

# CLAPPER V. AMNESTY INTERNATIONAL: WHO HAS STANDING TO CHALLENGE GOVERNMENT SURVEILLANCE?

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## I. INTRODUCTION

In *Clapper v. Amnesty International*,<sup>1</sup> the Supreme Court will decide whether plaintiffs in the United States have standing to challenge the constitutionality of the FISA Amendment Act of 2008 (FAA).<sup>2</sup> The standing issue in this case arises in the context of foreign intelligence and national security. The FAA broadens the government's ability to conduct electronic surveillance of communications. Primarily, the FAA focuses on monitoring communications between persons in foreign countries, although domestic communications may be intercepted unintentionally.<sup>3</sup> Amnesty International et al., Plaintiffs in this case, claim that the FAA violates the guarantee of judicial review established by Article III of the Constitution and is in violation of principles of separation of powers because, by limiting review of specific searches, it restricts the FISA Court's power of judicial review<sup>4</sup> to general programs enacted under the FAA.<sup>5</sup> Plaintiffs also claim that the FAA violates their right to free speech under the First Amendment and their right to due

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1. *Clapper v. Amnesty Int'l USA*, No. 11-2025 (U.S. argued Oct. 29, 2011).

2. Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008 (FAA), Pub. L. No. 110-261, 122 Stat. 2436, codified at 50 U.S.C. § 1881.

3. See FAA § 702, 50 U.S.C.A. § 1881a(d) (West 2012) (requiring the Attorney General, in consultation with the Director of National Intelligence, to adopt procedures reasonably designed to avoid targeting of persons within the United States. This assumes that despite reasonable precautions, some domestic person may nonetheless be targeted inadvertently).

4. See Foreign Intelligence Surveillance Act of 1978 (FISA), Pub. L. 95-511, 92 Stat. 1783, codified at 50 U.S.C. § 1803. The legislation created a special court (the "FISA Court") to oversee actions undertaken under FISA. The legislation also established a process for authorization and review of actions under FISA.

5. See Brief in Opposition at 14 n.9, *Clapper*, No. 11-1025 (U.S. Apr. 18, 2012).

process under the Fourteenth Amendment because it authorizes warrantless surveillance of United States citizens.<sup>6</sup> Here, however, the Supreme Court is faced with the narrower issue of whether Plaintiffs can challenge the constitutionality of the FAA based on the mere risk that communications in the United States may be monitored under the FAA, even if Plaintiffs have no evidence that their communications are actually being monitored.

## II. FACTS

In 2008, legal, labor, human rights, and media organizations, along with attorneys and journalists, brought an action challenging the constitutionality of the portion of the FAA that established section 702 of the Foreign Intelligence Surveillance Act (FISA).<sup>7</sup> Plaintiffs claim that section 702 gives sweeping and unmonitored powers to the government to conduct surveillance on Americans' international communications in violation of Article III of the Constitution, the principle of separation of powers, and Plaintiffs' First and Fourth Amendment constitutional rights.<sup>8</sup> Plaintiffs seek a declaration of unconstitutionality and an injunction against the use of section 702.<sup>9</sup>

Section 702 of the FAA amends the procedures for surveillance first established under the Foreign Intelligence Surveillance Act,<sup>10</sup> creating new procedures for authorizing surveillance of non-United States citizens outside of the United States.<sup>11</sup> The changes include abolishing the requirement of individualized orders and diminishing the role of the FISA Court.<sup>12</sup> Under the new FAA procedures, the

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6. *Id.* at 14.

7. *Amnesty Int'l v. McConnell*, 646 F. Supp. 2d 633, 643–44 (S.D.N.Y. 2009).

8. Brief in Opposition, *supra* note 5, at 14.

9. *Id.*

10. FISA, 18 U.S.C.A. § 1801(f) (West 2012). FISA was originally enacted in 1978 to regulate surveillance of communications for foreign intelligence purposes between persons in the United States and between persons in the United States and persons abroad.

11. *Compare* 50 U.S.C.A. § 1881a (West 2012) (describing the procedures for authorization for the electronic surveillance “of persons reasonably believed to be located outside the United States”), *with* 50 U.S.C.A. § 1805 (West 2012) (describing the findings that a judge must make in order to issue an order authorizing general electronic surveillance).

12. Section 1881a requires the government to obtain FISA Court approval of (1) government certification regarding the proposed surveillance, and (2) targeting and minimization procedures to be used. 50 U.S.C.A. § 1881a. Certification requires that the Attorney General or the Director of National Intelligence attest that the surveillance complies with the Fourth Amendment, does not target persons known to be located in the United States, and creates adequate procedures to restrain the acquisition and dissemination of information about people within the United States. *Id.*

FISA Court merely approves certifications rather than finding probable cause for monitoring, as it did under the older FISA procedures.<sup>13</sup> Moreover, the FAA restricts the FISA Court to *ex ante* review of an investigation, while authorizing the Attorney General and the Director of National Intelligence to direct continuous ongoing review of both the substance and process underlying the investigation.<sup>14</sup>

According to Plaintiffs, the changes that the FAA made to FISA give rise to violations of Plaintiffs' constitutional rights.<sup>15</sup> Plaintiffs explain that the FAA allows authorization of surveillance of foreign targets based on any information deemed by the government to be foreign-intelligence information.<sup>16</sup> Plaintiffs further explain that their jobs require them to engage in communications with foreign contacts regarding matters that could be deemed related to foreign-intelligence information.<sup>17</sup> Consequently, Plaintiffs fear that their international communications will be intercepted under FAA authorization. They claim that, as a consequence of this fear, they have taken costly measures to protect against interception. These measures include traveling to meet contacts in person and avoiding email communications.<sup>18</sup>

Both parties filed for summary judgment.<sup>19</sup> Plaintiffs sought an injunctive order prohibiting the Government from conducting

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13. Compare 50 U.S.C.A. § 1805(a)(2)(A) (West 2012) (requiring, under FISA, that the judge determine that the target of surveillance is a "foreign power," and noting that a United States person cannot be a "foreign power" or agent thereof when his actions are protected by the First Amendment), with 50 U.S.C.A. § 1881a(i)(3) (requiring, under the FAA, that the Court enter an order approving the certification when the request for certification complies with certification requirements).

