acting in the absence of a grant of authority by Congress, the President's authority is uncertain; (3) when acting against an express or implied authorization by Congress, the President's authority "is at its lowest ebb." *Id.* at 635, 637. This third category leaves "Presidential power . . . [in the] least favorable of possible constitutional postures." *Id.* at 640.

Using Justice Jackson's framework, this Court in *Hamdan v. Rumsfeld*, 58 U.S. 557 (2006), found that the President does not have authority under the AUMF to ignore Congress' laws and regulations regardless of exigency of a terrorist

threat. *Id.* at 567. In *Hamdan*, the President attempted to try terrorist suspects in special "military commissions" that contravened congressional regulations of such trials through the Uniform Code of Military Justice. *Id.* at 566-67. This Court found that in acting against Congress' regulations, the President's authority was "at its lowest ebb" and that the President could not "justify variances" from Congress regulations regardless of "the danger to the safety of the United States and the nature of international terrorism." *Id.* at 622, 638

As in *Hamdan*, the President's authority in this case "is at its lowest ebb" because his authorization of the Program acts against Congress' express limitations on surveillance in Title III and FISA. *See id.* at 638. The AUMF gives the President no more authority to violate electronic surveillance laws than it does to violate laws concerning military justice. The President does not argue that the exigencies of combating terrorists is any greater now than it was two years ago when he raised that argument in *Hamdan*. And danger does not allow the President to overcome Congress' constitutional authority anymore now than it did two years ago. *See id.* at 622. Thus, the AUMF does not give the President "implied" authority to authorize the Program and infringe on Congress' constitutional powers.

Finally, the AUMF does not give the President "implied" authority to infringe the constitutional rights of Plaintiffs. This Court in *Hamdi v. Rumsfeld*,

542 U.S. 507 (2004), found that the AUMF does not allow the President to infringe on a person's constitutional rights in the name of combating terrorism. *Id*. at 533. In *Hamdi*, the President tried to deny a detainee's petition for writ of habeas corpus, thus cancelling the detainee's constitutional right of procedural due process. *Id*. at 509. Despite upholding the government's authority under the AUMF to detain certain "enemy combatants," this Court held that the government must provide the detainees due process rights because a person's "constitutional promises may not be eroded." *Id*. Thus, the President may not use his authority under the AUMF to infringe upon Plaintiffs' constitutional rights in this case.

This Court has "always been careful not to minimize the importance and fundamental nature of the individual's right to liberty." *Id.* at 529-30. Special care must be taken here, where the invasion of Plaintiffs' constitutional protections has harmed Plaintiffs' ability to conduct their business, to disseminate information to the public, and to aggressively represent their client's interests. Plaintiffs' interest in this case is not theoretical or superfluous; it is a real interest with real consequences to Plaintiffs and all other similarly situated professionals who risk losing the constitutional protections that allow them to effectively do their jobs. A "state of war is not a blank check for the President when it comes to the rights of the Nation's citizens," especially "during our most challenging and uncertain moments." *Id*. at 532, 536. Especially now, during these times of heightened fear

in our country, we must careful to "preserve our commitment at home to the principles for which we fight abroad." *Id.* at 532. Thus the AUMF does not, and should not, grant the President authority to infringe upon rights of Congress or the people.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court hold that Plaintiffs have standing to challenge the lawfulness of the program, declare that the Program is unconstitutional under the First and Fourth Amendments, Declare that the Program violates the principle of separation of powers, declare that the Program violates the Administrative Procedures Act, permanently enjoin defendants from utilizing the Program; award Plaintiff fees and costs pursuant to 28 U.S.C. § 2412 and grant such other and further relief as the Court deems just and proper.

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Respectfully submitted,

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