14. See 50 U.S.C.A. § 1881a(g)(2)(A)(i), (ii) (authorizing review of surveillance process and minimization procedures *before* surveillance starts); *id.* § 1881a(l)(1) (requiring the Attorney General and the Director of National Intelligence to review compliance with targeting and minimization procedures every six months).

15. Brief in Opposition, *supra* note 5, at 1.

16. *Id.* at 8.

17. *Id.* at 15–19. Plaintiffs are attorneys, journalists, and human rights and labor organizations who are in constant contact with clients and witnesses abroad. *Id.* Journalists and human rights and labor organization plaintiffs claim that fear of surveillance inhibits their ability to cultivate new sources or obtain information from family members and potential clients. *Id.* Attorney-plaintiffs suffer from an added burden: they have a professional obligation to make sure that communications with clients are confidential. *Id.* As long as there is a possibility that their communications can be monitored, they are under an obligation to take additional measures to ensure the confidentiality of their communications. *Id.*

18. *Id.* at 16–17.

19. *Amnesty Int'l USA v. Clapper*, 638 F.3d 118, 127 (2d Cir. 2011), *cert. granted*, 132 S. Ct. 2431 (U.S. Oct. 29, 2012) (No. 11-2025).

surveillance under the FAA,<sup>20</sup> the Government argued that Plaintiffs lacked standing to challenge the facial validity of the FAA.<sup>21</sup> The district court for the Southern District of New York agreed, holding that Plaintiffs lacked standing because they did not have a “personal, particularized, concrete injury in fact” and were not “subject to” the FAA.<sup>22</sup> The district court found that Plaintiffs’ fear that their communications would be monitored was merely speculative and only “subjective[ly] chill[ed]” Plaintiffs’ rights.<sup>23</sup> The Second Circuit reversed, holding that Plaintiffs have standing “[b]ecause standing may be based on a reasonable fear of future injury and costs incurred to avoid that injury.”<sup>24</sup> The Government petitioned for en banc review, but was denied by a six-to-six vote.<sup>25</sup>

### III. LEGAL BACKGROUND

Article III of the Constitution empowers the federal courts to hear only “cases” and “controversies.”<sup>26</sup> Standing doctrine exists to determine whether a plaintiff has shown a “case” between himself and the defendant that warrants resolution by the court on the merits.<sup>27</sup> A plaintiff must show that he has “a personal stake in the outcome” of the case or controversy.<sup>28</sup> To that end, the plaintiff must show the three elements of standing: (1) that the plaintiff has suffered an injury-in-fact, (2) that a causal connection exists between the injury and the challenged statute, and (3) that a decision is likely to redress the injury.<sup>29</sup>

An injury-in-fact may be present and ongoing, or based on prospective government action.<sup>30</sup> The plaintiff must show that the injury, committed under the scope of the implicated statute, affects the plaintiff in an individualized way.<sup>31</sup> Future injuries based on

20. *Id.*

21. *Amnesty Int’l v. McConnell*, 646 F. Supp. 2d 633, 643–44 (S.D.N.Y. 2009).

22. *Id.*

23. *Id.*

24. *Amnesty Int’l USA*, 638 F.3d at 122.

25. *Amnesty Int’l USA v. Clapper*, 667 F.3d 163, 164 (2d Cir. 2011) (en banc).

26. U.S. CONST. art. III, § 2.

27. *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

28. *See Baker v. Carr*, 369 U.S. 186, 204 (1962) (holding that an adversarial presentation of the case “sharpens the presentation of the issues” in a way that leads to the best resolution of the constitutional question).

29. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

30. *Id.*

31. *Id.* at 560 n.1.

prospective government action are only injuries-in-fact when they reach a certain threshold of likelihood.<sup>32</sup> The plaintiff cannot assert a future injury based on a subjective fear that he will be affected by the government action.<sup>33</sup> Instead, he must show that the threat of injury is not merely “conjectural or hypothetical” but rather “real and immediate.”<sup>34</sup> Nevertheless, the anticipation of future injury may itself be a present injury-in-fact and be sufficient to warrant standing if the plaintiff can show that the anticipation is not speculative.<sup>35</sup> Anticipation of future injury qualifies as present injury when the threat of government action causes the plaintiff to refrain from some protected action (such as speech)<sup>36</sup> or when it deprives the plaintiff of benefits he was expecting to incur (such as protection from liability or competitiveness in the market).<sup>37</sup>

A plaintiff must also show that there is a causal nexus between his injury and the conduct being challenged.<sup>38</sup> Yet, a plaintiff can assert a legal right even if he is not the target of a defendant’s action or when his injury is not a direct product of the defendant’s action.<sup>39</sup> In such a scenario, a plaintiff can establish injury-in-fact by showing that he has altered or ceased constitutionally protected conduct as a reasonable response to the government action.<sup>40</sup> The plaintiff must also show that his injury would be redressed by a favorable court decision.<sup>41</sup> The judicial remedy sought must directly correct the plaintiff’s injury.<sup>42</sup>

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32. *City of Los Angeles v. Lyons*, 461 U.S. 95, 108 n.8 (1983); *accord* *Curtis v. City of New Haven*, 726 F.2d 65, 68 (2d Cir. 1984) (“[T]he critical inquiry is the *likelihood* that the plaintiffs will be . . . assaulted.” (emphasis added)).

33. *See id.* at 107 n.8. (“It is the *reality* of the threat of . . . injury that is relevant to the standing inquiry, not the plaintiff’s subjective apprehensions.” (emphasis in original)). A “subjective chill” is not enough to warrant standing. *Laird v. Tatum*, 408 U.S. 1, 13–14 (1972).

34. *O’Shea v. Littleton*, 414 U.S. 488, 495–96 (1974).

35. *See id.* at 498 (explaining that plaintiffs do not have standing when the possibility that they will be charged under the challenged statute is only speculative).

36. *See Meese v. Keene*, 481 U.S. 465, 476–77 (1987) (holding that the necessity of going on the record to request political literature injures a First Amendment right).

37. *See Clinton v. City of New York*, 524 U.S. 417, 426 (1998) (holding that even when a future outcome is speculative it can create present injury by depriving the plaintiff of a present opportunity).

38. *Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973).

39. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (“[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily ‘substantially more difficult’ to establish.”).

40. *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 184–85 (2000).

41. *Lujan*, 504 U.S. at 561.

42. *See Linda R.S.*, 410 U.S. at 618 (explaining that the legal remedy sought by the plaintiff, an injunction against the district attorney for refusing to prosecute the child’s father, would not cause the father to pay child support and redress the plaintiff’s injury).

The Supreme Court addressed the issue of standing to challenge government surveillance in *Laird v. Tatum*.<sup>43</sup> There, the United States Army established a program that compiled information about public political activities that had the potential to cause civil disorder.<sup>44</sup> The information collected was readily available to the public.<sup>45</sup> The plaintiffs challenged the constitutionality of the program, asserting that Army surveillance of their protests imposed a “chilling effect” on the plaintiffs’ First Amendment rights.<sup>46</sup> The Court held that the plaintiffs did not have standing to challenge the program.<sup>47</sup> The Court explained that a “chilling effect” does not arise merely from the knowledge of the existence of a surveillance program that potentially targets the plaintiffs.<sup>48</sup> Rather, plaintiffs must present evidence that the program was regulatory, proscriptive, or compulsory in a way that would injure the plaintiffs directly.<sup>49</sup> The Court held that the *Laird* plaintiffs did not meet this test because the plaintiffs did not alter their conduct in response to government surveillance.<sup>50</sup> Consequently, the plaintiffs could show only a subjective chill rather than a direct injury, which is not enough.<sup>51</sup>

Although *Laird* addressed the test for standing in government surveillance cases, the circuits are split as to whether *Laird* established a separate standard for standing in surveillance cases. Some circuits interpret *Laird* to establish a heightened standard for plaintiffs who wish to bring a First Amendment claim in response to government surveillance. More precisely, both the Sixth and D.C. Circuits have held that *Laird* precludes standing in cases of government surveillance when the plaintiff is not the target of the regulation and can show only a “subjective chill” of protected rights.<sup>52</sup> Before

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43. 408 U.S. 1 (1972).

44. *Id.* at 6.

45. *Id.* at 9.

46. *Id.* at 3.

47. *Id.*

48. *Id.* at 11.

49. *Id.*

50. *Id.* at 9.

51. *Id.* at 13–14 (“[A] subjective ‘chill’ [is] not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.”). A “subjective chill” occurs when a governmental activity restrains a plaintiff in such a way that he is deterred from engaging in constitutionally protected activities due to fear of repercussion. *Id.* at 11.

52. See *ACLU v. NSA*, 493 F.3d 644, 661 (6th Cir. 2007) (holding that the relevant factor is the level of restraint on the plaintiffs, “and ‘chilling’ is not sufficient restraint no matter how valuable the speech”); *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375, 1378 (D.C. Cir. 1984) (“[T]he ‘chilling effect’ which is produced by their fear of being subjected to

granting standing, these circuits would first require that the plaintiff be directly “regulated, constrained, or compelled” by the government action.<sup>53</sup> The First and Ninth Circuits, however, have held that *Laird* allows for standing in cases where the plaintiff can show that the challenged government conduct has reasonably led the plaintiff to alter his conduct, even if he was not directly targeted by the regulation.<sup>54</sup> In *Clapper*, the Court will likely address the proper standard for standing in First Amendment government surveillance cases and resolve the circuit split.

#### IV. DECISION BELOW

In the decision below, a Second Circuit panel unanimously held that Plaintiffs had fulfilled the three requirements of standing: injury-in-fact, a causal connection between the injury and the challenged statute, and redressability.<sup>55</sup> The court first analyzed whether Plaintiffs had proven concrete injury.<sup>56</sup> Plaintiffs argued two grounds for injury: (1) fear that their communications would be monitored created a future injury and (2) the burdens and expenses incurred to protect their communications created a present injury.<sup>57</sup>

The Second Circuit explained that to prove future injury, Plaintiffs had to show that the “FAA creates an objectively reasonable likelihood that the plaintiffs’ communications are being or will be monitored under the FAA.”<sup>58</sup> According to the court, if Plaintiffs’ “reasonable enough” interpretation of the statute leads to a legitimate fear of enforcement, then Plaintiffs have standing.<sup>59</sup>

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illegal surveillance and which deters them from conducting constitutionally protected activities, is foreclosed as a basis for standing by the Supreme Court’s holding in *Laird*.”).

53. See *NSA*, 493 F.3d at 661 (“[T]o allege a sufficient injury under the First Amendment, a plaintiff must establish that he or she is regulated, constrained, or compelled directly by the government’s actions, instead of by his or her own subjective chill.”).

54. See *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 522 (9th Cir. 1989) (holding that *Laird* does not preclude standing when government surveillance causes a “distinct and palpable” injury); *Ozonoff v. Berzak*, 744 F.2d 224, 230 (1st Cir. 1984) (explaining that the issue is “whether the [regulation] reasonably leads [the plaintiff] to believe he must conform his conduct to its standards”).

55. *Amnesty Int’l USA v. Clapper*, 638 F.3d 118, 122 (2d Cir. 2011), cert. granted, 132 S. Ct. 2431 (U.S. Oct. 29, 2012) (No. 11-2025).

56. *Id.* at 133–34.

57. *Id.* at 133.

58. *Id.* at 134.

59. *Id.* at 137 (citing *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 383 (2d Cir. 2000)).

Upon examination of Plaintiffs' asserted future injury, the court decided that Plaintiffs had shown that the broad monitoring allowed by the FAA would likely include Plaintiffs' communications.<sup>60</sup> The FAA was enacted to broaden the government's powers under FISA to monitor communications related to foreign-intelligence information.<sup>61</sup> The Plaintiffs' communications were likely to be within the scope of communications monitored by the FAA because Plaintiffs' foreign contacts are apt to be targets of surveillance—their contacts include individuals who are believed to be associated with terrorist groups, activists who oppose governments supported by the U.S. government, and people located in areas of interest to the U.S. government.<sup>62</sup> The court concluded that Plaintiffs' fears were "fairly traceable to FAA because they are based on a reasonable interpretation of the challenged statute and a realistic understanding of the world."<sup>63</sup>

Moreover, according to the Second Circuit, the requirements of FISA Court authorization did not preclude Plaintiffs' standing.<sup>64</sup> The court explained that the presence of intervening steps does not preclude standing unless there is a significant intervening step.<sup>65</sup> Only a step that attenuates the connection between the defendant's action and the plaintiff's harm, based on the uncertainty of its completion, would be significant enough to defeat standing.<sup>66</sup> The intervening steps presented here do not fall under that category.<sup>67</sup> Here, it is reasonable to expect that the government will seek the authorization for surveillance.<sup>68</sup> It is also reasonably certain that the FISA Court will approve the request.<sup>69</sup> FISA Court authorization requires only a certification that the request for surveillance complies with basic procedural requirements and not a substantive analysis of each request. Moreover, after the FAA was enacted, only one request for authorization was denied by the FISA Court.<sup>70</sup> Because it is

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60. *Id.* at 138.

61. *See id.* (citing 154 CONG. REC. 769, 771 (2008) (noting that the FAA was passed specifically to permit surveillance that was not permitted by FISA)).

62. *Id.*

63. *Id.* at 139.

64. *Id.* at 139–40.

65. *Id.* (quoting *Massachusetts v. EPA*, 549 U.S. 497, 516–26 (2007)).

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

reasonable to expect that the government would (1) apply for authorization for surveillance and (2) acquire that authorization from the FISA Court, the court stated that the certification is not a significant intervening step.<sup>71</sup>

The Second Circuit thus held that Plaintiffs had a concrete fear of a future injury that was causally connected to the FAA. Thus, Plaintiffs had sufficiently shown that their imminent future injury was injury-in-fact for the purposes of standing.<sup>72</sup>

Next, the court determined that Plaintiffs had standing based on present injury-in-fact.<sup>73</sup> The court explained that when the anticipation of future injury causes present economic harm, there is injury-in-fact sufficient to establish the injury element of standing.<sup>74</sup> The court further noted that even if the injury is self-inflicted, it is still sufficient for the purposes of standing as long as Plaintiffs' actions are reasonable responses to a concrete fear of future injury.<sup>75</sup> After concluding that Plaintiffs' fear of monitoring under the FAA was reasonable, the court held that Plaintiffs' fear was concrete enough to warrant a finding of present injury.<sup>76</sup> Moreover, Plaintiffs' undisputed factual record showed that they incurred costs in a direct attempt to protect their communications from monitoring via the FAA.<sup>77</sup> Because there was a concrete present injury directly connected to the FAA, the court held that Plaintiffs had standing.<sup>78</sup>

The court also held that despite not having been directly subject to government action, Plaintiffs had standing because the FAA reasonably caused them to alter their conduct.<sup>79</sup> The court held that Plaintiffs had shown that if the FAA can reasonably be expected to lead to monitoring of Plaintiffs' communications, the monitoring may lead to additional injuries such as potential harm to clients and breach

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71. *Id.*

72. *Id.* at 140.

73. *Id.* at 133.

74. *Id.*

75. *See id.* at 134 (holding that when plaintiffs can show that "it was not unreasonable for them to incur cost out of fear" of interception, then measures taken support standing, but measures do not support standing when the "possibility of interception is remote or fanciful").

76. *See id.* ("[T]he line of future-injury standing cases provides a helpful framework for analyzing plaintiffs' present-injury arguments.").

77. *Id.*

78. *Id.* at 139–40.

79. *See id.* at 143–45 (explaining that when it is reasonable for a plaintiff to fear surveillance, there is standing if the measures the plaintiff took were a reasonable response to that fear).

of Plaintiffs' ethical responsibilities.<sup>80</sup> Therefore, the court reasoned, in a reasonable effort to avoid those injuries, Plaintiffs avoided electronic communication or traveled long distances to meet with their clients.<sup>81</sup> Because Plaintiffs had to choose between being monitored and incurring costs, the court found that they had the necessary "personal stake in the outcome of the controversy" to warrant standing.<sup>82</sup>

The Second Circuit further held that the standard for standing in issues of government surveillance programs follows traditional standing doctrine.<sup>83</sup> It remarked that *Laird* did not create a stricter standard by declining to confer standing when the plaintiffs claimed that the surveillance program inflicted a "subjective chill" on plaintiffs' rights.<sup>84</sup> Instead, the Second Circuit stated that the *Laird* decision was limited to the facts presented in the case.<sup>85</sup> The Second Circuit noted that the *Laird* plaintiffs did not have standing because they were not directly subject to the statute and they could not show that the surveillance program caused them to alter their conduct.<sup>86</sup> Unlike in *Laird*, Plaintiffs in the case at hand had shown that they had altered their conduct in response to the FAA.<sup>87</sup> Because the court did not create a stricter standard for standing in *Laird*, the Second Circuit concluded that *Laird* did not preclude standing for Amnesty International and its fellow plaintiffs.<sup>88</sup>

## V. ARGUMENTS

The main arguments presented by both parties focus on whether Plaintiffs have sufficiently shown that they have suffered either a future injury or a present injury as a result of the FAA. The Government asserts that Plaintiffs have not proven future injury.<sup>89</sup> The Government argues that future injury claims are subject to an "imminence" standard and that the connection between the FAA and

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80. *Id.* at 143–44.

81. *Id.*

82. *Id.* at 144.

83. *Id.* at 145.

84. *Id.* at 146.

85. *Id.*

86. *Id.*

87. *Id.* at 146–47.

88. *Id.* at 148–49.

89. Brief for the Petitioners at 27, *Clapper v. Amnesty Int'l*, No. 11-1025 (U.S. July 26, 2012).

Plaintiffs' alleged injuries is insufficient to meet this standard.<sup>90</sup> Plaintiffs, on the other hand, argue they can prove future injury because their injuries meet the standard of "reasonable likelihood of future harm."<sup>91</sup>

The Government also challenges the Second Circuit's holding regarding present injury.<sup>92</sup> The Government asserts that Plaintiffs' injuries are not enough to satisfy the standing requirement because they are merely self-imposed responses to a "subjective chill" of Plaintiffs' rights.<sup>93</sup> Finally, the Government argues that a judicial remedy would not redress Plaintiffs' injuries because the Government has other ways to monitor communications.<sup>94</sup> Plaintiffs reply that their injuries are only self-inflicted because they had no other options to protect their communications.<sup>95</sup> Plaintiffs also note that although other methods of surveillance are available to the Government, Plaintiffs need only prove that a judicial remedy would redress some of their injuries.<sup>96</sup>

#### A. *The Future Injury Claim*

##### 1. The Government's Attack on the Standard Adopted by the Second Circuit

The Government argues that the Second Circuit adopted the wrong standard for injury-in-fact in cases of future injury.<sup>97</sup> According to the Government, the standard adopted by the Second Circuit impermissibly allows standing to be based on "speculative assertions of possible future harm,"<sup>98</sup> and the proper standard only allows standing when threatened future injury is imminent.<sup>99</sup> An "imminence" standard requires Plaintiffs to prove that the acquisition of their communications is "certainly impending" as a result of the Government's challenged action.<sup>100</sup> Thus, the Government argues, the Second Circuit's standard strays significantly from that imposed by

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90. *Id.*

91. Brief in Opposition, *supra* note 5, at 25.

92. Brief for the Petitioners, *supra* note 89, at 35.

93. *Id.* at 39–40.

94. *Id.* at 45.

95. Brief in Opposition, *supra* note 5, at 37.

96. *Id.* at 49–50.

97. Brief for the Petitioners, *supra* note 89, at 18.

98. *Id.* at 19.

99. *Id.* at 24 (citing *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)).

100. *Id.* at 19.

the *Laird* Court in a way that dilutes the requirement of an individualized factual presentation of the case;<sup>101</sup> because the nexus between the statute and the injury to Plaintiffs is not sufficiently clear, Plaintiffs' challenge to the Government action will be too abstract and lacking a personal, factual basis.<sup>102</sup> Abstract challenges to regulations cross over the fine line between personal challenges and advisory opinions.<sup>103</sup>

The Government asserts that if the correct standard were applied, Plaintiffs' injuries would be insufficient to warrant standing because their claimed future injury is based on mere conjecture about the possibility of any injury caused by future government action.<sup>104</sup> According to the Government, Plaintiffs are not the targets of the FAA and thus they cannot positively show that their communications are subject to certainly impending interception by surveillance authorized under the FAA.<sup>105</sup> That the Government might target Plaintiffs' foreign contacts and might accidentally intercept protected communications is pure speculation.<sup>106</sup> It is also speculative, from the Government's perspective, to claim that the Government will monitor Plaintiffs' conversations using FAA authorization, as opposed to other authorized means of monitoring.<sup>107</sup> Moreover, if the Government decides to use the FAA to monitor Plaintiffs' foreign clients' communications, it is unclear whether it would acquire FISA Court authorization.<sup>108</sup> Because the Plaintiffs cannot show, with a sufficient level of certainty, that they are subject to any injury-in-fact, the Government believes that Plaintiffs' future injury claims are insufficient for the purposes of standing.<sup>109</sup>

## 2. Plaintiffs' Reply

Plaintiffs assert that the standard for future harm encompasses the threat of surveillance at issue in the case.<sup>110</sup> They argue that the appropriate standard for injury-in-fact requires only a "reasonable

101. *Id.* at 24.

102. *Id.* at 35.

103. *See id.* (explaining that one of the foundations of the American judicial system is its adversary nature and its general prohibition on advisory opinions).

104. *Id.*

105. *Id.* at 23.

106. *Id.* at 30–31.

107. *Id.* at 31–32.

108. *Id.* at 33.

109. *Id.* at 29.

110. Brief in Opposition, *supra* note 5, at 24–25.

likelihood of future harm” and a “realistic danger” that injury will occur.<sup>111</sup> This standard requires only that the plaintiff show a reasonable and substantial likelihood that his injury will come to pass.<sup>112</sup> Moreover, Plaintiffs argue that requiring future plaintiffs to prove with immediate certainty that their communications are being monitored would effectively preclude any challenge to the FAA.<sup>113</sup> Foreign-intelligence monitoring is generally done in secret, without any prior announcement to the targeted persons. Accordingly, it is unlikely that any particular plaintiff would be able to show with individualized, immediate certainty that his communications are being monitored.<sup>114</sup>

Plaintiffs assert that they have shown a sufficient threat of future harm to support injury-in-fact.<sup>115</sup> They argue that it is undisputed that the Government uses the FAA to monitor foreign communications, and that Plaintiffs’ communications with their foreign clients are precisely the type and kind of information monitored under the FAA.<sup>116</sup> Thus, the Government is likely to monitor Plaintiffs’ communications through the FAA surveillance process.<sup>117</sup> If the FAA is used as envisioned, it is reasonable for Plaintiffs to fear that their communications with foreign contacts are reasonably likely to or are in realistic danger of being monitored.<sup>118</sup> Thus, Plaintiffs argue, they have shown sufficient fear of future injury to satisfy the injury-in-fact requirement.<sup>119</sup>

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111. *Id.* at 55–56 (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000); *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979)).

112. *See id.* at 56 (challenging the Government’s argument that the standard of “certainly impending” requires more than a realistic threat, and arguing that the two standards have been used interchangeably to require a substantial likelihood of injury).

113. *Id.* at 57.

114. *Id.* at 57–58.

115. *Id.* at 53–54.

116. *Id.* at 53; *see also id.* at 30 (arguing that the changes brought by the FAA enable the Government to conduct broader monitoring programs that reach communications with individuals within the United States because the FAA does not require the Government to specify who will be monitored when applying for authorization).

117. *Id.* at 53–54.

118. *Id.*

119. *Id.* at 54.

### B. *The Present Injury Claim*

#### 1. The Government Challenges the Present Harm as Self-Inflicted and Subjective

The Government contends that Plaintiffs do not have standing because self-imposed injuries are not sufficient to warrant Article III standing.<sup>120</sup> Plaintiffs have failed to show that they have suffered injuries resulting from the Government's challenged conduct.<sup>121</sup> In fact, Plaintiffs can avoid the consequent expenditures without judicial intervention. Plaintiffs *elected* to spend that money on measures to avoid monitoring and could have, instead, chosen not to take those measures.<sup>122</sup> Granting standing in this situation would treat those who choose to inflict injury on themselves more favorably than similarly situated parties who do not choose to self-inflict injuries, allowing uninjured individuals to manufacture injury-in-fact.<sup>123</sup>

Moreover, the Government argues that Plaintiffs' altered behavior, allegedly a reaction to their fear of future harm, is merely a "subjective chill" and not a sufficient substitute for the required injury-in-fact.<sup>124</sup> The Government notes that *Laird* establishes that a plaintiff must show more than a "subjective chill" to fulfill the injury-in-fact requirement in government surveillance cases.<sup>125</sup> Because Plaintiffs cannot show that they feared imminent and concrete interception of their communications, they cannot show more than a subjective chill and, consequently, cannot point to any injury-in-fact.<sup>126</sup>

The Government also contends, in the alternative, that even if self-inflicted injury were sufficient to satisfy the injury-in-fact requirement, Plaintiffs did not show that their injury could be redressed by a favorable court decision.<sup>127</sup> Plaintiffs' alleged injuries would have to be redressed by an injunction because the injuries stem from the threat that the Government may monitor their foreign contacts' communications.<sup>128</sup> However, the Government may choose not to monitor those communications via FAA authorization; rather,

120. Brief for the Petitioners, *supra* note 89, at 38.

121. *Id.* at 39.

122. *Id.*

123. *Id.*

124. *Id.* at 39–40.

125. *Id.* at 40–41.

126. *Id.* at 39.

127. *Id.* at 44.

128. *Id.*

the Government may choose any of the several alternative ways of monitoring foreign persons for foreign-intelligence purposes.<sup>129</sup> It is therefore speculative to suggest that an injunction against the use of the FAA would prevent monitoring of Plaintiffs' communications with foreign contacts.<sup>130</sup> Plaintiffs have not shown that the judicial remedy sought would redress their injury.<sup>131</sup>

## 2. Plaintiffs' Reply

Plaintiffs contend that the FAA is causing them "actual and ongoing professional and economic harm."<sup>132</sup> They argue that they have concrete rather than conjectural injuries because they have been forced to take costly measures (such as traveling abroad and avoiding telephone and email) to avert the risk of having their protected communications intercepted.<sup>133</sup> The FAA has also impaired Plaintiffs' ability to find additional contacts, witnesses, and sources abroad because such sources refuse to share information that they would otherwise share.<sup>134</sup> Plaintiffs explain that the actions they have taken in response to the FAA were necessary and sometimes required by various professional rules of confidentiality.<sup>135</sup> For example, journalist-plaintiffs cannot maintain sources or gain new sources if there is the possibility that their conversations are being monitored.<sup>136</sup> The attorney-plaintiffs are required by ABA Rules of Professional Conduct to protect their clients' privacy at all costs; they cannot allow their communications with clients to be monitored.<sup>137</sup>

Thus, their actions are only self-inflicted insofar as they could have chosen not to protect their communications and instead accept the damage to their personal and professional reputations.<sup>138</sup> Plaintiffs contend that they have taken action to avoid concrete injury that would otherwise be inflicted by the Government through the challenged conduct. Such injury is sufficient for standing if the injury

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129. *Id.* at 45.

130. *Id.* at 46.

131. *Id.* at 46–47.

132. Brief in Opposition, *supra* note 5, at 28–29.

133. *Id.* at 27, 29.

134. *Id.* at 29.

135. *See, e.g., id.* at 34 (explaining attorney-plaintiffs' ethical requirements under the Rules of Professional Conduct).

136. *Id.* at 29.

137. *Id.* at 34–35.

138. *Id.* at 37.

is traceable to the statute.<sup>139</sup> Because Plaintiffs’ injuries were a direct reaction to the FAA—the scope of the FAA allows government monitoring to reach Plaintiffs’ communications with sources—the economic injuries inflicted on Plaintiffs are directly traceable to the FAA.<sup>140</sup>

Plaintiffs also contend that their injuries are justiciable under the *Laird* standard.<sup>141</sup> They argue that *Laird* does not require plaintiffs who are attempting to prove substantiality of injury to show that their communications have already been monitored.<sup>142</sup> The *Laird* plaintiffs lacked standing because their complaint challenged the existence of the government program without any demonstration of injury.<sup>143</sup> The *Laird* Court explained that had plaintiffs alleged present objective harm, the Court might have found grounds for standing.<sup>144</sup> Plaintiffs in the case at hand, however, took costly measures to avoid monitoring and therefore allege a present objective harm.<sup>145</sup>

Moreover, Plaintiffs believe that their injuries would be redressed by a favorable judgment.<sup>146</sup> Plaintiffs do not have to prove that the same injury cannot be inflicted by alternative monitoring methods. They simply must show that the judgment will redress “a discrete injury.”<sup>147</sup> The Court has previously held that the standing requirement is satisfied when judgment only partially addresses the injury.<sup>148</sup> In fact, it is enough that the relief sought would be a “first step” toward redressing the injury.<sup>149</sup> Plaintiffs also argue that the FAA imposes

139. *Id.*

140. *Id.* at 35–36.

141. *Id.* at 46–47.

142. *Id.* at 46.

143. *Id.*

144. *Id.*

145. *Id.* at 47–48.

146. *Id.* at 48.

147. *Id.* at 48–49 (citing *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982)).

148. *Id.* at 49–50. Plaintiffs cite a series of cases in which plaintiffs sought to enjoin just one of multiple offenders from engaging in the offending conduct: *Massachusetts v. EPA*, 549 U.S. 497, 523–24 (2007) (holding that even though enjoining the EPA to regulate greenhouse emissions would not reverse global warming, it would be a step toward reducing global warming); *Meese v. Keene*, 481 U.S. 465, 476 (1987) (holding that an injunction against the use of the words “political propaganda” would “at least partially address” the injury to the plaintiff); *Duke Power Co. v. Carolina Env’tl. Study Grp.*, 438 U.S. 59, 62 (1978) (holding that although the defendant was only one of many nuclear power plants that could cause radioactivity, the defendant was the one causing the plaintiffs’ fear of increased radioactivity in the air, water, and property).

149. See *Massachusetts v. EPA*, 549 U.S. at 524 (explaining that resolution of the full injury may take incremental steps that address one problem at a time).

more burdens than other statutes authorizing electronic monitoring because it allows for sweeping and unrestricted monitoring without constant judicial review.<sup>150</sup> The lack of judicial oversight increases Plaintiffs' fear of monitoring and thereby increases the harm caused by the FAA. As a consequence, an injunction against the Government would directly redress Plaintiffs' injuries.<sup>151</sup>

## VI. ANALYSIS AND LIKELY DISPOSITION

The Court is likely to affirm the Second Circuit's holding because Plaintiffs may have just enough "skin in the game" to survive standing scrutiny. Because the statute does not directly target Plaintiffs, the Court will only address the issue of whether Plaintiffs have provided sufficient factual proof evidencing the individualized effect of government monitoring under the FAA.<sup>152</sup>

The Court is likely to hold that proof of injury-in-fact requires that Plaintiffs show that the FAA causes a reasonable fear of injury.<sup>153</sup> In cases of government surveillance, requiring that plaintiffs show that they have already been monitored would preclude adjudication of a statute's constitutionality because the government is not likely to disclose specific targets of foreign-intelligence surveillance.<sup>154</sup> Thus, Plaintiffs will not have to show that they *will* be injured—a standard that is effectively impossible to meet—rather, they need only show that it is reasonable for them to fear surveillance under the FAA.<sup>155</sup>

Plaintiffs can show reasonable fear because the FAA has an expansive scope. Even communications that do not fall directly within the statute's scope can still be unintentionally intercepted.<sup>156</sup> The Court is likely to view the enumeration of the type of

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150. Brief in Opposition, *supra* note 5, at 51.

151. *Id.*

152. The FAA was enacted to permit surveillance of communications outside the United States on matters of foreign intelligence. 154 CONG. REC. 769, 771 (2008). Since Plaintiffs are within the United States, they do not directly fall under the scope of the FAA.

153. See *City of Los Angeles v. Lyons*, 461 U.S. 95, 108 n.8 (1983) ("It is the *reality* of the threat of repeated injury that is relevant . . . ." (emphasis in original)).

154. Brief in Opposition, *supra* note 5, at 57–58.

155. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000).

156. See, e.g., 50 U.S.C.A. § 1881a(d)(1) (West 2012) (requiring that minimization procedures be set in place to ensure that there is no *excessive* unintentional monitoring of communications between persons in the United States). The very inclusion of minimization procedures indicates that the drafters of the FAA understood that some domestic communications will be monitored incident to the surveillance explicitly allowed by the statute.

communications that can be “picked up” as sufficient evidence of the individualized effect of the FAA on Plaintiffs, despite the fact that Plaintiffs are not the primary targets of the FAA. Thus, the Court will likely hold that because there is a “reasonable danger” that Plaintiffs’ communications will be monitored under the FAA, the threat of future injury suffices to establish injury-in-fact.

To prove ongoing injury, the Court is likely to require that Plaintiffs show that, faced with the threat of injury, they took action to avoid the injury. Plaintiffs have shown that in order to avoid monitoring, they modified their conduct and, as a result, incurred costs.<sup>157</sup> Although Plaintiffs’ injuries were arguably “self-inflicted,” those injuries were the result of a Hobson’s choice: Plaintiffs had to either incur the costs of avoiding FAA monitoring or decline to take measures to protect communications and suffer any resulting reputational and professional consequences.<sup>158</sup> When a plaintiff is forced to make a choice between relinquishing a protected constitutional right on the one hand, and a less grievous self-inflicted injury on the other, the plaintiff should have the right to challenge the offending statute.<sup>159</sup>

Moreover, the Court is likely to hold that *Laird* does not preclude justiciability for the case at hand. Although *Laird* held that plaintiffs did not have standing to challenge the constitutionality of a government surveillance program because their injury was only a “subjective chill” of their rights, it is unlikely that the Court will hold that *Laird* created a new standard for standing. The issue in *Laird* pertained to two of the fundamental requirements of standing: (1) whether plaintiffs could show *any* injury-in-fact, and (2) whether the injury was incurred as a result of the challenged government conduct.<sup>160</sup> Although *Laird* did address the issue of future or “fear-based” injuries, it arguably did not heighten the existing standing standards for injuries arising from a government surveillance program.<sup>161</sup> *Laird* merely applied, albeit narrowly, the established

157. See Brief in Opposition, *supra* note 5, at 29 (noting, for example, that Plaintiffs travelled abroad to gather information instead of using phone or email).

158. *Id.* at 37.

159. See *Meese v. Keene*, 481 U.S. 465, 476–77 (1987) (holding that a plaintiff who faces the choice of refraining from a protected action or suffering injury has the right to challenge the government action in question).

160. *Laird v. Tatum*, 408 U.S. 1, 9–10 (1972).

161. See Brian Calabrese, *Fear-Based Standing: Cognizing an Injury-in-Fact*, 603 WASH. & LEE L. REV. 1445, 1456–57 (2011) (explaining that *Laird* is the leading case on fear-based

requirements of standing in the context of government surveillance programs.

Additionally, the Court is likely to hold that Plaintiffs have shown that their injury can be redressed by a favorable judgment. Established standing doctrine does not require a plaintiff to show that the remedy sought will perfectly redress all of his injuries.<sup>162</sup> The plaintiff need only show that the injunction will provide some measure of relief.<sup>163</sup> Plaintiffs have shown that they fear monitoring because of the FAA's extraordinary breadth.<sup>164</sup> Thus, requiring that the Government be prohibited from using the FAA to conduct electronic surveillance would provide some measure of relief. Additionally, to deny standing because the Government has other means available to infringe on Plaintiffs' constitutional rights<sup>165</sup> would insulate any duplicative government programs from any constitutional challenge.<sup>166</sup> Thus, the Court is likely to hold that Plaintiffs have fulfilled the requirements of standing.

## VII. CONCLUSION

The Plaintiffs here may have just enough personal interest to satisfy the standing inquiry. Plaintiffs can show future injury based on a standard that requires a *reasonable* fear of injury because the FAA is broad enough to encompass Plaintiffs' communications. Plaintiffs can also show that their "self-inflicted" injuries were undertaken based on a Hobson's choice: either failing to fulfill their professional obligations by allowing government monitoring or incurring costs to avoid them. Moreover, issues of causality and redressability are unlikely to preclude standing because intervening steps and partial redressability are not factors that defeat standing in this case. However, this will be a close decision that will, at least in subtext, require the Court to balance the Plaintiffs' constitutional rights with the Government's duty to protect its citizens.

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injuries as injuries-in-fact in all government actions).

162. *Massachusetts v. EPA*, 549 U.S. 497, 523–24 (2007); *see also* *Friends of the Earth v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 186 (2000) ("To the extent that [sanctions] encourage defendants to discontinue current violations and deter them from committing future ones, they afford redress to citizen plaintiffs who are injured or threatened with injury as a consequence of ongoing unlawful conduct.").

163. *Massachusetts v. EPA*, 549 U.S. at 523–24.

164. Brief in Opposition, *supra* note 5, at 51.

165. Brief for the Petitioners, *supra* note 89, at 45.

166. Brief in Opposition, *supra* note 5, at 26.